Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

REPLY COMMENTS OF MONTGOMERY COUNTY, MARYLAND

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SUMMARY

The Commission's actions in recent years have implicitly assumed that the presence of more than one provider in a marketplace is enough to create a fully competitive marketplace. The experience of citizens residing in Montgomery County, Maryland is that choice is not the same as competition. The Commission must act, or in the alternative, call upon the Congress to change the Cable Act where necessary to protect consumers as market forces alone have proved inadequate.

The Commission is required to provide an annual report to Congress on the status of competition in the market for delivery of video program. The County agrees with the comments of Public Knowledge that this report should be more robust rather than a simple catalogue of industry data. The County, alone and as part of a coalition, has filed comments and supplemental comments in this proceeding over the years providing detailed information about the consumer impact of cable rate and service increases, local programming statistics, and additional consumer issues. Yet despite receiving hundreds of comments, a statutory requirement to provide **annual** reports to Congress, and the collection of nearly $60 million in annual federal regulatory fees from cable subscribers, the Commission has neither complied with the letter of the law to provide annual reports, nor the spirit of the law to provide information that would improve consumers' ability to reap the benefits of actual competition for the delivery of video programming.

The Commission is again requesting information that takes considerable time, effort and resources to compile. The County respectfully requests that the Commission fulfill its statutory obligation and publish a report of developments between 2007 and 2010 to bring itself current and thereafter release annual reports which provide useful information about how to improve

competitive video services for consumers. To support the Commission's efforts, Montgomery County hereby presents further information in this reply round to:

1. Update the County's prior filings to include 2010 cable rate and equipment data.
2. Note that the Commission is failing Congress by not highlighting that cable rates are rising and consumer satisfaction is falling despite what has been a more than doubling of the number of communities considered subject to effective competition, and respectfully request that the Commission fulfill its **statutory** obligation to provide annual cable pricing information and begin to include costs for equivalent DBS and on-line video services (including broadband connection fees).
3. Call to the Commission's attention that the fact that Congress and consumers would be better served by the annual reports if the Commission:
    a. Included consumer satisfaction questions and customer surveys as part of a *Status of Competition* report;
    b. Improved its vastly outdated cable consumer protection standards and undertook exploratory proceedings to develop on-line video distribution consumer standards; and
    c. Mandated the sale of navigational equipment or make clear that such a requirements imposed by state law would not be preempted.
4. Recognize that channels, channel capacity and program guides being set aside for public interest programming are not keeping pace with assets dedicated to non-public interest programming.
5. Note that there were no complaints regarding local franchising.

6. Welcome On-Line Video Distribution (OVD) but also point out that absent action to permit local franchising authorities to protect on-line subscribers, there will be no consumer protection for OVD subscribers.
7. Welcome new entrants like Digital Broadcasting OVS, but call on the Commission to make clear there are OVS obligations that are not negotiable.
8. Encourage the Commission to use its annual reports to Congress to advocate for consumer protection standards, not merely engage in a data collection and reporting exercise to Congress.
9. Recognize that channels, channel capacity and program guides being set aside for public interest programming are not keeping pace with assets dedicated to commercial programming.

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REPLY COMMENTS OF MONTGOMERY COUNTY, MARYLAND

I. INTRODUCTION

Montgomery County, Maryland ("County"), by its counsel, files these reply comments in response to the Commission's Notice of Inquiry (the "NOI"),[1] and Further Notice of Inquiry (the "FNOI")[2] in the above captioned proceeding to urge the Commission to re-examine the premises underlying its analysis of video competition issues and share with Congress the evidence that merely having a choice of cable providers is not a guarantee of a fully competitive video marketplace that offers competitive cable rates.[3] Furthermore, the County urges the Commission to report to Congress, based on the cable evidence, that mere choice of DBS and on-line video service delivery will not alone ensure a competitive market for delivery of video services that benefits consumers. Implicit in the Commission's actions in recent years is the assumption that choice equals competition which equals consumer protection. The experience of citizens

[1] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, MB Docket 07-269 (rel. Jan. 16, 2009) ("NOI").

[2] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Further Notice of Inquiry, MB Docket 07-269 (rel. April 21, 2011)("FNOI").

[3] Montgomery County, as well as the New Jersey Ratepayer and others make powerful cases for why better regulation is needed. Comments of Comcast and NCTA calling on the Commission to recommend that Congress further *deregulate* the cable industry make imperative the need for a Commission declaration that current market place protections and limited rate regulation are not protecting consumers.

residing in the County is that choice is not the same as competition and does not offer adequate consumer protection.[4] The Commission should act, or in the alternative, call upon Congress to change the Cable Act where necessary to protect consumers as market forces alone have proved inadequate to do so.[5] The Commission's actions or threats of action to preempt state and local efforts at self-help have been equally harmful to consumers.[6]

The County, alone, and as part of a coalition, has been an active participant in this proceeding over the years. The County joined the counties of Anne Arundel, Maryland, and Fairfax, Virginia, and the cities of Laredo, Texas and Boston, Massachusetts in filing comments in June of this year. Two years ago, the County filed comments including rate surveys when the Commission first sought to update its *14th Report* to Congress.[7] The County also called up the

[4] The County submits data on prices in the County to emphasize two points: first, the rates paid by subscribers for cable service continue to increase even in the face of competition; and second, those rates must be considered together with the very high rates that operators charge for equipment needed to obtain the service. Viewing the first in isolation from the second does not actually reflect the effect on consumers, and the effect of high equipment rates is exacerbated by the fact that consumers have no competitive alternatives for acquiring such equipment.

[5] In fact, the Commission's own statistics demonstrate the perverse competitive situation under the current regulatory/deregulatory scheme. In its most recent annual cable rate assessment provided to the Congress, the Commission revealed that cable rates grew faster in communities under the alleged protection of a competitive marketplace than in those communities protected by rate regulation: "Over the year ending January 1, 2009, the average price of expanded basic service increased by 5.7 percent, to $52.10, for those operators serving communities for which no effective competition finding was made ("noncompetitive communities"). The average price increased by 6.6 percent, to $52.96, for the group of operators the Commission has found to face effective competition." Yet in none of its reports to Congress of which the County is aware has the FCC called on the Congress to change the definition of effective competition. *In the Matter of Implementation of Section 3 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, (rel. Feb. 14, 2011) at 3 ("2011 Rate Report").

[6] For a fuller discussion on this point see *In the Matter of 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) ("NOI"), Reply Comments of Montgomery County, (Aug. 12, 2010).

[7] A copy of the latter comments, *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 07-269, Comments of Montgomery County, MD (May 20, 2009) ("2009 Comments"), is attached hereto. The County refiles its 2009 Comments together with

Commission to either mandate that cable operators make equipment available for purchase or confirm that such action by a State would not be preempted by the Commission.[8] However, the Commission did not provide an annual report using data that was submitted in response to its last call for video competition data, and the last report released by the Commission contains data only through 2006.

It takes substantial time, effort and resources to respond to the Commission's annual call for comments on these important matters. The County respectfully requests that the Commission fulfill its statutory obligation and publish a report of developments between 2007 and 2011 to bring itself current, thereafter release annual reports which provide useful information about how to improve competitive video services for consumers, and support the effort of State and local governments to promote a competitive market for cable equipment.

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these Reply Comments because the report to Congress that these comments were submitted to support has yet to be made. The County further notes that the data submitted in these materials is more current than the cable rate data that the Commission shared with the Congress in February of 2011.

[8] For a fuller discussion on this point *see supra*, note 6. Specifically, the County has worked with its state legislative delegation to seek state remedies such as mandated sale option for subscriber equipment as a means to address escalating equipment charges, only to have such efforts thwarted by the delay or refusal of the Commission to declare that such legislation is not preempted.

II. COMPETITION IS NOT LOWERING PRICES AND THE CURRENT EFFECTIVE COMPETITION STANDARD IS NOT PROTECTING CONSUMERS

A. Industry Comments Paint an Unrealistic Picture of the Benefits of Competition with Incomplete Data.

The evidence from the Commission,[9] from parties in this proceeding,[10] and from the marketplace itself[11] continues to confirm that competition of second, third or even fourth providers has not resulted in lower video pricing. The Commission asked for data in the FNOI which it would use "to enhance our analysis of competitive conditions, better understand the implications for the American consumer, and provide a solid foundation for Commission policy making with respect to the delivery of video programming to consumers."[12] In paragraphs 26, 27 and 28 of the FNOI, the Commission posed numerous questions intended to elicit detailed and specific information about the prices that each type of MVPD charges for delivered video programming, and as well as information about pricing strategies.[13]

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[9] *See e.g.* 2011 Rate Report.

[10] *See e.g.* City of Boston Comments, New Jersey Division of Rate Counsel Comments, discussed more fully *infra.*

[11] See Table 1, *infra.*

[12] FNOI, ¶. 1.

[13] A few examples of questions the Commission asked are listed below:

- What prices are subscribers paying for MVPD service?
- To what extent do MVPDs use promotional or reduced pricing as a competitive strategy?
- Can consumers easily find the prices of MVPD video packages and services on their monthly bill and/or MVPDs' web sites and other promotional materials?
- To what extent do providers of MVPD service use a strategy of reducing prices to attract and retain subscribers?
- To what extent do MVPDs offer new subscribers price discounts for an introductory period?
- Do prices change at the end of the introductory period, and, if so, how?
- Are introductory and long-term prices listed and fixed, or do providers negotiate with individual subscribers over prices before and after introductory periods?

Unfortunately, in their comments the industry largely ignored the Commission's detailed questions and gave short, generalized responses on pricing, choosing instead to provide detail on topics such as investment or competitive entry that might create a more positive impression of industry development especially when price trends are left out of the discussion.[14] But these non-responsive industry comments do a disservice to the Commission and consumers as they leave out valuable information that the Commission itself recognized would be needed to fully analyze and understand competitive conditions and the implications for consumers. In so doing, the industry crafts an unduly favorable picture of the state of competition for video programming services. The County strongly urges the Commission to use all legal and regulatory means available to it to require industry to provide the specific data requested by the Commission in the FNOI.

B. Industry Comments Seek to Conflate Choice with Consumer and Price Safeguards

The National Cable & Telecommunications Association (NCTA), at pages 7-13, provides several figures and charts on trends in MVPD market share, infrastructure expenditures, MVPD subscriptions, digital penetration, subscriptions to DVR and VOD services – all intended to back the claim that these are "strong indicators of a vibrantly competitive marketplace." Buried in this discussion is a single paragraph citing three Multichannel News stories on promotional offers and bundling. That is *all* the information on pricing provided by the cable industry's national

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- Do households that subscribe to the same delivered video services, from the same provider, in the same geographic area, pay different prices?
- How do bundles of service (*i.e.*, double- or triple-play offerings) change the price of delivered video services?
- To what extent have MVPDs been adding linear channels and non-linear VOD programming and raising prices as a result?

[14] See discussion *infra*.

trade association. The lack of specific industry information on pricing, even in aggregated form, is unacceptable to the County, and should be unacceptable to the Commission as well.

Individual cable operators are no more forthcoming with actual pricing data. For example, Comcast devotes a single paragraph to this topic, simply stating that operators offer bundling and promotional pricing, and citing comments filed by NCTA in 2009 to support the claim that that bundled prices are much lower.[15] Absolutely no pricing data is provided at all, not even by way of illustration.

Yet as we discuss below, the actual evidence on price trends belies the industry assertion that competition is "vibrant". While there may indeed be more competitors in the marketplace, when it comes to pricing, competition is clearly not working to benefit consumers.

C. Non-Industry Commenters Demonstrate that Competition is Not Providing Price Protection

Some specific pricing trends and practices are provided by non-industry commenters, and the story they tell is not a positive one for consumers. The City of Boston, where rates are deregulated under the "effective competition" standard, provided evidence to demonstrate that an "effective competition" order can lead to excessive rate increases. The City produced a recent survey of area cable rates that demonstrated that despite the presence of a wireline competitor to Comcast for some consumers in Boston and the availability of satellite dish service in the City of Boston, Comcast charges *higher* prices to consumers in Boston for virtually the identical services

[15] Comcast Comments, p. 18-19.

as it provides to Boston's neighboring communities. These other communities enjoy *lower* rates because they lack competition, and thus are still subject to rate regulation.[16]

The New Jersey Division of Rate Counsel provides a reality check on the true impacts on consumers of the widespread industry practices of offering promotional offers and bundles. In the short run, a consumer will see a price benefit but once signed up, the advantage goes to the operator who has a free hand to raise prices and knows very well that the transaction costs and inconvenience of trying to change providers or services will be very discouraging.[17] Likewise, the County detailed the strong benefits that bundling offers *to providers* in its 2009 Comments (at pages 12-15), and industry has said nothing of substance to challenge the validity of the County's analysis. Furthermore, Fairfax County, Virginia also filed comments in January 2007 noting rising prices between 2004 and 2007 and how difficult it was for consumers to compare bundled information.[18]

D. Analysis of the True Costs of Cable, Including Service and Equipment, is Made More Difficult By Industry Practices and Lack of Cooperation.

Compiling cable rate data is hard as reflected by the two examples Montgomery County shares below. The County does not offer these insights as an excuse for the Commission not to discharge its own independent means to establish price studies, but more to share that such research can be done. And as we hope our data tables show, by employing independently

[16] The experiences in Boston mirror those found by the Commission on a national basis, i.e. that rates are rise faster in markets were prices are established by the marketplace than in communities that have rate regulation. *See* 2011 Rate Report.

[17] New Jersey Division of Rate Counsel Comments, p. 5-6.

[18] Reply Comments of Fairfax County filed January 16, 2007. A copy of this filing is attached hereto as Exhibit 2.

gathered information, not only industry provided data, better and more meaningful insights are achievable.[19]

In the County's experience, marketing information from operators will rarely make adequate disclosure of all of the service and equipment options available to consumers For example, Verizon offers a low cost plan for $12.99 that includes PEG channels and broadcast channels (including some HD channels), but it is difficult for consumers to learn about that plan by looking at Verizon's main FiOS TV webpage which prominently displays three much more expensive plans ($64.99, $74.99, $89.99 respectively).[20] The only way for a consumer to get information about the $12.99 plan is if the consumer happens to click on the "See Local Channel Plan" link on this webpage, and then has the patience and service location information to go through multiple steps to determine if this lower cost plan is available in their area. It simply should not be so difficult.

County staff also had difficulties in obtaining price information beyond promotional prices when they contacted the providers by telephone. Customer service representatives are apparently only able to access pricing information with a specific street address; and one was unwilling to provide information without a callback telephone number as well. Cable operators prominently post promotional information on their websites, but rarely post annual rate cards, even though such notices are typically required by regulation to be provided to current

[19] Montgomery County is not the only party to voice concerns with the Commission's data collection techniques. The General Accounting Office found that there is a "weaknesses in FCC's processes for collecting and using information …[and that it could] …raise concerns regarding the transparency and informed nature of FCC's decision-making process." FCC MANAGEMENT: Improvements Needed in Communication, Decision-Making Processes, and Workforce Planning (GAO-10-79) released December 17, 2009 available at http://www.publicutilityhome.com/docs/d1079.pdf (last visited July 6, 2011).

[20] http://www22.verizon.com/residential/fiostv/plans.htm (last visited July 7, 2011).

subscribers. And such annual rate cards do not contain rate information for all equipment offered by cable operators.

Thus, the problem of cable operators not responding to specific pricing information requests is not limited to Commission proceedings; it is also a problem in the cable operators' communications with current and potential subscribers. Given that the Commission had asked for pricing information to be provided in this proceeding, and that the operators declined to do so despite the fact that all of this pricing information is readily available to them, the County urges the Commission to use all available legal and regulatory means available to it to require that all MVPDs provide the information requested by the Commission.[21] In the absence of specific information provided by the MVPDs, the County suggests that the Commission make use of the information we have provided herein in its report to Congress.

E. <u>**Rates for Cable Service Continue To Increase Unchecked.**</u>

Data on pricing of cable services in Montgomery County is discussed in this section, and the data on pricing of equipment is discussed in the next. The County submits this data to the Commission to provide factual information regarding the actual consumer price benefits to consumers from competition, or lack thereof, and to counter industry comments that competition is unquestionably working for the benefit of consumers. The County emphasizes two points about the allegedly "vibrant" competitive marketplace:

[21] County also notes that it is not the only party to voice concerns with the Commission's data collection techniques. The General Accounting Office found that there is a "weaknesses in FCC's processes for collecting and using information ...[and that it could] ...raise concerns regarding the transparency and informed nature of FCC's decision-making process." FCC MANAGEMENT: Improvements Needed in Communication, Decision-Making Processes, and Workforce Planning (GAO-10-79) released December 17, 2009 available at http://www.publicutilityhome.com/docs/d1079.pdf (last visited July 6, 2011).

- Rates paid by subscribers for cable service continue to increase even in the face of competition; and
- The very high rates that operators charge for the digital equipment required to obtain service must be considered with the cost for that service to obtain the real price of the service.

The rates charged by the three wireline providers currently serving Montgomery County residents – Comcast, RCN and Verizon – appear in Table 1. As illustrated in Table 1, the rates paid by subscribers for cable television services continue to increase. Clearly wireline competition does not restrain rates. Competition has not resulted in lower rates in Montgomery County, which has almost 400,000 households, nearly 250,000 cable subscribers among three franchised cable operators, and a high broadband penetration rate. For example, even though Comcast must compete with two wireline providers, Comcast's rate for basic service in the County increased by over 22% between 2007 and 2011 and its rate for its standard service (a combination of basic and expanded tier service) increased by 14.1%.

Table 1 – Cable Service Rates in Montgomery County

	2007	2008	2009	2010	2011	2007-11 % Increase
Comcast						
Basic	$17.30	$17.25	$19.10	$19.10	$21.10	22%
Expanded Basic only	$40.80	$43.10	$44.20	$44.05	$45.20	11.3%
Combined*	$58.10	$60.35	$63.30	$63.15	$66.30	14.1%
RCN						
Basic	n.a.	n.a.	$17.95	$22.97	$22.97	27.9%**
Signature Lineup	$56.94	$61.44	$65.50	$70.50	$73.50	29%
Verizon						
Basic	$12.99	$12.99	$12.99	$12.99	$12.99	0%
Expanded Basic (includes basic)	$39.99	$47.99	$47.99	$57.99	$64.99	62.5%

n.a = price not available.
* A Comcast customer must subscribe to basic in order to get expanded basic, thus the "combined" price is comparable to Verizon's expanded basic.
** RCN Basic percentage increase is from 2009-2011.

Table 1 also shows that the competitors do not seem to be affected by competition any more than the incumbent. RCN's rate for its signature lineup has increased by 29% since 2007. And while Verizon has held its basic rate steady since 2007, it has raised its expanded basic rate by a whopping 62.5% in just five years. Indeed, industry pricing behavior in the County has played out much as predicted in the County's 2009 filing in which we stated:

> It is reasonable to assume...that Verizon's priority is to gain market share as it rolls out its network, while Comcast and RCN seek to maximize revenue from existing customers. Perhaps at some point in the future prices will converge, with Verizon raising its rates and Comcast's coming down – but at that point it would seem that both companies would have the incentive to maintain comparable prices, and no incentive to reduce them, or even to limit increases to the general rate of inflation. In fact, this kind of pricing behavior is not uncommon in oligopolies. (citations omitted)[22]

The County was optimistic in thinking Comcast's rates would come down, but Comcast's rate increases did (at least temporarily) slow compared to its competitors. And now, in 2011, the once impressive price differential between Verizon and Comcast for expanded basic service has largely evaporated, as Verizon has quickly raised its prices to meet Comcast's.

In the bigger picture, perhaps the most striking thing about these double digit service rate increases in the 2007 to 2011 period is that they have been imposed during a time of deep recession in which the U.S. economy has experienced some of the lowest annual inflation rates since the Great Depression. The CPI increase from 2007 to 2011 was a modest 8.7%.[23] Thus, looking past industry's vague and generalized references to the benefits of promotional rates and bundling, and focusing on the real service rates on offer to consumers, it is clear that consumers

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[22] 2009 Comments, p. 7.

[23] The CPI was derived by comparing the figure for May 2007 to May 2011 in Department of Labor, Bureau of Labor Statistics CPI table available on the internet here: ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (accessed July 7, 2011).

in Montgomery County are not seeing a pricing benefit of competition where they could use it most, in their pocket books. And there is no reason, and certainly no industry evidence, to suggest that consumers elsewhere are having a better experience.

III. THE COMMISSION MUST CONSIDER EQUIPMENT RENTAL COSTS AS PART OF ITS ANALYSIS OF CABLE RATES AND TAKE ACTIONS TO REIGN IN THESE COSTS.

Montgomery County's experience shows that head-to-head competition is not restraining rates for cable equipment any more than it is holding down monthly service rates. Subscribers in the County are paying substantial amounts to rent equipment, and recent trends suggest subscribers will continue to pay substantial amounts to their service providers for equipment which they can obtain from no other source.

Table 2 contains the rates for cable equipment in Montgomery County for 2007 through 2011. The table shows that monthly rental rates for some of the most popular equipment have increased, while others for less popular equipment have stayed flat or decreased. For example, NCTA data shows that demand for digital tiers and digital services such as DVRs and VOD have increased substantially,[24] and so have the prices for the equipment needed to use these services, as demonstrated in Table 2.

As important as increases in equipment rental prices is the fact that these rental fees add significantly to the total cost of obtaining cable services. As a part of the June 2009 digital broadcast television transition, cable operators were given an incentive to move to all digital systems (as all digital cable systems were relieved of analog channel must-carry obligations).

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[24] NCTA Comments, p. 11-12

Digital cable also provides technical benefits for cable operators and subscribers. But those benefits have come at a very high cost for consumers. Cable operators in Montgomery County encrypt almost all cable channels and subscribers without digital televisions are forced to pay for additional equipment charges – a converter or a digital adapter – on every television in their house. Higher equipment fees are required to use basic features, such as the electronic program guide, or moderately advanced features such as video-on-demand, because low priced adapters offered by cable operators do not provide these types of services. Consequently, as cable operators abandon analog technology, they are simultaneously expanding their captive digital equipment rental market.

This cost increase is particularly dramatic for subscribers who must rent equipment for more than one television set. Comcast estimates that there are 2.8 television sets in the average household.[25] For the large number of subscribers in the County who have more than one television set, paying for a converter on every television set adds substantial amounts to their monthly bills.

Table 2 – Cable Equipment Rates in Montgomery County

	2007	2008	2009	2010	2011	2007-11 % increase
Comcast						
Basic only converter	$0.90	$1.10	$1.10	$4.99	$3.20	255%
Addressable converter	$3.75	$3.70	$3.40	$15.99	$3.20	-17%
DVR converter					$15.95	
HD converter	$6.50	$7.95	$7.95	$19.20	$18.50*	185%
HD- DVR converter					$15.95^	
Remote control	$0.20	$0.25	$0.25	$0.25	$0.25	25%
Cable Card	n.c.	n.c.	n.c.	$9.25	$9.25	0%
Digital Adapter	n.a.	n.a.	$1.99	$1.99	$1.99	0%

[25] *Comcast's Montgomery Digital Network Enhancement and "The World of More,"* presentation by Comcast to Montgomery County (June 2009).

	2007	2008	2009	2010	2011	2007-11 % increase
RCN						
Digital converter	$7.95	n.a.	$3.95	$3.95	$4.95	-38%
Additional converter	$7.95	n.a.	$6.95	$6.95	$4.95	-38%
DVR converter	$12.95	n.a.	$17.95	$17.95	$17.95	39%
HD converter	$9.95	n.a.	$11.95	$9.95	$9.95	0%
HD- DVR converter					$19.95	
Cable Card	$1.50	n.a.	$1.50	$1.50	$1.50	0%
Digital Adapter	n.a.	n.a.	$3.95	$3.95	No longer offered	
Verizon						
Std Def. Converter	$4.99	$4.99	$5.99	$5.99	$5.99	20%
DVR converter					Not available	
HD converter	$9.99	$9.99	$9.99	$9.99	$9.99	0%
HD DVR converter	$12.99	$15.99	$15.99	$15.99	$15.99	23%
HD Home Media DVR	$19.99	$19.99	$19.99	$19.99	$19.99	0%
CableCard	n.a.	n.a.	$3.99	$3.99	$3.99	0%
Digital Adapter	n.a.	n.a.	$3.99	$3.99	$3.99	0%

*Includes an HD Technology Fee of $9.25 per month. Comcast representatives were unaware of this charge and did not know if it was applicable regarding other HD equipment.
^Price does not include HD Technology Fee which may also apply.
n.c. = no charge
n.a.= price not available

Table 3 shows the effects of equipment charges on rates for subscribers who pay for service to more than one television set. As noted above, subscribers do have the option of paying lower rates for digital adapters, instead of set-top boxes, but these devices do not provide access to the on-screen program guide or to video-on-demand services.[26] Thus, if a subscriber wants the benefit of the full capability of provider's services, these cheaper devices are not adequate.

[26] Rates for digital adapters appear in Table 2.

Table 3 – 2011 Rates for Service plus Equipment

	Service Only	Service + one set		Increase over service only	Service + two sets		Increase over service only	Service + three sets		Increase over service only
Comcast										
Basic only (analog) + converter + remote	21.10	$23.09		5.2%	$25.08		10.4%	$27.07		15.6%
Expanded Basic + Addressable converter + remote	66.30	$69.75		5.2%	$73.20		10.4%	$76.65		15.6%
Expanded basic + HD digital converter + remote	66.30	$84.80^		27.9%	$94.05		41.9%	$103.30		55.8%
RCN										
Basic + digital converter	22.97	$27.92		21.5%	$32.87		43.0%	$37.82		64.6%
Expanded basic + digital converter	73.50	$78.45		6.7%	$83.40		13.5%	$88.35		20.2%
Expanded basic + HD converter	73.50	$83.45		13.5%	$93.40		27.0%	$103.35		40.6%
Verizon										
Basic + standard definition converter	12.99	$18.98		46.1%	$24.97		92.2%	$30.96		138.3%
		HD	HD-DVR		HD	HD-DVR		HD	HD-DVR	
Prime HD service and converter 104 channels	64.99	$74.98	$80.98	24.6%*	$84.97	$96.97	49.2%*	$94.96	$112.96	73.8%*
Extreme HD service & converter 204 channels	74.99	$84.98	$90.98	21.3%*	$94.97	$106.97	42.6%*	$104.96	$122.96	64.0%*
Ultimate HD service & converter 270 channels	89.99	$99.98	$105.98	17.8%*	$109.97	$121.97	35.5%*	$119.96	$137.99	53.3%*

Comcast and Verizon Expanded packages include basic service charge
*Percentage increase for HD-DVR converter box
^Includes HD Technology Fee ($9.25)- Comcast customer service representatives were unaware of this charge and did not know if it was applicable regarding other HD equipment.

Table 3 also illustrates the dramatic effects of equipment rates on the amounts subscribers pay, especially in the case of Verizon. A Verizon basic-only subscriber renting a single converter will pay 46.1% more than the basic service price. A Verizon HD subscriber with a DVR pays an extra 17.8 to 24.6%. The effects are even greater for subscribers with multiple televisions: if a Verizon subscriber has three sets and wants a standard converter on all of them, the subscriber will pay an additional 138.3%. A comparable RCN subscriber would pay an additional 64.6%, and a Comcast subscriber would pay an additional 15.6%. In other words, equipment adds a lot to the rates subscribers pay, and the Commission needs to specifically address this issue in any discussion of competitive video service.

So long as subscribers are captive renters – they can only rent equipment and then only from the operators – and each operator is free to charge whatever rate it chooses for the equipment, subscribers will suffer oligopolistic pricing behavior. But this need not be the case, as the County has urged on numerous occasions; the Commission could mandate a purchase option for subscriber equipment.[27]

Indeed other pricing models available in the communications industry involve a purchase option. Wireline phone subscribers can buy their equipment. Wireless phone subscribers can buy their cell phones, or get them at a reduced price with a longer term service contract with a specific provider. Broadband subscribers can purchase their own cable modem instead of renting one. Satellite subscribers can purchase their own equipment.[28] In fact, in an *ex parte* filing in the *All Vid* proceeding, the cable industry lauded the fact that consumers can buy all sorts of equipment to access video content.[29] But the conclusion drawn from these advances in technology "for sale" is rather astonishing. NCTA stated: "The fact that tens of millions of tablets, game consoles, Internet-connected TVs, and other smart, video-capable devices have

[27] *See* footnote 6; see also *In the Matter of 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) ("NOI"), Comments of Montgomery County, Maryland (July 13, 2010).

[28] The County notes that DBS subscribers must purchase equipment and then pay additional "lease" fees of $5 to $10 per converter box per month.

[29] Letter from K. McSlarrow to J. Genachowski dated January 26, 2011.

been sold and will be sold means that the Commission no longer needs to "create" a retail market for navigation devices."[30]

The implication is that because there are alternative devices for sale that allow consumers to access some video content principally over the Internet, a retail market for navigational devices for multichannel video programming services already exists. In that case why is it that cable operators continue to offer only to rent their equipment to consumers? Industry provides no answer, but the County believes Tables 4 and 5 do. Equipment rental is extremely profitable. Table 4 illustrates very clearly that a cable subscriber in effect "pays" in rental fees the equivalent of the full reference purchase price for their equipment in most cases in about a year.

[30] *Id.* at 3

Table 4: Consumer Equipment Cost Comparison
DirecTV Receiver Purchase vs Monthly Cable Converter Rental
(Number of months at monthly rate to meet equivalent purchase price)

DIRECTV	COMCAST	RCN		VERIZON
	Digital Adapter $1.99	Digital Adapter No longer available		Digital Adapter $3.99
	Analog Basic Only* $3.45			
Standard Receiver $69.00	Digital Converter* $3.45 **(20 months)**	Digital Converter $4.95 **(18 months)**	Additional Converter $4.95 **(10 Months)**	Digital Converter $5.99 **(12 months)**
DVR Receiver $99.00		DVR** $17.95 **(6 months)**		
HD Receiver $99.00	HD Converter* $9.25^ **(12 months)**	HD Converter $9.95 **(10 months)**	Additional Converter $9.95 **(9 months)**	HD Converter $9.99 **(10 months)**
HD DVR Receiver $199.00		HD DVR Converter $17.95 **(14 months)**	Additional Converter $17.95 **(12 months)**	HD DVR Converter $15.99 **(13 months)**
				MultiRoom DVR *** $19.99
Not Required	CableCard $9.25	CableCard $1.50		CableCard $3.99

*Includes Comcast $0.25 charge for remote control
** No longer advertised on RCN website
*** Requires rental of additional Verizon converters
^Equipment rental price does not include monthly HD Technology Fee of $9.25 required for HD service.
CableCard enables use of commercially available converter box, *i.e.*, "navigation device," for unidirectional cable service. (Electronic program guide, video-on-demand, and pay-per-view cannot be accessed.)
Source: Montgomery County Office of Cable and Communications, using Cable Rate Card Information as of June 28, 2011

Table 5 further shows that the equipment rental market is skewed to the benefit of the operator rather than the consumer. Should a piece of equipment be damaged, or not returned, a significant fee will be charged to the consumer. Without a retail market for the devices, it is impossible to know how much profit is built into this charge. Certainly the charges in Table 5 seem much higher than the reference prices for the satellite equipment listed in Table 4.

Table 5 – 2011 Unreturned/Damaged Equipment Charges

	CableCard	Digital Adapter	HD Converter	HD-DVR	SD-DVR	SD-STB
Comcast	Actual Replacement Cost					
RCN*	$55		300.00 to 402.00 Depending on the model	370.00 to 550.00 Depending on the model		
Verizon	$100	$175	$350	$555	$475	$240

*Plus taxes
Source: Montgomery County Office of Cable and Communications, using Cable Rate Card Information as of June 28, 2011

Moreover, these charges are fixed or require payment of the replacement cost. No consideration is given to the fact that the consumer may have already in effect paid for the equipment many times over in rental fees. Nor do they take into account that the equipment itself may have been in service for a number of years, with little useful life or value remaining. Thus, the operator is able to benefit in two ways from its captive rental market. A subscriber may pay many multiples of the cost of the equipment in rental fees over the years. And, should the equipment ever be damaged or unreturned, the subscriber pays for the replacement equipment as well. Thus, the County strongly opposes NCTA's proposal that the Commission no longer needs to "create" a retail market for navigation devices.[31]

In light of the above, the *status quo* on equipment rentals is not benefiting consumers. Frankly, it is harmful. Thus, once again the County urges the Commission to take action to mandate a purchase option for equipment, or at a minimum state publicly that it supports such efforts by other jurisdictions.[32]

IV. THE COMMISSION HAS OBLIGATIONS TO CONSUMERS AND CONGRESS THAT ARE NOT BEING MET THE COMMISSION SHOULD REEXAMINE AND REASSERT ITS ROLE REGARDING A RANGE OF SUBJECTS CRITICAL TO SUBSCRIBERS, BECAUSE THE MARKET WILL NOT ADDRESS THOSE MATTERS.

As the Commission seeks information for only its 14th report to the Congress in this the 19th year since passage of the Cable Act amendments of 1992, it is clear that the Commission has failed in its obligation to provide annual competition reports to Congress[33]. Moreover, by providing a report based only on cable rate information voluntarily submitted by cable operators which is almost 3 years out-of-date by the time it is shared with Congress, it is clear that the Commission has not acted in a timely manner in meeting is cable rate reporting obligations.[34]

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[31] *Id.*

[32] For a fuller discussion on this point see footnote 6.

[33] Section 628 (g) of the 1992 Act provides: "The Commission shall, beginning not later than 18 months after promulgation of the regulations required by subsection (c), annually report to Congress on the status of competition in the market for the delivery of video programming."

[34] Section 623 (k) of the 1992 Act provides "The Commission shall annually publish statistical reports on the average rates for basic cable service and other cable programming, and for converter boxes, remote control units, and other equipment, of-

> (1) cable systems that the Commission has found are subject to effective competition..., compared with

Such delays by the Commission to act in a timely manner to meet its statutory deadlines is especially troubling considering the Commission has recently devoted significant resources to imposing "shot clocks" on local governments for cable franchising and tower siting, despite Congress limiting the authority of the Commission to regulate either.[35]

A. **There Remains a Need for Regulation and the Commission Must Find Ways to Ensure that Consumers Have a Voice in These Reports.**

NCTA (at 26) bubbles over in praise of the industry claiming that consumers can choose from "a multitude of video providers" and "a virtually unlimited array of programming" and, that competition in the marketplace is "flourishing" and "far exceeds anything that Congress could have envisioned" in 1992. It should come as no surprise then, that industry is urging the Commission not only to declare mission accomplished in this status report, but to remove all vestiges of industry regulation. In NCTA's words "[i]t is time not only to report that the video marketplace is vibrantly competitive but also that those regulations intended to remedy a perceived lack of competition are no longer necessary or appropriate."

The County not only rejects NCTA's view, but calls on the Commission to make clear to Congress that the industry view reflects a distorted and self-serving perspective on the marketplace. Choice does not equate competition, if competition is meant to be a substitute for consumer protection in the cable industry.[36] The County would also suggest that the

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(2) cable systems that the Commission has found are not subject to such effective competition.

[35] It is also worth noting that the Commission has publicly admitted it "has more than three thousand open dockets" and that "many of these dockets have seen little or no activity in years." *In the Matter of Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization,* (GC Docket No. 10-44), Notice of Proposed Rulemaking rel. February 22, 2010 at ¶ 19.

[36] In exchange for higher rates, cable subscribers have more programming choices and advanced features such as DVR and video-on-demand options. But not all consumers want such options or to have to pay unrestrained rates for such services. Arguably, since little to no data was provided, increases in

Commission fill in gaps on matters ignored by industry by addressing a number of important issues that directly affect subscribers, and which the Commission has not kept adequately up-to-date. These issues are highlighted in the discussion below.

1. CableCARDS

The NOI and FNOI specifically request comment on issues related to the availability of navigation devices and CableCARDS.[37] Unfortunately, despite years of effort, the Commission has not been able to ensure that cable subscribers can purchase their own fully compatible set-top boxes. The County is pleased to note that on the same date these reply comments were due, the Commission's October 14, 2010 *Third Report and Order* on navigation devices was published in the Federal Register.[38] Publication of the Third Report and Order will benefit the small number of consumers who use CableCARD devices, but as the Commission is aware, CableCARD do not permit use of interactive features such as the electronic program guide, video-on-demand, or pay-per-view.

2. Customer Service Regulations

The County would also urge that the Commission examine how badly out of date its customer service rules are and how the Commission's inaction has undercut efforts by local franchising authorities to address the complaints of broadband Internet service and on-line video subscribers. Neither of these issues is raised by the NOI or FNOI.

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programming costs and terms of retransmission consent agreements are a key component of cable price increases. The County urges the Commission to specifically look at the high cost of sports programming and subscribers in ability to opt out of expensive national and regional sports programming such as ESPN and MASN.

[37] NOI at ¶¶ 83, 86. FNOI at ¶ 66. For a fuller analysis of this issue see 2009 Comments, at 21-22.

[38] 76 Fed Reg 40263 (July 8, 2011)

B. The Commission's Customer Service Rule Is Outdated.

The Commission's customer service rule took effect on July 1, 1993, and except for minor amendments in 1996 and 2000, has remained unchanged since.[39] The cable industry, however, has evolved dramatically since 1993 and the rule is now very much out of date – it does not address the kinds of problems that franchising authorities and subscribers typically face today. If national standards are necessary to avoid a proliferation of individual local standards, then it is essential for the Commission and the industry to keep those standards up to date.

In the County, the most common category of complaints received from subscribers concerns billing problems, as seen here:

Table 6: Types of Complaints

Fiscal Year	Billing	Internet Service	Reception	Other
2008	39.1%	24.3%	23.2%	13.4%
2009	39.9%	17.3%	22.8%	20.0%

In reality, however, the chief complaint of subscribers is that providers do not take their complaints seriously. This manifests itself in several ways:

- It takes too long for complaints to be resolved. Subscribers often report having to make multiple telephone calls before matters are resolved.
- Subscribers express frustration with the inability of cable companies to diagnose and correct problems in the first service call.
- Cable companies will only schedule service calls for a specific address; even when a subscriber has checked with neighbors and concluded that problem affects a broader area, customer service representatives have no authority to take further action.

[39] 47 C.F.R. § 76.309.

- When complaints are "resolved," many subscribers remain dissatisfied with the outcome.[40]

Consumer dissatisfaction with customer service in the industry is well known, yet the Commission's rules say nothing about how effective or efficient an operator's complaint resolution process should be. These are the issues that really matter: Why did the subscriber have to call in the first place? Was the complaint resolved in a single call? And did the subscriber agree that the matter was properly resolved?

Another problem that generates a great deal of subscriber frustration concerns promotional offers, a marketing practice which the industry points to as a mark of a "vibrant" marketplace.[41] For consumers, the experience is not so positive. Promotional offers are sometimes not well planned or executed. .[42] But more often, consumers sign up for new service at a promotion rate and do not clearly understand the terms and conditions of the offer. The Commission's rules do not require the cable operator to provide any information in writing and often subscribers are provided the promotional flyer as a substitute for a more adequate explanation of the offer. Subscribers often feel that companies or their customer service representatives are not held accountable for providing misleading or incorrect information at the point of sale. One possible solution would be for the Commission to develop a standard format and minimum content requirements for all offers made by providers, similar to the standard terms required to be disclosed in credit card promotional offers. If terms and conditions were

[40] In both 2008 and 2009, over 20% of subscribers surveyed report that they were not satisfied with the resolution of specific complaints they raised with their providers.

[41] See discussion, *supra*.

[42] For instance, one well known incident was Verizon's holiday offer of an HDTV set to new subscribers raised expectations that the set would be provided upon installation, when in fact subscribers had to go to a website to obtain shipment of the set. The company subsequently ran out of the promotional HDTV sets, the offer was replaced with a gift certificate.

fully and clearly disclosed, using the same format, subscribers would be better able to compare and evaluate offers.

The problems discussed above are not addressed at all by the Commission's rule. What's more, many of the issues that are addressed by the rule are no longer relevant to subscribers. For example, 47 C.F.R. § 76.309(c)(1) addresses telephone answering standards, but only in terms of the problems subscribers complained about in 1993, before the wide-spread use of large regional or national call centers. The rule requires company representatives to be available during normal business hours, permits after hours calls to be answered by an answering machine, requires the phone to be answered within thirty seconds, and specifies that customers may receive a busy signal no more than three percent of the time. Operators can and do easily meet these standards today by using any automatic response unit. But that has given rise to different problems for consumers. Customer complaints today have to do with cumbersome and confusing call answering menus, and the inability to reach live customer service representatives easily. Technology has advanced, but the Commission's rule has not.

Where there is not a convenient way to "comply" with outdated rules, operators "re-interpret" them to suit their business needs. For example, 47 C.F.R. § 76.309(c)(2) requires a cable operator to complete an initial installation within seven days of an order being placed. Verizon, however, does not always comply with this rule. Because Verizon's system requires installation of an optical network termination (ONT) device before cable service can be provided, Verizon insists on franchise standards that allow Verizon seven days to install the ONT, and then additional time – typically another seven days – to install cable service. Only if an ONT is already in place will Verizon comply with the rule's single seven-day standard. Many franchising authorities have reluctantly accepted Verizon's position on this point, because the company is virtually uncompromising.[43] Thus, the original intent of the rule has been circumvented entirely.

47 C.F.R. § 76.309(c)(3) purports to address communications between cable operators and subscribers, but in fact it merely sets maximum time limits on when refunds and credits must be made. Subscribers are very much concerned with billing errors, and the process for their billing complaints to be resolved, but the Commission's rule is entirely silent on that point. As shown in Table 6, almost 40% of subscriber complaints concern billing. Cable operators often continue to bill even after an account has been disconnected, and automatic payments continue to be deducted from subscribers' bank accounts. Neither one of these problems is addressed by the current rule.

Furthermore, to the extent the rule does apply, it is honored only in the breach. Refunds take six to eight weeks to receive, and required credits are often not made. Operators routinely state that refunds must be issued by check cut from a separate corporate entity. In addition, subscribers who pay by automatic electronic debit often cannot receive refunds using the same automated process.

Finally, the Commission's standards only apply if expressly adopted by a community, and they include no enforcement mechanism. The existence of the standards allows operators to treat them as the default provision in any local franchise – "if they're good enough for the FCC they should be good enough for you" – but since they are largely ineffective, communities gain little by adopting them. The Cable Act and the Commission's rules permit more extensive local regulation, but the Commission has discouraged independent local action by permitting the costs

[43] Two examples are the Montgomery County franchise, at Ex. D, § II(Y)(1), and the District of Columbia franchise, at Ex. D §3(B).

of stricter regulation to be passed through to subscribers.[44] The threat of passing on the cost of more effective regulation has been enough to convince some local franchising authorities not to insist on stricter requirements. The overall effect of the Commission's rules is that customer service in most communities is essentially unregulated.

The above discussion demonstrates that the Commission's current customer service rule is largely outdated and ineffective. Furthermore, the lack of effective rules is not being adequately remedied by market forces, despite the claims by some industry players that they are making improvements in response to competition.[45] Oligopolies are not generally concerned with delivering high levels of customer service, especially if improving service requires a significant increase in costs. Providing good customer service requires significant numbers of trained personnel to respond to individual complaints. The effect of ILEC entry into the video services market, however, has generally been to induce the cable industry to cut costs, and even before then, the entire trend in customer service had been to reduce costs by consolidating and centralizing customer service functions in regional call centers. In other words, the imperfectly competitive market that currently exists is not a substitute for regulation. Properly crafted rules, on the other hand, would offer subscribers a minimum level of protection and providers would be less tempted to cut corners.

Restated, effective federal regulation – or federal regulation that permits effective local regulation – would create an environment in which a certain acceptable level of customer service would be built into the system. If specific and effective standards were required by law, operators would find it much more difficult to justify cutting back in those areas, simply because

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[44] 47 C.F.R. §76.925(a)(3). This provision does not apply if a community is subject to effective competition – but many communities entered into franchise agreements when rate regulation was still in effect.

[45] *See e.g.* Comcast Comments at p. 18-19.

the failure to comply would be a violation of the law. This would also benefit operators in dealing with pressure from investors, since investment in meeting the standards could be justified in the same way.

The Commission should initiate a proceeding to reexamine the customer service rules and develop new standards that actually address current problems, and provide the flexibility to address new problems as they arise. Furthermore, such a proceeding should address the issue of customer service regulation in state franchising states. The Commission has always assumed that the local franchising authority would adopt and enforce customer service standards, and historically this has meant that local governments fulfilled that role. But the recent wave of state franchising statutes has eliminated the local role often without replacing it with a significant state role. Recent state franchising laws typically adopt the Commission's standards, and then eliminate or limit local authority to enforce them.[46] The net impact for consumers is the states have vitiated cable customer service regulation: they impose ineffective standards, while precluding local governments from adopting effective ones. Very few states have adopted standards of their own, or even given any consideration to this issue, in part because they rely on the existence of the Commission's rule. In addition, even if a state undertakes to enforce whatever standards might apply, the effectiveness of that effort will depend entirely on the resources devoted to the task.

Finally, the County notes that the Commission has the financial resources to perform its statutory reporting obligations and take other regulatory action to address the needs of cable subscribers. The Commission annually collects tens of millions of dollars in regulatory fees from cable television systems; fees that are passed through to and paid as additional line item charges

[46] *See, e.g.*, Fla. Stat. § 610.108; Tx. Util. Code § 66.008; N.C. G.S.A. 66-356(b).

by subscribers. In FY 2010, the per subscriber annual contribution was $0.89, and for FY 2011 the rate is proposed to increase by 4.4% to $0.93 per subscriber. That translates into close to $60 million in regulatory fees paid by cable subscribers to the Commission annually.[47]

C. The Commission Should Expressly Endorse Local Regulation of Internet Customer Service Issues.

The Commission listed as one of its compelling reasons to reopen this proceeding the need to address "the growing importance of online video distribution ("OVD") to consumers" (FNOI at ¶ 4). The County would suggest that until the Commission acts to protect consumers of Internet service, or in the alternative recognizes a local community's ability to do so, the subscribers of OVD services will suffer the same challenges as traditional cable subscribers.

From the County's perspective it appears that the Commission is not regulating Internet customer service, except on an *ad hoc* basis.[48] The states are not regulating Internet customer service. Montgomery County believes that Section 632 of the Communications Act permits the County to establish customer service standards pertaining to a cable operators' Internet access service, because the statute, by its terms, is not limited to video service. This is logical because in fact Internet access subscribers face much the same kinds of problems as confront cable

[47] The per subscriber fee is derived from dividing the Commission's prorated revenue requirement for cable television regulation by the number of "payment units", that is the Commission's estimate of the number of cable TV subscribers. The Commission determines the number of cable TV subscribers based on "publicly available data sources for estimated subscriber counts" and actual prior year payment units reported by operators. In calculating the FY 2011 per subscriber amount, the prorated revenue requirement used by the Commission was $58,633,597 and the estimated subscriber count was 63,400,000; in FY 2010, the numbers were $57,545,458 and 64,500,000, respectively. *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2010*, MD Docket No. 10-87 Report and Order (FCC 10-123) (July 9, 2010); *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2011*, MD Docket No. 11-76, Notice of Proposed Rulemaking (FCC 11-68) (May 3, 2011).

[48] The Commission's 2008 order on network management practices is an example of an *ad hoc* action. *Memorandum Opinion & Order*, 23 FCC Rcd. 13,028 (2008).

subscribers. Indeed, at one point the Commission had been referring subscribers who complained to the Commission regarding Internet service to their local franchising authorities. The Commission should formally adopt that position and allow local franchising authorities to address Internet service issues in the same fashion they address cable service complaints. From a consumer perspective, when they seek assistance from their local government to address a service problem, they expect that the local government will assist them regardless of whether video service is delivered from a cable or broadband provider. Consumers are frequently dismayed that local consumer protection for broadband service, is significantly weaker than protection for cable service, even though both services are provided by the same company.

Commission action is necessary because even though the statute can be construed to support local authority, franchising authorities have been wary of proceeding in the face of industry opposition. The industry's position, however is not entirely logical. Providers insist that they should not be required to obtain local franchises to provide Internet service, since they are using the same facilities they use to provide cable service – but by that logic local government should be permitted to handle resident complaints regarding Internet service. After all, the residents live in the local jurisdiction, the two services are provided by the same provider over the same plant, and Internet service is often bundled with cable service. It would be entirely logical to allow local governments to handle Internet customer, a.k.a OVD subscriber matters.

As shown on Table 6, 24.3% of complaints received by the Montgomery Office of Cable and Communications Services in Fiscal Year 2008 concerned Internet service. For the first three quarters of Fiscal Year 2009, 17.3% of complaints received had to do with Internet service. Consumers have problems, but only very limited recourse. With the roll out and acceptance of

OVD services, is it unreasonable to believe that these complaints will grow in number? The County urges the Commission to address this, on behalf of subscribers nationally.

V. THERE WERE NO COMPLAINTS REGARDING LOCAL FRANCHISING

Despite being prompted by the FNOI to do so[49], not a single commenter complained about local franchising as the basis for limited competition or delayed entry.[50] The County hopes that the Commission will bear in mind this lack of complaints by the nation's leading residential broadband providers as it examines issues related to Broadband Acceleration efforts as part of its implementation of the National Broadband Plan.[51]

VI. MONTGOMERY COUNTY WELCOMES NEW OPERATORS SUCH AS DIGITAL BROADCASTING OVS BUT REMINDS IT AND THE COMMISSION THAT OVS PROVIDERS HAVE IMPORTANT STATUTORY OBLIGATIONS.

On May 26, 2011, Digital Broadcasting OVS ("Digital Broadcasting") filed an application for certification to operate an open video system pursuant to Section 653(a)(1) of the Communications Act of 1934 and the Commission's rules. Montgomery County was listed among the communities that Digital Broadcasting OVS planned to serve with its new service upon the obtaining of an OVS license. On June 3, 2011, the FCC denied Digital Broadcasting's

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[49] FNOI at ¶¶ 20, 21.

[50] While Verizon does not complain about local franchising, it does credit the Commission's prior actions on local franchising as the rationale for not needing to complain. The County would note that Verizon was not compelled to use any of the Commission's regulations in its negotiations with the County and is unaware of a single incident around the nation where Verizon placed a local community on the cable franchise shot clock. In fact, while not a public number, it is believed that Verizon has in excess of 1,000 local cable franchises. Were such a number accurate, it would appear that Verizon has been granted on average a new local franchise every business day for the last four years.

[51] *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting,* (WC Docket No. 11-59) released April 7, 2011.

application finding "Digital Broadcasting …failed to sufficiently and exhaustively indicate to the Commission the local communities it intends to serve and has failed to adequately serve a copy of its application on designated telecommunications officials in such local communities."[52]

While the County welcomes all potential new entrants and new technologies, there are obligations under the Act and Commission rules with which these new entrants must comply. The County was therefore somewhat troubled that in its comments in the instant matter Digital Broadcasting requested clarification from the Commission as to what its obligations might be as a new technology OVS provider.[53] The County expects that the Commission, if it responds to the numerous questions posed by Digital Broadcast in its comments, will explain that while qualifying as an OVS provider does entitle the operator to the benefits of a streamlined regulatory process under Title VI, that streamlined process does not mean that there are no obligations.

In particular, the protections afforded Public, Education and Government (PEG) channels and support outlined in 47 CFR § 76.1505 (a) are important to the County. Digital Broadcasting must be prepared to demonstrate how it plans to satisfy these obligations, including support, channel capacity, in-kind services and resources. In addition, a discussion of Digital Broadcasting's plans to meet its obligations with respect to fees in lieu of cable franchising fees, as described in 47 CFR § 76.1511, would also be helpful.

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[52] *In the Matter of Digital Broadcasting OVS Certification to Operate an Open Video System* Memorandum Opinion and Order (rel. June 3, 2011) at ¶ 3.

[53] Digital Broadcasting OVS Comments at 16.

VII. CHANNELS, CHANNEL CAPACITY AND PROGRAM GUIDES DEDICATED TO PUBLIC INTEREST PROGRAMMING ARE NOT KEEPING PACE WITH CAPACITY AND SUPPORT AFFORDED OTHER CABLE PROGRAMMING.

The Commission asked parties to share updates on the status of public interest programming. The County offers some commentary on its recent experiences and concerns in this area.

The Commission pointed out that DBS operators are required to reserve four percent of their channel capacity for noncommercial programming of an educational or informational nature. 47 C.F.R. § 25.701 and PEG channels can be required under the Cable Act to meet the needs and interests of the franchising community. If one assumes that the DBS reserve standard was created to mirror the capacity set aside for public interest programming at the behest of local franchising authorities at the time the Commission established the DBS reserve standard, it is clear that, unlike the DBS public interest percentage set asides, the required number of PEG channels has not kept pace with growth in channel capacity on cable systems.

Moreover, in the County's experience, operators have not put their technological and service delivery advances to work to fully benefit PEG programming. A prime example is the Electronic Program Guide which has become the "go to" method for seeing what's on. Consumers don't surf channels, they surf the program guide. As they surf the guide's listing of commercial channels they are provided with detailed information about the program, the episode, etc. Not so for PEG channels; the program guide descriptor is limited to "local programming."

VIII. CONCLUSION

For all the foregoing reasons, Montgomery County urges the Commission to carefully reexamine its past assumptions about the nature, scope, and effectiveness of competition in the video market, and to reassess its policies in light of a more accurate understanding of the market. The County also supports the Comments of Public Knowledge that these annual reports should serve a "purpose beyond simply cataloging … the status of competition in the market for the delivery of video programming."[54] The Commission has the opportunity, indeed the County would argue, the obligation, not only to Congress but to the American consumer, to provide a thoughtful and careful analysis of the true state of play in the video marketplace, and to take all the action in its power to address the glaring problems that still plague the marketplace some 19 years after Congress first mandated annual reviews.

Respectfully submitted,

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[54] Public Knowledge Comments, p.1.

Attachment 1

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

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

COMMENTS OF MONTGOMERY COUNTY, MARYLAND

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May 20, 2009

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SUMMARY

Montgomery County, Maryland (the "County"), urges the Commission to re-examine the premises of its analysis of video competition issues. Local governments like Montgomery County have been working hard to promote competitive entry and address the needs of subscribers. The Commission's policy in recent years has implicitly assumed that the presence of more than one provider in a marketplace is enough to create a fully competitive marketplace. In reality, however, the market for video service is best described as an oligopoly, and it is not fully competitive. This fact has ramifications for a broad range of issues of concern to the Commission and the County, and more active regulation is needed to correct market failures in many areas.

The Notice of Inquiry ("NOI") asks for comment on the effects of local franchising on competition. The County granted a competitive cable franchise nearly a decade ago, and strongly believes that the most important factor underlying competitive entry decisions is the high cost of new construction. High programming costs are also a very significant factor. On the other hand, although video providers may consider local franchising to be cumbersome, local franchising promotes the public interest by ensuring that local interests and concerns are met. The County urges the Commission to re-examine its policies in this light.

The County's experience also shows that even with competitive entry many of the promised benefits of competition have not appeared. This is because choice is not the same as competition. Providers have added to their service offerings, bundled services together, and taken other steps to make their services more attractive to subscribers. But subscriber rates continue to go up faster than the rate of inflation, and the presence of more than one provider does not necessarily have any effect on actual prices. Furthermore, the packaging of video

programming services and the bundling of video, telephone and data services make it very difficult for consumers to compare service offerings. And the costs of switching – such as the inconvenience associated with changing email addresses – are significant. Bundling therefore does not advance competition.

In addition, the adoption of statewide franchising and other restrictions on local authority has not benefited consumers. Competition has not lowered prices in Montgomery County. An examination of prices in communities in Texas and Virginia, where limits on local franchising have been adopted, shows that consumers in those states also have not benefited. The County recommends that the Commission conduct a large-scale comparison of states that continue to protect local franchising, such as Maryland, with conditions in states where franchising legislation has been enacted. The County believes that such a study would show that state legislation has not improved competition, the scope of system build-out, or consumer welfare to any significant degree, and in some cases may have harmed it.

The County urges the Commission to address four areas of particular importance to consumers. The NOI specifically requests comment on issues related to the availability of navigation devices and CableCARDS. Unfortunately, despite years of effort, the Commission has not been able to ensure that cable subscribers can purchase their own fully compatible set-top boxes. The NOI also asks for comment regarding changes to the Commission's technical standards; those rules are severely outdated, and the County believes that specific standards for digital programming are needed.

The County also asks that the Commission to examine two issues not raised by the NOI: the Commission's cable customer service rule and the regulation of Internet customer service. The customer service rule is outdated and ineffective. The rule does not meet the public interest, because it does not address many of the key problems subscribers complain about, and the levels of competition that exist now or are likely to exist in the foreseeable future will not solve those problems. The Commission has also discouraged local governments from addressing Internet service complaints, even though service is provided over the same plant as cable service, and bundled together with cable service. Because neither the Commission nor the states are addressing Internet customer service complaints, this market is essentially unregulated and consumers have nowhere to turn. The County urges the Commission to clear the way so local governments can address the complaints of their residents.

Finally, the County urges the Commission to ensure that its analysis of the current market, as well as any conclusions reached in any future proceedings conducted to address matters raised in this docket, is based on a full and fair review of all of the relevant facts. The NOI itself notes, at ¶ 3, that the usefulness of the Commission's final report will depend on the quality of the information it receives. The County agrees wholeheartedly, and applauds the Commission for seeking thorough and complete information. The County also urges the Commission to follow the data where it leads. As noted above, the Commission's policy regarding a range of issues affecting cable television subscribers and local franchising authorities has been based on the flawed assumption that the presence of two wireline providers in a community is sufficient to make the video programming market fully competitive. The County urges the Commission to revisit this assumption and revise its policies accordingly.

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

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

COMMENTS OF MONTGOMERY COUNTY, MARYLAND

I. INTRODUCTION.

Montgomery County, Maryland (the "County"), submits these comments in response to the Commission's Notice of Inquiry (the "NOI"),[1] and urges the Commission to re-examine the premises of its analysis of video competition issues. The Commission's actions in recent years have implicitly assumed that the presence of more than one provider in a marketplace is enough to create a fully competitive marketplace. In reality, however, the market for video service is best described as an oligopoly, and it is not fully competitive.[2] Indeed, the behavior of multichannel video programming distributors described in the Commission's most recent competition report, and further illustrated by the County's experience described below, demonstrates this point. Providers have added to their service offerings, bundled services together, and taken other steps to make their services more attractive to subscribers. But

[1] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, MB Docket 07-269 (rel. Jan. 16, 2009).

[2] *See, e.g.,* S. Derek Turner, DISMANTLING DIGITAL DEREGULATION: TOWARD A NATIONAL BROADBAND STRATEGY (2009) at 20 (broadband market is a duopoly) *available at* http://www.freepress.net/files/dismantling-digital-deregulation.pdf. This discussion pertains to broadband service, but since exactly the same companies are providing video service, the conclusion still holds.

subscriber rates continue to go up faster than the rate of inflation, and the steps taken by providers often make it more difficult for consumers to compare service offerings.

Choice is not the same as competition, and there is ample evidence that the Commission and other bodies with regulatory authority – including local governments – must act in a range of areas to protect the public interest, because market forces alone are inadequate in this environment.

II. MONTGOMERY COUNTY RESIDENTS HAVE LONG HAD A CHOICE OF PROVIDER, YET PRICES CONTINUE TO RISE.

The NOI requests comment on a wide range of issues related to the regulatory environment and barriers to entry, and it is commonly believed that lowering regulatory barriers promotes consumer welfare by encouraging competition. While this is true in some markets and some industries, the experience of Montgomery County shows that local cable franchising does not significantly impede competition, and when competition does arrive many of the presumed benefits to consumers do not follow.

A. The County Has Promoted Commission Policy By Actively Encouraging Entry by Additional Providers.

The NOI requests comment regarding the effects of local franchising on competition,[3] and regarding the effects of recent state franchising legislation and the Commission's own franchising order.[4] Montgomery County[5] was one of the first jurisdictions in the country to introduce wireline competition for video service, with the grant of a cable franchise to Starpower Communications (now RCN) in 1999. In 2006, the County became one of the first large

[3] NOI at ¶ 10.

[4] *Id.*

[5] Montgomery County has a population of 952,500, and comprises 497 square miles and 356,400 households. Montgomery County also manages cable franchise matters for approximately 18 municipalities within its borders.

jurisdictions to grant Verizon a cable franchise.[6] Today, Comcast, Verizon and RCN are all providing voice, video and Internet service to County residents; over 50% of County residents have a choice of at least two providers. This competition arrived without any regulatory mandate from the state or federal governments. Indeed, the Maryland General Assembly recently rejected a proposal for altering the local franchising process.[7] RCN's franchise was awarded long before the recent wave of intervention in the franchising process began, and Verizon's franchise was awarded before the Commission adopted its franchising order.[8]

One potential competitor, Cavalier, did claim to rely on the Commission's *Franchising Order* when it approached the County regarding a cable franchise in early 2007. Nevertheless, that order has had no practical effect in the County, because the order does not fully reflect the behavior and motives of potential providers.

One of the inequities imposed by the *Franchising Order* is that franchising authorities must expend time and money in responding to applications within set time periods, whereas providers have no obligation to follow through on their applications. Shortly after the

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[6] At the time that the franchise was granted, Verizon had been awarded approximately 60 franchises, most by relatively small communities. Today, Verizon has over 800 cable franchises.

[7] Maryland House Bill 1182 as drafted would have replaced franchise fees and taxes on cable and telecommunications services with a sales and use tax on a newly defined category of service, "communications service." The bill would have required local cable franchise fees to be paid not to a locality but to the Maryland Comptroller, and, after a fixed date, would have deprived localities of the power to obtain any new cable franchise fees or even to recover a portion of the sales and use tax collected by the Comptroller. H.B. 1182 also would have empowered the Maryland Public Service Commission ("PSC") to issue a "statewide cable franchise." The bill has been removed from the actively considered agenda of the Ways and Means & Economic Matters Committee. It is unclear whether the bill will be assigned a study committee status this summer.

[8] See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 5101 (2007) ("*Franchising Order*").

Commission released the *Franchising Order*, Cavalier embarked on a campaign to gain access to numerous jurisdictions in Maryland and Virginia, explicitly relying on the rights it claimed to have been granted by the Commission. The County worked diligently to allow Cavalier to join the three incumbent providers at considerable expense in County staff time and outside counsel fees.[9] The County negotiated an agreement with Cavalier, which was scheduled for approval by the County Council. At the last minute, however, Cavalier withdrew its application and the County had no choice but to deny the request.

Cavalier had simultaneously applied for franchises in most of the Washington-area jurisdictions, but its management ultimately decided that it would not be able to compete successfully in the video business. The company's withdrawal in Montgomery County coincided with similar action in many other jurisdictions, including Arlington County, Fairfax County, and the City of Alexandria in Virginia. These jurisdictions all were forced to devote significant staff and consultant time to respond to Cavalier's application, all to no purpose. Indeed, the County is not aware of any jurisdiction in which the Commission's *Franchising Order* has actually had any effect.

It is also worth noting that RCN, which was granted a franchise to serve Arlington County shortly after it received its Montgomery County franchise, has reduced its original service area in Montgomery County, and never constructed its system in Arlington. The fact is that head-to-head competition is very difficult to achieve and sustain. Two large companies, such as Verizon and Comcast, may be able to compete in a given market over the long term, but this is far from certain, and nobody should have any illusion about the true nature of the marketplace in the County or anywhere else. That market is now and is likely to remain a

[9] The County's out-of-pocket expenses for attorneys' fees came to nearly $ 24,000.

duopoly. The barriers to competition have always been rooted in the enormous capital cost of constructing competitive networks,[10] as well as the cost of programming,[11] and not in the local franchising process.[12] This fact has important ramifications for Commission policy and for subscribers, and the County urges the Commission to consider the true nature of the market in formulating future policy.

B. Head-to-Head "Competition" Has Led to Bigger Cable Packages, More Channels on the Digital Tier – and Higher Prices.

The NOI asks for information about the benefits of head-to-head competition, including what effect competition has had on prices, programming, quality of service, and the introduction of more advanced services.[13] While the County believes that competition has provided benefits to subscribers, the County also believes that those benefits often have been neither as clear nor as great as is sometimes suggested. Any effect on prices has been limited, and many of the other effects of competition are actually mixed blessings.

1. Prices Keep Going Up.

Whatever else one might say about the cable television market, it cannot be said that prices are coming down or even holding steady. Nor has the presence of competition seem to have had much effect. Not only have Montgomery County residents had access to DBS service

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[10] For example, the capital cost of Verizon's FTTP construction has been estimated to be over $23 billion. Stephanie N. Mehta, *Bend It Like Corning*, Fortune, Aug. 6, 2007 at 69. *See also Annual Assessment of the Status of Competition on the Market for the Delivery of Video Programming*, Thirteenth Annual Report, MB Docket No. 06-189 (rel. Jan. 16, 2009) ("Thirteenth Annual Report") at n.453.

[11] Thirteenth Annual Report, pp. 48, 51-53.

[12] Testimony of Ivan G. Seidenberg, Chairman & Chief Executive Officer, Verizon Communications, before the Senate Commerce Committee, January 31, 2006 available at http://commerce.senate.gov/pdf/Seidenberg-021506.pdf

[13] NOI at ¶¶ 5-8.

throughout that period,[14] but as discussed below neither RCN's nor Verizon's entry seem to have had any significant effect on cable prices. It is possible that rates would have gone up by even more if neither RCN nor Verizon had entered the market. But the fact remains that prices have continued to rise and neither the market nor the Commission have prevented these increases.

For example, between January 2005 and January 2009, Comcast's price for basic cable service in the County has risen from $15.00 per month to $19.25 – a total increase of over 28%, and an average increase of seven percent per year. This compares to a total increase in the consumer price index during the same period of only 10.7%.[15] Verizon introduced a basic rate of $12.99 when it began service in 2006, and it has not increased that rate since. But Comcast's basic rate has continued to go up, from $16.25 when Verizon entered the market, to, again, $19.25 today. In fact, Comcast's rates have gone up more since Verizon received its franchise than they had in the comparable period before Verizon entered the market: from January 2005 through January 2007, Comcast's basic rate increased by $1.25; from January 2007, just after Verizon's entry, through January 2009, Comcast's basic rate has increased by another $3.00. *See* Table 1.[16]

Rates for expanded basic – cable programming tier service – show similar trends. Comcast's rate has increased from $54.40 at the beginning of 2007 to $63.30 two years later: a 12.7% increase. *See* Table 1. The rate for RCN's comparable service has increased from $53.95 in January 2007 to $61.44 today; this is a 13.8% increase. *See* Table 1. Verizon's rate,

[14] See discussion at Section V, *infra*.

[15] U.S. Dept. of Labor, Bureau of Labor Statistics, Consumer Price Index, All Consumers at http://data.bls.gov/PDq/outside.jsp?survey=cu.

[16] Note that the County does not have historical information on RCN's basic rate.

however, has increased from $39.99 to $49.99, which is a 25% increase in two years,[17] and six times the 4.3%[18] by which the CPI increased during the same period.[19]

Whatever the reasons for these continued price increases, local franchising is not one of them. It is reasonable to assume, however, that Verizon's priority is to gain market share as it rolls out its network, while Comcast and RCN seek to maximize revenue from existing customers. Perhaps at some point in the future prices will converge, with Verizon raising its rates and Comcast's coming down – but at that point it would seem that both companies would have the incentive to maintain comparable prices, and no incentive to reduce them, or even to limit increases to the general rate of inflation. In fact, this kind of pricing behavior is not uncommon in oligopolies.[20]

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[17] *See* Table 1.

[18] U.S. Dept. of Labor, Bureau of Labor Statistics, Consumer Price Index, All Consumers *available at* http://data.bls.gov/PDQ/outside.jsp?survey-cu.

[19] The County recognizes that the number of channels on the respective programming tiers is a relevant factor, and that a thorough analysis would address per channel rates. In fact, Comcast's tier structure has not changed dramatically during this period. In January 2005, there were 35 channels on the basic tier and 45 on the expanded basic tier; today, there are 34 and 39, respectively. It is also important to remember that often when new channels are added they have relatively low viewership and therefore cost the operator relatively little. Most of an operator's programming costs result from broadcast channels and sports programming. In any event, the key factor from the consumer's perspective is the actual rate the consumer must pay, and consumers have no control over the content of the programming packages they buy. Consequently, in assessing the benefits of competitive entry, the price per channel is a secondary consideration.

[20] *See, e.g.*, Hubert Humphrey Institute of Public Affairs, *Statewide Video Franchising Legislation: A Comparative Study of Outcomes in Texas, California and Michigan* (Mar. 2009) ("Minnesota Report"), at p. 25. *See also* Oligopoly: George Hay, *Oligopoly, Shared Monopoly, and Antitrust Law,* 67 CORNELL L. REV. 439 (1982), at 441:

> The traditional economic analysis of oligopoly, on the other hand, portrays the process of achieving a noncompetitive end as involving separate, albeit interdependent, decisions by each firm. Because the number of firms in an oligopolistic industry is small, each firm recognizes that its own actions will have a substantial impact on the economic well-being of its rivals and will probably provoke some reaction from them. If one firm cuts prices in an effort to boost sales, rivals may be compelled to match the price cut, not only rendering the

TABLE 1 – Cable Service Rates in Montgomery County[21]

	2005	2006	2007	2008	2009
Comcast					
Basic	$15.00	$16.25	$16.25	$17.25	$19.25
Expanded Basic	$52.40	$53.65	$54.40	$60.35	$63.30
RCN					
Basic*					
Expanded Basic	$43.00	$49.95	$53.95	$56.94	$61.44
Verizon					
Basic	--	--	$12.99	$12.99	$12.99
Expanded Basic	--	--	$39.99	$47.99	$47.99

* Not available.

2. Local Competition Does Not Necessarily Affect Local Pricing.

Head-to-head competition has not restrained prices simply because providers consider more than just the existence of a competitor in setting rates. Providers do not seek merely to undercut their competitors; instead, they consider a range of factors. For example, providers often set rates on a regional or national basis, presumably because they prefer to market a single rate rather than a profusion of individual local rates.

The best example of this is Verizon. Verizon appears to set rates on a national basis, which means that an incumbent cable operator's prices are simply irrelevant. The County cannot confirm that Verizon charges the same rates nationally because Verizon's website does not readily show rates in specific areas unless a customer provides a specific address. But the website clearly discloses that the company is running the same promotions on a national basis, and the County's survey of Verizon's rates in the Washington metropolitan area shows that Verizon is charging the same rates across the region. Verizon's rates for basic and expanded

initial effort to secure additional volume unsuccessful, but making all firms worse off than before. When all firms anticipate this chain of events and recognize that a price reduction is against their self-interest, no price cutting will occur and they can achieve and maintain a noncompetitive price.

[21] For ease of comparison, rates listed are those in effect on January 15 of each year.

basic service are identical in Fairfax, Arlington, and Montgomery Counties.[22] If Verizon does set rates on a national basis, then it is not responding at all to local price signals.

Cox Communications provides another example. Cox appears to set rates on a regional basis, and prices from region to region do not differ very much. For example, Cox charges \$46.99[23] for expanded basic service in Fairfax, and \$48.95 for the same service in all of its Hampton Roads systems, both areas in which it is competing with Verizon, which charges \$47.99. In both Phoenix and Tucson, however, where Cox does not have a wireline competitor, Cox charges \$47.95 for comparable service. This suggests that the existence of local competition and the rate charged by any local competitor have little bearing on pricing decisions.

Comcast, on the other hand, has not adopted uniform pricing, nor has it lowered its rates to meet Verizon's. Comcast charges \$19.25 for basic service in Montgomery County, \$16.96 in Fairfax and \$18.95 in Arlington, compared to Verizon's \$12.99.[24] Comcast's corresponding rates for expanded basic service are \$63.30, \$55.96, and \$60.20, while Verizon charges \$47.99.[25] There are clearly other factors at work in Comcast's pricing decisions. Channel selection and therefore programming costs could be a factor in particular jurisdictions, but this merely highlights the fact that subscribers do not really get to choose what they pay for.

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[22] *See* Tables 1 - 3.

[23] Cox implemented a rate increase to \$52.99 effective April 19, 2009.

[24] *See* Tables 1 - 3.

[25] *See* Tables 1 - 3.

TABLE 2 – Cable Service Rates in Fairfax County[26]

	2005	2006	2007	2008	2009
Comcast					
Basic	$13.45	$14.95	$14.95	$14.95	$16.96
Expanded Basic	$44.85	$49.88	$51.88	$55.95	$55.96
Cox					
Basic	$14.70	$17.99	$17.99	$19.99	$19.99
Expanded Basic	$40.40	$41.99	$43.99	$46.99	$46.99
Verizon					
Basic	--	$12.95	$12.99	$12.99	$12.99
Expanded Basic	--	$39.95	$42.99	$47.99	$47.99

TABLE 3 – Cable Service Rates in Arlington County[27]

	2006	2007	2008	2009
Comcast				
Basic	$14.25	$14.85	$14.95	$18.95
Expanded Basic	$49.38	$51.20	57.35	$60.20
Verizon				
Basic	12.95	$12.99	$12.99	$12.99
Expanded Basic	39.95	$42.99	$42.99	$47.99

If providers are not paying much attention to competitors' prices in setting their own rates, or give greater weight to other considerations, such as the convenience of regional marketing, then competitive entry may not be having a significant effect on prices. Rather than assuming that certain benefits will automatically flow from the introduction of competition, the Commission should determine what factors providers actually consider and develop a more precise model of the behavior of providers.[28]

[26] For ease of comparison, rates listed are those in effect on January 15 of each year.

[27] For ease of comparison, rates listed are those in effect on January 15 of each year.

[28] One area in which a more refined analysis could be useful is in the determination of effective competition. Although the Commission's discretion is somewhat limited by the language of Section 623(l)(1), a better understanding of the dynamics underlying the pricing decisions of providers might justify reexamining the Commission's interpretation of the statutory language.

3. Subscribers Have More Choices, But No Good Way To Evaluate Those Choices.

It is true that subscribers are getting more in their cable packages. In addition, the number of packages available has proliferated, to the point of bewilderment. Subscribers are getting choices – but whether they are given the information needed to evaluate those choices is another question entirely.

In Montgomery County, for example, Comcast offers two tiers of analog cable service (the traditional Limited Basic and Expanded Basic) plus nine digital cable packages, additional add-on digital services (Sports Entertainment Pack and Family Tier), and over a dozen separate premium services, not including pay-per-view. Comcast also offers three levels of high-speed Internet service. Consumers can probably navigate these options reasonably well, on a service-by-service basis. When one begins to look at the bundled packages, however, the choices become very difficult to evaluate. Comcast offers four triple-play packages, ranging in price from $134.99 to $209.99, and three digital video and Internet packages, ranging in price from $118.20 to $142.20. As discussed further below, it is essentially impossible to evaluate these bundles – they can be compared to each other, but consumers cannot readily compare the price of a bundle from one provider against the price of a bundle from another.

Verizon's cable offerings are much simpler: a basic tier, a large expanded digital tier and an HD tier, plus a single movie package and a handful of individual premium channels. Verizon also offers four tiers of Internet service and at least two triple play options. But Verizon does not provide a single printed rate card showing all of its video and Internet services.

One significant consumer issue that the Commission should address is the way providers disclose the existence of the lowest-priced basic cable service tier. For example, Verizon shows the basic tier on the video service menu on its website, but not in the same format as the other packages: the basic tier is referred to in a single line, and in a gray typeface that is easy to miss. On Comcast's website, on the other hand, the basic service tier is either not listed or at least very hard for a user to find. Cox Cable's website for Fairfax County, Virginia, only reveals the basic service rate after a specific word search. Indeed, this issue is just one illustration of how difficult it is for consumers to get information about their choices. Any effort to use the company's websites to compare services and especially prices is best described as an exercise in frustration.

Another area in which the Commission could play a role would be to require providers to identify what it would cost for subscribers to purchase the programming most people watch.[29] For instance, the Commission's Thirteenth Annual Report identifies the top 20 programming services by prime time viewership.[30] The Commission should consider the feasibility of requiring operators to offer a standard tier, consisting of a standard group of channels, such as the local broadcast channels plus the 10 or 15 or 20 most-watched cable networks.[31] This would allow consumers to comparison-shop more easily. Providers could include whatever else they chose in the packages, but at least potential subscribers would be able to better evaluate their choices.

4. Bundling Does Not Advance Competition.

The NOI asks what effects bundling has on head-to-head competition.[32] The answer is that, while bundling gives consumers more choices, it does not advance competition. Although

[29] The County is not asserting here that the Commission should impose a la carte pricing.

[30] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Thirteenth Annual Report, MB Docket 06-189 (rel. Jan. 16, 2009), at Table C-6. These 20 channels are: USA Network, Disney, TNT, Nickelodeon, Adult Swim, HBO, Lifetime, TBS, Nick at Nite, American Movie Classics, Cartoon Network, Fox News Channel, ESPN, Spike TV, FX, Discovery Channel, Comedy Central, HGTV, Hallmark Channel, MTV.

[31] *Id.*

[32] NOI at ¶ 5.

bundling is presented as a convenience to the consumer – one stop shopping, so to speak – an alternative purpose of bundling is to create a new product for the provider to sell. The consumer is not really buying three separate services. What the consumer actually buys is a single complex product, which is even harder to evaluate on its own merits and compare to other products than the individual components. Creating this new product – with its mix of features individual consumers might not choose to purchase if they could choose or reject them separately – thus helps the provider maximize revenue.

The County understands that providers are trying to differentiate their products from those of their competitors. This is reasonable from the perspective of the providers, but at the same time it creates problems for consumers. Ensuring that information and education is available to consumers is the only way to balance the scale.

In its current form, bundling favors providers because customers are forced to choose between providers based on confusing and incomplete information. In a fully competitive marketplace, it might be in the interest of at least one provider to make available full information about its product, so that potential customers could make informed decisions, but this is not the case in an oligopoly. Bundles actually make it harder to compare prices and services because it is practically impossible for prospective customers to compare the bundles to an objective standard or to each other. In comparing two triple-play packages, for instance, none of the services may be readily comparable: one video service may be analog and another digital, the number of channels may differ significantly, and there may be significant differences in the program offerings. The speed of the broadband services may differ substantially. And even the voice services may be different, since packages may include VoIP, traditional copper wire

POTS, fiber-based switched digital voice, or copper-based switched service provided by the cable company.

Bundling does lower prices, as long as the consumer is only looking at the cost of the bundle as compared to the cost of purchasing all three services from the same provider. But the consumer cannot get the benefit of the lower "bundled" price on individual services without paying for all three. In addition, bundled packages typically include progressively higher levels of both video and Internet service; subscribers typically cannot choose a high level of Internet service and the lowest tier of cable service, for example. Thus, consumers may well end up paying more than they would if they could pay the discounted rates for each service from different providers. Furthermore, within the context of comparing bundled offerings, it is difficult to say whether the providers actually respond to each other's prices. Presumably, the prices of bundles will be higher in communities where there is still only one video provider – but given how hard it is to compare bundles this is far from clear.

Bundling also favors providers because consumers cannot readily buy different services from different providers: although it is possible to do so, the cost differential makes this irrational for the vast majority of customers. So long as customers have no benchmark by which to compare bundlers from different providers, providers will be able to minimize the role price plays in purchasing decisions, and consequently will be able to charge more than they otherwise would. Bundles thus limit competition, because although the price of choosing service from more than one provider is a total higher rate, the price of choosing bundled service from a single provider may also be greater than the consumer would pay if he or she had more control over the content of the bundle.

Bundling also protects providers at the expense of consumers because of the costs to subscribers of switching. First, to get the benefit of the lower prices offered through a bundle, subscribers often must sign long-term contracts, which raises the cost of switching. Second, there is simply the likelihood that existing subscribers will accept increases in the price of a bundle because it will be hard for them to tell if a different bundle is cheaper or has gone up proportionately less. Third, there is the cost associated with changing providers, which has significant intangible components. For example, changing from one triple-play provider to another typically entails a change in e-mail addresses.

The Commission's experience with competition in the long distance market is not necessarily a good guide on this point, because customers of wireline providers will be substantially less likely to change providers if the switch requires an on-premises visit by a technician. On the other hand, the Commission's experience with the benefits of number portability in the wireless industry is a good guide: so long as e-mail addresses are tied to the service provider, consumers will find it harder to change providers.

In short, the opportunity to choose providers does not necessarily result in the benefits of a fully competitive marketplace. If consumers are to receive accurate information, regulatory intervention is required. Furthermore, regulation or the prospect of regulation can create a rationale for the market to respond by making more information available to consumers. The County urges the Commission to examine this issue in much more detail. One example of how the Commission could promote consumer welfare would be to develop a set of benchmarks for bundled services, and require operators to offer consumers information comparing their bundles to the benchmarks. To be meaningful, the benchmark would need to include a regional or national pricing standard, such as cents per channel or cents per Mbps.

III. THE ADOPTION OF STATEWIDE FRANCHISING AND OTHER RESTRICTIONS ON LOCAL AUTHORITY HAS NOT REALLY ADVANCED COMPETITIVE ENTRY OR BENEFITED CONSUMERS.

In recent years, the Commission and many state legislatures have taken steps to reduce or eliminate local franchising authority, in the belief that local franchising impedes competition. The NOI seeks comment on franchising and other local and state regulations and the effect on the marketplace, and on the effects of the local franchising prices on entry by new providers.[33] The County believes that local franchising does not significantly restrict competitive entry, and offers substantial benefits to the public. Competitive providers will enter individual markets when they believe that local conditions will allow them to earn a reasonable return on their investment in infrastructure, and the extent of local authority over franchising has little, if anything, to do with that analysis. To illustrate this, the County has examined the experience of jurisdictions in three different states: Texas, which has adopted statewide franchising; Virginia, which has retained local franchising while restricting local authority, and Maryland, which has done neither. The County urges the Commission to conduct a similar comparison on a larger scale.[34]

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[33] NOI at ¶ 10.

[34] Work is already being done in this area. The Alliance for Community Media ("ACM") has conducted a survey regarding the effects of franchising reform, which concludes, among other things, that new state legislation has led neither to lower prices nor improved customer service. Barbara Popovic, *Assessing the Damage: Survey shows that state video franchise laws bring no rate releive while harming public benefits, available at* www.ourchannels.org/wp-content/uploads/2008/09/harmsurveyreportacm08.pdf. Another example is the Minnesota Report cited earlier, which compared the situation in California, Michigan and Texas. *See also* National Association of Telecommunications Officers and Advisors, *Understanding the Impact of State Video Services Legislation, available at* http://www.natoa.org/Documents/StateLegSurveyExecSummFinal.pdf.

Texas

Austin, Texas, currently has three wireline video programming providers: Time Warner, Grande Communications, and AT&T. Texas adopted statewide franchising in 2005, but the state law has had no significant effect in Austin. Grande had obtained its franchise in 2001, before the Texas legislation was enacted. AT&T did enter after the state law was passed, but it serves only a relative handful of subscribers in the city, and has shown no interest in competing vigorously.[35] Furthermore, although Grande's entry gave subscribers a choice of providers, it has not led to reduced rates in Austin, as the table below shows.

TABLE 4 – Cable Service Rates in Austin, Texas

	2002	2003	2004	2005	2006	2007	2008
Time Warner							
Basic	8.58	8.58	$10.50	$10.50	$10.50	$14.95*	$16.95*
Grande							
Basic	--	$10.50	$10.50	$10.50	$13.50	n.a.	$16.95

*$19.95 for new subscribers.

It is impossible to evaluate the effect of AT&T's entry on prices: AT&T does not offer a video-only subscription, which makes it harder for consumers to compare AT&T's service with those of its competitors. Grande's entry, however, definitely seems to have led to significant price increases. As the table shows, after Grande entered the marketplace in 2003, Time Warner actually raised its rate for basic service to match Grande's. When Grande raised its rate in 2006, Time Warner again raised its rate. Time Warner was held to be subject to effective competition in 2007, and today both companies charge existing subscribers the same rate of $16.95.[36] Time

[35] *See* Declaration of Rondella M. Hawkins, attached as Exhibit A.

[36] The two basic tiers are roughly comparable, with 20 channels on Time Warner's basic tier and 17 on Grande's.

Warner subscribers are paying $8.37 a month more for basic service than they were in 2003, almost twice what they were paying at the time.

Thus, statewide franchising has had no significant effect on competition in Austin, and competition in the City has not led to lower prices.

Virginia

Fairfax County, Virginia, is also served by three providers. Cox Communications serves most of the County, and Comcast is the incumbent cable operator in the Reston area; the two do not compete head-to-head. Verizon has held a cable franchise from the County since 2005. Verizon actually sought and received that franchise before the Virginia General Assembly amended state law to limit local authority and expedite entry. In addition, as discussed above, Verizon's entry in Fairfax County has had little effect on the rates charged by the incumbents. Furthermore, because Fairfax County is a very attractive market, there is no reason to believe that, once Verizon decided to build its FTTP network, it would not have sought to serve the County.

Verizon has used the new state law to its advantage to obtain favorable terms from other jurisdictions – but Verizon has not actually sought franchises under the new law.[37] Instead, it has used the threat of the new law to force franchising authorities to accept Verizon's terms. Furthermore, Verizon has only approached the most populous jurisdictions in the state: Verizon's franchises run from the Washington, D.C., suburbs down Interstate 95 to Richmond, and from the Richmond suburbs down Interstate 64 to the Hampton Roads area. Verizon has

[37] Verizon did rely on the new "ordinance franchise" mechanism to obtain a franchise in the City of Virginia Beach – but that was only an interim measure, and within a matter of months that franchise was replaced with a traditional negotiated agreement. Montgomery County is not aware of any jurisdiction in Virginia in which Verizon now has a non-traditional franchise.

expressed little interest in building its new network in less densely populated areas.[38] The state law may have given Verizon more favorable terms, but that does not mean that without the law the company would not have sought and obtained franchises from the same Virginia jurisdictions where it is active today.

Maryland

Finally, as noted above, there are two competitors in Montgomery County, in addition to Comcast, even though no state law has been adopted. Indeed, Verizon now serves the six largest counties in Maryland, representing a majority of the state's population.[39]

The fact of the matter is that the inhibiting factors for Verizon and AT&T (and, in Montgomery County, RCN) have been the high capital cost of building new networks[40] and, in the case of AT&T, difficulties in rolling out the necessary technology.[41] Among the factors that affect a provider's capital costs are the proportion of underground vs. aerial construction required in an area, the density of homes per mile, and the number of multiple dwelling unit buildings to be served. Limiting local authority has reduced transaction costs for new providers, but this is a marginal benefit when compared to the costs of capital and technology development, and other

[38] For example, Verizon's franchise in Powhatan County, to the west of Richmond, only covers the eastern third of the County, which abuts fast-growing Chesterfield County.

[39] Verizon has franchises from Anne Arundel, (pop. 512,790), Baltimore (pop. 785,618), Harford (pop. 240,351), Howard (pop. 274,995), Montgomery (pop. 950,680) and Prince George's (pop. 820,852) Counties, and is nearing completion of the approval process in Charles County (pop. 140,764). Altogether that comes to just over 61% of the state's population. Source: Population Division, U.S. Census Bureau, Table 1: Annual Estimates of the Resident Population for Counties of Maryland: April 1, 2000 to July 1, 2008 (CO-EST2008-01-24) (Release Date: March 19, 2009).

[40] As noted above, Verizon is spending at least $23 billion on its FTTP network. Fortune, Aug.6, 2007 ay 69. Estimates range from $1000 to $1700 per home passed. Minnesota Report, at 13.

[41] Eric Bangeman, *AT&T scales back U-Verse expectations*, ARS TECHNICA (Mar. 2, 2007), available at http://arstechnica.com/business/news/2007/03/8969.ars.

factors. In fact, AT&T recently announced that it is slowing the pace of its U-Verse deployment.[42]

Indeed, nationwide, AT&T reports having 1.3 million U-Verse subscribers,[43] far fewer than the 2.2 million reported by Verizon,[44] even though AT&T has been very successful in convincing state legislatures in its territory to adopt state-wide franchising legislation. Indeed, Verizon's success illustrates that franchising "reform" is not essential to promoting competitive entry. The key factors are a good product, a good business plan, access to capital, and commitment to success.

The examples of Austin and Fairfax County illustrate that subscribers in states that have restricted local authority are no better off than subscribers in states such as Maryland, which has not done so. The presence of a competitor in these jurisdictions has not dramatically affected prices;[45] it certainly has not induced the incumbent cable operator to reduce its prices or limit increases to the general rate of inflation. In other words, state and Federal limits on local power have restricted local ability to address local needs, without actually accomplishing federal policy goals. All they have done is marginally lower the cost of entry by one provider in a handful of states. This is not a success story, and the County urges the Commission to consider these facts in formulating future policy. The County also again urges the Commission to conduct a detailed study comparing the state of competition and the effects of competitive entry in a range of states subject to different regulatory schemes.

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[42] Carol Wilson, *AT&T slows U-verse buildout, remains committed to video*, TELEPHONY ONLINE (Jan. 28, 2009).

[43] AT&T Form 10-Q, p. 22 (March 31, 2009).

[44] Verizon News Release, Verizon Communications Reports Revenue, Earnings and Cash Flow Growth in 1Q 2009 (April 27, 2009).

[45] *See* Tables 2 and 4.

IV. THE COMMISSION SHOULD REEXAMINE AND REASSERT ITS ROLE REGARDING A RANGE OF SUBJECTS CRITICAL TO SUBSCRIBERS, BECAUSE THE MARKET WILL NOT ADDRESS THOSE MATTERS.

The Commission has not kept up with four important issues that directly affect subscribers. The NOI specifically requests comment on issues related to the availability of navigation devices and CableCARDS.[46] Unfortunately, despite years of effort, the Commission has not been able to ensure that cable subscribers can purchase their own fully compatible set-top boxes. The NOI also asks for comment regarding changes to the Commission's technical standards;[47] the County believes these standards do not reflect the deployment of digital technology. Finally, the County urges the Commission to examine two issues not raised by the NOI: the Commission's customer service rules are badly out-of-date, and the Commission's inaction has undercut efforts by local franchising authorities to address the complaints of broadband Internet service subscribers.

A. The Commission's Failure To Fully Implement Section 629 of the Communications Act Imposes Substantial Costs on Consumers.

Section 629 of the Communications Act requires the Commission to adopt rules permitting cable subscribers to purchase their own converter boxes and other equipment needed to access services provided by cable operators. In adopting Section 629 in 1996, Congress sought to promote competition in the provision of such devices, while recognizing the concerns of cable operators for protecting signal security. Over ten years have passed since the Commission released its first order under Section 629,[48] and subscribers still cannot buy user-friendly devices from electronics retailers. While the County recognizes that this is a

[46] NOI at ¶¶ 83, 86.

[47] NOI at ¶ 89.

[48] *In the Matter of Implementation of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Report and Order*, 13 FCC Rcd 14775 (1998).

challenging problem, both because of the technical issues involved and because it is so hard to keep pace with technological change, the fact remains that the failure to resolve this issue amounts to a substantial burden on subscribers.

For example, Comcast currently charges its subscribers in the County $3.65 a month for an addressable converter and remote control; the rate for expanded basic service is $63.30 a month. Thus, subscribers are paying an additional 5.8% a month to the cable operator, for a single converter. An HDTV converter plus remote costs $8.20, or an additional 12.9%, if the subscriber is paying only for expanded basic service. Households with multiple television sets and additional converters are paying even more.

Further, as shown in Table 5, Verizon and RCN subscribers pay substantially more for equipment. Verizon charges $7.99 a month for a digital converter box, and $9.99 for an HD converter. RCN charges $3.95 for a single digital converter, $6.95 for additional converters, and $11.95 for an HD converter. A Verizon basic-only customer thus pays an additional 61% over the rate of basic cable service, a Verizon expanded basic customer pays an extra 16.6%, and a Verizon HD customer pays an additional 17.2%, all because subscribers cannot buy their own converters on the open market.

TABLE 5. Equipment Rates

	Comcast	Verizon	RCN
Standard converter	1.10	n.a	n.a
Digital converter	3.40	7.99	3.95
HD converter	7.95	9.99	11.95
Remote	0.25	no charge	no charge

Subscribers do have the option of obtaining CableCARDs from their providers, but as the Commission knows, consumers have not found CableCARD to be a particularly useful technology. CableCARDS do not permit the use of the full, two-way functionality of a modern cable system, and many consumers do not own CableCARD compatible equipment. Furthermore, although Comcast does not charge for CableCARDs in Montgomery County, Verizon and RCN charge $3.99 and $1.50 monthly, respectively. Of course, if competitive devices were available at retail, consumers who bought such equipment would have to pay the retailer, and some subscribers would still choose to rent, but the lack of an alternative satisfactory to most consumers still means that subscribers are paying more than they should.[49]

The County urges the Commission to redouble its efforts in this area.

B. The Commission's Technical Standards Are Out of Date.

The FCC has never adopted technical standards for digital channels, even though some providers no longer provide analog service at all, and it is only a matter of time before analog service disappears. Digital technical standards are needed, just as much as analog standards ever were, if subscribers are to have any assurance that they will continue to receive good quality signals.

Because digital service is new and offers crisper pictures than analog service, there is a perception that it never fails and standards are not needed. But digital service raises new problems – such as frozen pictures and tiling – that did not occur on traditional analog systems. A whole range of factors can affect signal quality: active and passive components in a fiber network, set-top boxes, and transmission distances, among other things, can help degrade signal quality in ways that are visible on a subscriber's television set. In addition, operators may wish to compress channels in order to save money on equipment, or to compress channels in ways that reduce picture quality in an effort to reserve bandwidth for other uses. The fact is that

[49] The Commission could also, at least as an interim measure, encourage providers to sell rather than lease equipment to subscribers. Long term residents might benefit if they had that option.

subscribers to digital service do experience problems with their picture quality; even if digital quality is higher on the whole than analog quality, subscribers have the right to get what they pay for.

Finally, the Commission's rules should be amended to address the treatment of PEG programming in the digital environment. This is a very important issue for the County, because the County's PEG channels provided almost 61,000 hours of local programming in 2008. The Commission's rules do not require cable operators to list local PEG programming in their digital program guides.[50] This means that for many subscribers those programs might as well not exist – even though they receive them, they may never realize they are on the system. In addition, if viewers do come across them by chance, they may be unable to identify what they are watching, and their absence from the digital program guide limits the ability of subscribers to take advantage of the full functionality of the cable system, such as the ability to use a DVR to record programming on the PEG channels. As consumers get used to using DVRs to watch programming at times convenient to them, this will become an even greater issue.

The NOI also seeks comment on digital migration issues.[51] In Montgomery County, RCN and Verizon have completed this process; the County believes that it is far less disruptive to subscribers if the migration is done all at once, as those companies did.

A national digital technical standard would establish a level playing field for all types of operators, assure subscribers of a basic level of service quality, and assure PEG programmers of fair treatment.

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[50] The NOI seeks comment regarding program guides at ¶ 83.

[51] NOI at ¶ 59.

C. The Commission's Customer Service Rule Is Also Outdated.

The Commission's customer service rule took effect on July 1, 1993, and except for minor amendments in 1996 and 2000, has remained unchanged since.[52] The cable industry, however, has evolved dramatically since 1993 and the rule is now very much out of date – it does not address the kinds of problems that franchising authorities and subscribers typically face today. If national standards are necessary to avoid a proliferation of individual local standards, then it is essential for the Commission and the industry to keep those standards up to date.

In terms of the category of complaints received from subscribers, the most common concerns billing problems, as seen here:

TABLE 6: Types of Complaints

Fiscal Year	Billing	Internet Service	Reception	Other
2008	39.1%	24.3%	23.2%	13.4%
2009	39.9%	17.3%	22.8%	20.0%

In reality, however, the chief complaint of subscribers is that providers do not take their complaints seriously. This manifests itself in several ways:

- It takes too long for complaints to be resolved, and when complaints are "resolved," many subscribers remain dissatisfied with the outcome.[53]
- When subscribers register complaints, they are put on hold for long periods of time, supervisors are not available, and supervisors do not return calls even when a customer service representative has promised such a call will be made.

[52] 47 C.F.R. § 76.309.

[53] In both 2008 and 2009, over 20% of subscribers surveyed report that they were not satisfied with the resolution of specific complaints they raised with their providers.

- Subscribers express frustration with the inability of cable companies to diagnose and correct problems in the first service call.
- Cable companies will only schedule service calls for a specific address; even when a subscriber has checked with neighbors and concluded that problem affects a broader area, customer service representatives have no authority to take further action.

Subscribers often report having to make multiple telephone calls before matters are resolved, but the Commission's rules say nothing about how effective or efficient an operator's resolution process should be. These are the issues that really matter: Why did the subscriber have to call in the first place? Was the complaint resolved in a single call? And did the subscriber agree that the matter was properly resolved?

Another problem that generates a great deal of subscriber frustration concerns promotional offers, which sometimes are not well planned or executed. For instance, Verizon's offer of an HDTV set to new subscribers raised expectations that the set would be provided upon installation, when in fact subscribers had to go to a website to register for the set. And when the company ran out of free sets the offer was replaced with a gift certificate. The Commission's rules say nothing about this kind of issue, and subscribers feel that customer service representatives are not held accountable form providing misleading or incorrect information. One possible solution would be for the Commission to develop a standard format and content requirements for promotional and other offers made by providers. If terms and conditions were fully and clearly disclosed, using the same format, subscribers would be better able to compare and evaluate offers.

The problems discussed above are not addressed at all by the Commission's rules, but even many of the issues that are addressed by the rule are not relevant to subscribers. For example, 47 C.F.R. § 76.309(c)(1) addresses telephone answering standards, but only in terms of the problems subscribers complained about in 1993, before the wide-spread use of large regional or national call centers. The rule requires company representatives to be available during normal business hours, permits after hours calls to be answered by an answering machine, requires the phone to be answered within thirty seconds, and specifies that customers may receive a busy signal no more than three percent of the time. These standards are readily met today by any automatic response unit. Furthermore, the complaints customers have today have to do with cumbersome and confusing call answering menus, and the inability to reach live customer service representatives easily. Technology has advanced, but the Commission's rule has not.

Similarly, 47 C.F.R. § 76.309(c)(2) requires a cable operator to complete an initial installation within seven days of an order being placed. Verizon, however, does not comply with this rule: Because Verizon's system requires installation of an optical network termination device before cable service can be provided, Verizon insists on franchise standards that allow Verizon seven days to install the ONT, and additional time – typically another seven days – to install cable service. Only if an ONT is already in place will Verizon comply with the single seven-day standard. The vast majority of franchising authorities have reluctantly accepted Verizon's position on this point, because the company is virtually uncompromising.[54] Thus, the intent of the rule has been circumvented entirely.

47 C.F.R. § 76.309(c)(2) prohibits cancellation of appointments after the close of business on the day before the appointment, and if a company representative cannot make an appointment on time, the appointment must be rescheduled at a time convenient to the customer. The rule does nothing to address the inability of providers to address an issue in a single visit.

[54] Two examples are the Montgomery County franchise, at Ex. D, § II(Y)(1), and the District of Columbia franchise, at Ex. D §3(B).

47 C.F.R. § 76.309(c)(3) purports to address communications between cable operators and subscribers, but in fact it merely sets maximum limits on when refunds and credits must be made. Subscribers are very much concerned with the process for their billing complaints to be resolved, but the Commission's rule is entirely silent on that point. As shown in Table 6, almost 40% of subscriber complaints concern billing. Cable operators often continue to bill even after an account has been disconnected, and automatic payments continue to be deducted from subscribers' bank accounts. Neither one of these problems is addressed by the rule. Furthermore, to the extent the rule does apply, it is honored only in the breach. Refunds take six to eight weeks to receive, and required credits are often not made. Operators routinely circumvent the rule by claiming that refunds must be issued by check cut from a separate corporate entity. In addition, subscribers who pay by automatic electronic debit often cannot receive refunds using the same automated process.

Finally, the Commission's standards only apply if expressly adopted by a community, and they include no enforcement mechanism. The existence of the standards allows operators to treat them as the default provision in any local franchise – "if they're good enough for the FCC they should be good enough for you" – but since they are largely ineffective, communities gain little by adopting them. The Cable Act and the Commission's rules permit more extensive local regulation, but the Commission has discouraged independent local action by permitting the costs of stricter regulation to be passed through to subscribers.[55] The threat of passing on the cost of more effective regulation has been enough to convince some local franchising authorities not to

[55] 47 C.F.R. §76.925(a)(3). This provision does not apply if a community is subject to effective competition – but many communities entered into franchise agreements when rate regulation was still in effect.

insist on stricter requirements. The overall effect of the Commission's rules is that customer service in most communities is essentially unregulated.

Thus, the Commission's current customer service rule is largely ineffective. Furthermore, the lack of effective rules is not being remedied by market forces. Oligopolies are not generally concerned with delivering high levels of customer service, especially if improving service requires a significant increase in costs. Ensuring good customer service is expensive because it requires significant numbers of trained personnel to respond to individual complaints. The effect of ILEC entry into the video market, however, has been to induce the cable industry to cut costs, and even before then the entire trend in customer service had been to reduce costs by centralizing customer service functions in regional call centers. In other words, the imperfectly competitive market that currently exists is not a substitute for regulation. Properly crafted rules, on the other hand, would offer subscribers a minimum level of protection and providers would be less tempted to cut corners.

To put it another way, effective federal regulation – or federal regulation that permits effective local regulation – would create an environment in which a certain level of customer service would be built into the system. If specific and effective standards were required by law, operators would find it much more difficult to justify cutting back in those areas, simply because the failure to comply would be a violation of the law. This would also benefit operators in dealing with pressure from investors, since investment in meeting the standards could be justified in the same way.

The Commission should initiate a proceeding to reexamine the customer service rules and develop new standards that actually address current problems. Furthermore, such a proceeding should address the issue of customer service regulation in state franchising states. The

Commission has always assumed that the local franchising authority would adopt and enforce customer service standards, and historically this has meant that local governments fulfilled that role. But the recent wave of state franchising statutes has eliminated the local role without necessarily replacing it with a significant state role. Most of the recent state franchising laws have adopted the FCC's standards, and then eliminated or limited local authority to enforce them. *See, e.g.*, Fla. Stat. § 610.108; Tx. Util. Code § 66.008; N.C. G.S.A. 66-356(b). One problem with this – as noted above – is that the Commission's current standards are not terribly relevant, so the states have vitiated cable customer service regulation: they impose ineffective standards, while precluding local governments from adopting effective ones. Very few states have adopted standards of their own, or even given any consideration to this issue, in part because they rely on the existence of the Commission's rule. In addition, even if a state undertakes to enforce whatever standards might apply, the effectiveness of that effort will depend entirely on the resources devoted to the task.

D. The Commission Should Expressly Endorse Local Regulation of Internet Customer Service Issues.

The Commission is not regulating Internet customer service, except on an *ad hoc* basis, such as its 2008 order on network management practices.[56] The states are not regulating Internet customer service. Montgomery County believes that Section 632 of the Communications Act permits the County to establish customer service standards pertaining to a cable operators' Internet access service, because the statute, by its terms, is not limited to video service. This is logical because in fact Internet access subscribers face much the same kinds of problems as confront cable subscribers. Indeed, at one point the Commission had been referring subscribers who complained to the Commission regarding Internet service to their local franchising

[56] *Memorandum Opinion & Order*, 23 FCC Rcd. 13,028 (2008).

authorities. The Commission should formally adopt that position and allow local franchising authorities to address Internet service issues in the same fashion they address cable service complaints.

Even though the statute can be construed to support local authority, franchising authorities have been wary of proceeding in the face of industry opposition. The industry's position, however is not entirely logical. Providers insist that they should not be required to obtain local franchises to provide Internet service, since they are using the same facilities they use to provide cable service – but by that logic local government should be permitted to handle resident complaints regarding Internet service. After all, the residents live in the local jurisdiction, the two services are provided by the same provider over the same plant, and Internet service is often bundled with cable service. It would be entirely logical to allow local governments to handle Internet customer service matters.

As shown on Table 6, 24.3% of complaints received by the Office of Cable and Communications Services in FY 2008 concerned Internet service. For the first three quarters of F Y 2009, 17.3% of complaints received had to do with Internet service. Consumers have problems, but only very limited recourse. The County urges the Commission to address this, on behalf of subscribers nationally.

V. THE COMMISSION SHOULD BASE FUTURE POLICY ON A CONSISTENT UNDERSTANDING OF THE NATURE OF THE RELEVANT MARKET.

For the reasons discussed above, the County believes that a fundamental reevaluation of the role of competition in the video programming market is in order. In addition, the County urges the Commission to adopt a consistent view of that market. In the past, the Commission has concluded that presence of certain competitors was relevant for some purposes and not for others. The County believes this inconsistency was not justified by the facts, and has led to faulty conclusions.

For example, in the interpretation of the definition of effective competition for purposes of rate regulation, the Commission has also held that DBS constitutes competition to the cable industry.[57] And yet, in various other contexts the Commission has repeatedly ruled that DBS competition did not restrain prices for cable service.[58] For example, in the Franchising Order, the Commission found that "new cable competition reduces rates far more than competition from DBS."[59]

Similarly, as discussed above, the Commission's policy regarding a range of issues affecting cable television subscribers and local franchising authorities has been determined by conclusions regarding the nature of the marketplace that were not based on conditions as they actually existed. So long as the Commission bases policy on the unfounded assumption that the presence of two wireline providers in a community is sufficient to make the MVPD market fully competitive, cable subscribers and the public interest will continue to be ill-served.

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57 *In the Matter of Time Warner Entertainment-Advance/Newhouse Partnership Petition for Determination of Effective Competition in 24 Communities in the State of New York and the Commonwealth of Pennsylvania,* Memorandum Opinion and Order, 23 FCC Rcd. 18,355 (2008) (finding effective competition exists where community is served by 2 DBS providers).

[58] *In the Matter of Implementation of Section 3 of The Cable Television Consumer Protection and Competition Act of 1992,* Report on Cable Industry Prices, 24 FCC Rcd. 259, 261 (2009) ("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 as reflected in Chart 1-a below."); *Thirteenth Annual Report,* 24 FCC Rcd. 542, 544-545 ("DBS competition appears to have led cable operators to add more programming services to their channel line-ups, it has not constrained cable prices as wireline competition has done").

[59] *Franchising Order* at ¶ 50.

CONCLUSION

For all the foregoing reasons, Montgomery County urges the Commission to carefully reexamine its past assumptions about the nature, scope, and effectiveness of competition in the video market, and to reassess its policies in light of a more accurate understanding of the market.

Respectfully submitted,

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May 20, 2009

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

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

DECLARATION OF RONDELLA M. HAWKINS IN SUPPORT OF COMMENTS OF MONTGOMERY COUNTY, MARYLAND

I, Rondella M. Hawkins, declare as follows:

1. I submit this declaration in support of the Comments submitted by Montgomery County in the above-captioned matter. I am the Manager of the Office of Telecommunications & Regulatory Affairs for the City of Austin. I am fully competent to testify to the facts set forth herein, and if called as a witness, I would testify to them.

2. Austin, Texas, currently has three wireline video programming providers: Time Warner, Grande Communications, and AT&T.

3. Texas adopted statewide franchising in 2005, but the state law has had no significant effect in Austin.

4. Grande had obtained its franchise in 2001, before the Texas legislation was enacted. Grande began serving subscribers in 2003.

5. Although Grande's entry gave subscribers a choice of providers, it has not led to reduced rates in Austin, as the table below shows:

Cable Service Rates in Austin, Texas

	2002	2003	2004	2005	2006	2007	2008
Time Warner							
Basic	8.58	8.58	$10.50	$10.50	$10.50	$14.95*	$16.95*
Grande							
Basic	--	$10.50	$10.50	$10.50	$13.50	n.a.	$16.95

*$19.95 for new subscribers.

6. AT&T did enter after the state law was passed, but it serves only a relative handful of subscribers in the city, and has shown no interest in competing vigorously.

7. It is impossible to evaluate the effect of AT&T's entry on prices, since AT&T does not offer a video-only subscription, but Grande's entry seems to have led to significant price increases.

8. As the table shows, after Grande entered the marketplace in 2003, Time Warner actually raised its rate for basic service to match Grande's.

9. When Grande raised its rate in 2006, Time Warner again raised its rate. Time Warner was held to be subject to effective competition in 2007, and today both companies charge existing subscribers the same rate of $16.95. The two tiers are roughly comparable, with 20 channels on Time Warner's basic tier and 17 on Grande's.

10. Time Warner subscribers are paying $8.37 a month more for basic service than they were in 2003, almost twice what they were paying at the time.

11. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 19th day of May, 2009, at Washington, DC.

Rondella M. Hawkins

Rondella M. Hawkins

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Attachment 2

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. 06-189
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

REPLY COMMENTS OF FAIRFAX COUNTY, VIRGINIA

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TABLE OF CONTENTS

SUMMARY

Fairfax County, Virginia submits these reply comments to document the consumer impact of wireline competition in the market for video services. Fairfax County is served by three competitive wireline cable operators: incumbent cable operators, Comcast of Virginia, Inc., and Cox Communications of Northern Virginia, Inc., serve non-overlapping areas of the County; and Verizon Virginia Inc. ("Verizon VA"), serves the entire County. Fairfax County is one of the largest jurisdictions to have granted a competitive wireline franchise to Verizon, and Verizon VA has been providing cable service for over one year in Fairfax County. Because of the willingness of both parties to meaningfully engage in negotiations, Fairfax County staff and Verizon VA were able to complete negotiation of a comprehensive draft franchise with all major terms and conditions in approximately seven weeks, and in just under three months, completed a draft franchise agreement for the Fairfax County Board of Supervisors' consideration.

Reasonable build-out requirements have benefited Fairfax County consumers. Each of the County's three franchises require providers to make service available to all homes in the franchise area within a reasonable period of time and the County Code requires providers to make service available to at least eighty-five percent of all households without line extension charges. Verizon VA was granted seven years to complete its build-out. Fairfax County staff estimates that Verizon VA is now capable of serving approximately one-third of all County households, and all County households will have a choice of two cable operators within the next six years. Reasonable build-out requirements serve the important public policy purpose of ensuring that competitive video service – and as well as its by-product, high-speed Internet access via cable modem – is made available to every household. It will be important for

consumers that local franchising authorities retain the power to ensure that competition for such services – and accompanying competitive pricing pressure – leaves no neighborhood behind.

The 2006 Virginia cable franchising legislation grandfathered protection for existing cable franchises where a competitive franchise has been granted, but also permits existing providers to opt into the applicable terms in their entity of any new competitive franchise granted by its local franchising authority. In some cases, new competitors may request an ordinance cable franchise instead of a negotiated cable franchise. However, Verizon reports that it has continued to negotiate franchises since the new Virginia law took effect. Verizon reports that it negotiated two additional franchises in the six months since the new legislation took effect. Overall, the 2006 Virginia legislation has not yet significantly increased the rate of competitive cable system deployment in Virginia.

Fairfax County responds herein to arguments by some commentors that competition leads to lower pricing, and therefore any regulations perceived to delay competitive entry – including local franchising in particular – should be radically altered. Fairfax County provides non-promotional rates offered by Fairfax County cable operators for 2004, 2005, 2006 and 2007, to provide the Commission with more complete rate information. Rate data submitted by other commentors in this proceeding include unpublished temporary promotional prices and promotional prices available only to new subscribers, and thus do not reflect actually monthly cable rates paid by the majority of subscribers.

Wireline competition for video services in Fairfax County is still in the nascent stage and any conclusions drawn are preliminary in nature. A choice of competitive cable systems is still not available to the majority of County households. Therefore, Fairfax County cannot definitively determine what impact competition is having on cable service pricing. It is difficult to compare digital cable and bundled service packages between providers because of the differences between each providers' package content. It is unclear how much, if any, of the applicable bundled service package discounts are attributable to competitive forces in the marketplace, or to generally accepted industry practices (which occur in both noncompetitive and competitive markets) to provide discounts to bundled services. Incumbent providers appear to be responding to competition by offering promotional discounts to new subscribers or by reducing some features in bundled packages so as to offer lower-priced bundled packages and match the competitor's bundled rate. But it also appears that in Fairfax County, the competitive entrant is offering consumers a stand alone cable package with a larger number of channels at a price point similar to the incumbent's rates. All cable operators have increased their rates since January 2006 and cable rates have risen at a faster rate as compared to when no head-to-head wireline cable competition existed in the County. Because the most recent cable pricing data released by the Commission analyzes cable rates as of January 1, 2005 (as contained in the *2005 Cable Price Report*) and wireline cable competition in Fairfax County began in November 2005, Fairfax County is unable to determine whether competition has caused monthly cable rates in the County to grow at a slower rate than in franchise areas without wireline cable competition.

As a consumer protection issue, Fairfax County notes that converter boxes account for almost eight percent of analog monthly cable rates (expanded basic service plus converter and remote control costs) and more than seven percent of mid-sized digital monthly cable rates (Verizon VA's expanded basic, Comcast VA's Digital Plus, and or Cox VA's Digital Gateway, Digital Discovery, and Digital Variety Tiers; plus digital converter box and remote control). Fairfax County urges the Commission to complete its implementation of the provisions of the 1996 Telecommunications Act that would enable consumers to purchase commercially available converter boxes capable of receiving all programming, including interactive electronic program guides and video-on-demand services. The County also urges the Commission to complete implementation of the provisions of the 1996 Telecommunications Act that would permit subscribers to view all cable programming, including premium channels, without converter boxes so that consumers may fully utilize the advanced features of the their televisions, including picture-in-picture features.

The County also reports that each month, Fairfax County public, educational, and governmental access channels provide 1,691 hours of locally-originated programming, 301 hours of foreign language programming, and 976 hours of closed-captioned programming. The County also highlights important public safety considerations and technical information regarding the functional differences in operation of local emergency overrides on cable systems with regionally-based cable system headends. Finally, Fairfax County provides the Commission with information about the County's recent consumer educational campaign, "Connecting Your Home," which provided consumers with information about the E-911 services and back-up battery considerations when choosing between traditional telephone service and voice-over-Internet-protocol telephone service.

The County provides the information herein to assist the Commission in developing a comprehensive report to Congress regarding the state of competition in the market for the delivery of video programming. The County also urges the Commission to recognize the important public policy goals that have been achieved through the local franchising process as the Commission deliberates issuing new franchising regulations in a related proceeding.

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. 06-189
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

REPLY COMMENTS OF FAIRFAX COUNTY, VIRGINIA

I. INTRODUCTION.

Fairfax County, Virginia ("Fairfax County" or "County") submits the following reply comments in response to the Federal Communications Commission's ("Commission") Notice of Inquiry, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189 (2006) ("*Notice*"), in response to comments filed in this proceeding on behalf of Comcast Corporation ("Comcast"), the Fiber-To-The-Home Council ("FTTH Council"), the National Cable & Telecommunications Association ("NCTA"), Verizon,[1] and as an update to comments filed on February 13, 2005 on behalf of the

[1] Respectively, "Comcast Comments," "FTTH Council Comments," "NCTA Comments," and "Verizon Comments." References herein to "Verizon Comments" or other claims alleged on behalf of "Verizon" refer to statements contained in comments filed in this proceeding on behalf of "Verizon" and references to Verizon VA refer to Verizon Virginia, Inc., which entered into a 2005 cable franchise agreement with Fairfax County. Fairfax County and Verizon VA enjoy a

County ("County Franchising NPRM Comments") in response to the Commission's Notice of Proposed Rulemaking, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311 (2005) ("*Franchising NPRM*").

The Fairfax County Board of Supervisors (the "Board") is the local franchising authority for Fairfax County and has a long history of encouraging competition for video services in Fairfax County. The Board has never awarded an exclusive cable franchise. Twenty-four years ago, the Board awarded its first non-exclusive cable franchise to Media General Cable of Fairfax County, Inc. ("Media General"), to serve the North County and South County franchise areas, followed by the award of a non-exclusive franchise for the Reston franchise area in 1988 to Warner Cable Communications of Reston, Inc. ("Warner").[2] Four years later, in 1992, federal law was enacted to prohibit the award of exclusive cable franchises,[3] *i.e.*, addressing an issue that did not and has never existed in Fairfax County. The non-exclusive, non-overlapping Media General and Warner franchises were ultimately transferred to Cox Communications Northern Virginia ("Cox VA") and Comcast of Virginia, Inc. ("Comcast VA"), respectively. The Board

positive working relationship focused on ensuring the highest public safety during system construction and fostering the best possible customer service for all County residents. Similarly, references herein to "Comcast" refer to comments filed in this proceeding on behalf of Comcast Corporation and Comcast Cable Communications, LLC (collectively "Comcast") whereas references to Comcast VA refer to obligations agreed to and performance under the 1998 and 2005 franchise agreements between Fairfax County and Comcast of Virginia, Inc. Fairfax County enjoys similarly positive working relationships with Comcast VA and Cox VA.

[2] "Cable Television Franchise Agreement Between Fairfax County, Virginia and Media General Cable of Fairfax County, Inc., September 30, 1982," *available upon request*. "Franchise Agreement Dated May 16, 1988, Between the Board of Supervisors of Fairfax County, Virginia, and Warner Cable Communications of Reston, Inc.," *available upon request*.

[3] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 12, 106 Stat. 1460 (1992) ("1992 Cable Act").

granted a non-exclusive renewal cable franchise to Media General in 1998 (now held by Cox VA), and a non-exclusive renewal cable franchise to Comcast VA in May 2005.[4]

Recognizing that competition would likely follow the enactment of the Telecommunications Act of 1996, the Board specifically structured the terms of the 1998 Media General renewal franchise agreement to ensure that its provisions could be replicated in a competitively neutral manner if wireline competition for delivery of video programming developed.[5] As outlined in greater detail in the County's Franchising NPRM comments, because of the foresight of the Board and the willingness of both parties to negotiate, in 2005, Fairfax County staff and Verizon Virginia Inc., ("Verizon VA") were able to complete negotiation of a comprehensive draft with all major terms and conditions in approximately seven weeks and, in just under three months, completed a draft franchise agreement for the Board's consideration.[6] Notably, the incumbent cable operators Cox and Comcast testified in a public hearing in favor of the award of a franchise to Verizon VA, stating that the Verizon VA franchise met the Virginia level playing field statute,[7] and that they welcomed the competition the Verizon

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[4] "A Cable Franchise Agreement By and Between Fairfax County, Virginia and Comcast of Virginia, Inc." (2005) ("Comcast VA Franchise Agreement"); "A Cable Franchise Agreement By and Between Fairfax County, Virginia and Media General Cable of Fairfax County, Inc." (1998), transferred to Cox Communications of Northern Virginia, Inc. on September 23, 2002 ("MCG Franchise Agreement" or "Cox VA Franchise Agreement"). All current Fairfax County cable franchise agreements are available at http://www.fairfaxcounty.gov/cable/regulation/cable_franchises.htm.

[5] The majority of wireline cable systems occupy and utilize the public rights-of-way to deliver service and thus require a cable franchise. 47 U.S.C. §§ 541(b)(1) and 522(7).

[6] *See* County Franchising NPRM Comments at 4-6.

[7] Va. Code Ann. § 15.2-2108(C) [repealed]. Section 15.2.-2108(C) barred localities from granting a competitive franchise "on terms or conditions more favorable or less burdensome than those in any existing ... franchise...," and was replaced by Va. Code Ann. § 15.2-2108.20(B) (2006), which provides that a locality cannot regulate cable operators through the adoption or ordinances or regulations: (1) that are more onerous than ordinances or regulations adopted for

VA franchise would bring to Fairfax County.[8] The Board unanimously approved the Verizon VA Franchise Agreement on September 26, 2005, with an effective date of October 1, 2005,[9] and Verizon VA began to offer competitive cable service in Fairfax County in November 2005.[10]

The Board's award of a competitive County-wide cable franchise enabled Verizon VA to provide head-to-head competition against the incumbent cable operators in all three franchise areas within the County. At the time, the County, with more than 377,000 households, was the largest jurisdiction to award a franchise to Verizon.[11] As discussed further herein, Fairfax County granted a competitive franchise to Verizon VA some five months prior to the Virginia state legislature's decision to limit the ability of local governments to negotiate franchise terms and conditions in the belief that such actions would speed cable deployment. At the present time, there is little evidence to suggest that the new Virginia state cable franchise legislation has increased market entry by competitive cable providers.

Fairfax County's three franchise agreements guarantee that deployment of competitive cable services and any upgrades of existing cable systems will be made available to all

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existing cable operators; (b) that unreasonably prejudice or disadvantage any cable operator, whether existing or new... .

[8] County Franchising NPRM Comments at 6.

[9] "Cable Franchise Agreement By and Between Fairfax County, Virginia and Verizon Virginia Inc. (2005)" ("Verizon VA Franchise Agreement"), *available at* http://www.fairfaxcounty.gov/cable/regulation/franchise/verizon/verizon_franchise_2005.pdf.

[10] Fairfax County Franchising NPRM Comments at 7.

[11] *Verizon Wins Franchise for FiOSTV From Fairfax County*, TVover.net (September 28, 2005), *available at* http://www.tvover.net/2005/09/28/Verizon+Wins+Franchise+For+FiOS+TV+From+Fairfax+County.aspx. The Fairfax County Department of Systems Management for Human Services reported that there were 378,639 total units in the Fairfax County housing unit inventory and estimated that there would be 384,683 housing units by 2005. "*Housing Unit Inventory by Unit Type by Planning District – Fairfax County, January 2004*," *available at* http://www.fairfaxcounty.gov/demogrph/demrpts/hupd.pdf; "*Historical, Estimated and*

households within a franchise area. All franchised cable operators in Fairfax County must make cable service available to all households within the County, and without line extension charges to eighty-five percent of all households.[12] Congress and the Commission should consider to what extent new federal action, combined with existing state reciprocity and level playing field statutes, could eviscerate voluntarily negotiated build-out provisions in existing franchises.

Verizon VA has another six years to fully build out its cable system in Fairfax County, but the County has now had a full year to evaluate the impact of competitive franchised cable service, and therefore submits the information contained herein to the Commission so that the Commission may develop an accurate report to Congress regarding the status of competition in the market for the delivery of video programming. Overall, cable operators in Fairfax County have discounted prices for bundled video-broadband-telephone services. In some cases, long term contracts are required to obtain discounted prices, but in other cases, cable operators have replaced limited promotional rate offers with similarly priced rate offers that do not expire. However, despite increased competition, stand alone cable rates continue to rise, and every cable operator, including Verizon VA after one year of offering service, has announced a cable rate increase since January 1, 2006.

Finally, Fairfax County submits information to the Commission regarding the substantial amount of local and foreign language programming produced and distributed over the County's public, educational, and governmental access channels, as well as the technical issues associated with Emergency Alert System and Emergency Message System capabilities and battery back-up systems for cable telephony phone service.

Forecasted Housing Units by Planning District – Fairfax County, January 2004," *available at* http://www.fairfaxcounty.gov/demogrph/demrpts/hufpd.pdf.

[12] Fairfax County Code Section 9.1-7-2.

II. FRANCHISE BUILD-OUT REQUIREMENTS BENEFIT CONSUMERS.

As the local franchising authority for all of Fairfax County, the Fairfax County Board of Supervisors has an obligation to ensure that the benefits of competition are made available to all County residents. Nonetheless (and contrary to Verizon's generalized intimations[13]), the Board has balanced its obligations to serve all residents with the economic and technical feasibilities of build-out when negotiating build-out requirements in franchise agreements. Fairfax County disagrees with Verizon that a franchise agreement requirement to build-out an entire franchise area over a reasonable number of years is either unduly "burdensome," "tantamount to [an] 'unreasonabl[e] refus[al] to award' competitive franchises," or that authority to negotiate such provisions "should be prohibited."[14] The Board has permitted new entrants to begin immediately providing service as soon as their systems become capable; permitted the operator to define the boundaries of a initial service area, *i.e.*, a limited geographic area of the County in which build-out must be completed within three years; and granted the operator up to seven years to complete its build-out throughout the County. Furthermore, the Board has also agreed to permit cable operators to recover line extension costs where there are fewer than 30 to 35 occupied homes per line mile.[15] The requirement that a competitive provider should be able to make service available to an entire franchise area by the mid-point of the franchise term is inherently reasonable; it would be inherently unreasonable for the Commission to attempt the prohibit the

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[13] *See* Verizon Comments at 17.

[14] Verizon Comments at 17.

[15] Verizon VA Franchise Agreement at Section 3.1; Comcast VA Franchise Agreement at Appendix 1; Media General Cable Franchise Agreement at Appendix 1.

County from ensuring that benefits of competition and digital cable systems reach all County households.[16]

The core of the argument against build-out requirements is that competition need not reach all residents; that it is "simply unnecessary" to require that service be made available to every household.[17] Fairfax County could not disagree more. Reasonable build-out requirements have not only ensured that video service reaches almost every home in America, but because those same reasonable build-out requirements also applied to system upgrades, reasonable local franchise build-out requirements have also ensured that advanced services delivered over cable systems, including cable modem, have continued to reach almost every home in America. Three years after enactment of the 1992 Cable Act, the Commission reported in its *Third Annual Report* to Congress that, "at year end 1995, cable service was available to 92.7 million homes or approximately 96.7% of all television households in the United States."[18] In the Commission's most recent *Twelfth Annual Report*, the Commission reported that cable passed 108.6 million homes or 98.7% of homes with a television.[19] Moreover, NCTA reported that by June 2006, 97 million television households, 89%, were served by at least one cable system that offered high

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[16] Leslie Cauley, *FCC Hopes to Speed Phone Companies' Entry Into TV*, USA Today, Dec. 1, 2006 at B1. ("AT&T and Verizon are building advanced broadband networks so they can sell bundles of TV, voice, wireless and high-speed Internet services.")

[17] *The Communications Act: Hearings on S. 1822 Before the Senate Commerce Committee* (May 18, 1994) (Statement of Brian Roberts, President, Comcast Corporation), *cited with approval*, Verizon Comments at 16.

[18] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd. 2060 (1996) at ¶ 13 ("*Third Annual Report*"), *available at* http://www.fcc.gov/Bureaus/Cable/Reports/fcc96496.txt.

[19] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, (2006) at n.30 and ¶ 30 ("*Twelfth Annual Report*"), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-11A1.doc.

definition television service.[20] By contrast, in June 2006, the Commission reported that nationwide, 93% of residential end users had access to cable modem service, whereas only 78% of residential end users had access to DSL service (which is not subject to build-out requirements).[21] In Virginia, the disparity is even greater – 96% of all residential end users have access to cable modem, whereas only 67% have access to DSL.[22] Applying this differential to the total households in Virginia and the nation, the cable system build-out requirements in local cable franchises have helped to ensure that broadband services have reached the estimated 838,009 Virginia households left behind by DSL and the 16.7 million U.S. housing units not served by DSL.[23]

As video service providers continue to "enhance ...traditional cable offering" by "combin[ing] existing assets with innovative new technologies"[24] to deliver more content and a "'triple play' bundle of phone, high-speed cable Internet, and video services,"[25] it will remain important that local franchising authorities retain the power to ensure that competition for such

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[20] NCTA Comments at 41.

[21] Federal Communications Commission, *High Speed Services for Internet Access: Status as of December 31, 2005* (July 2006) at Table 14, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-266596A1.pdf.

[22] *Id.*

[23] The U.S. Census Bureau estimated 2,889,688 occupied housing units in Virginia in 2005. http://factfinder.census.gov/servlet/ACSSAFFFacts?_event=Search&_lang=en&_sse=on&geo_id=04000US51&_state=04000US51. The approximate number of Virginia households with access to cable modem but without access to DSL was calculated by subtracting from the percentage of premises with cable modem access, the percentage of premises with DSL access, and then multiplying by the number of occupied housing units ((.96 – .67) x 2,889,688). Nationally, the Commission reports there are 111.4 million occupied housing units, Notice at n.30, *i.e.*, ((.93 – .78) x 111,400,000).

[24] Comcast Comments at 60.

[25] *Id.* at 71.

services – and accompanying competitive pricing pressure – will reach every household and that the information super highway leaves no neighborhood behind.

III. BUNDLED SERVICE AND STAND ALONE CABLE PRICING IN FAIRFAX COUNTY.

In 2005, Fairfax County staff and the Consumer Protection Commission[26] recommended that the Board approve the Verizon VA Franchise Agreement. The franchise agreement was consistent with the Board's policy of supporting competition and competitive choice for consumers, and the terms of the franchise agreement ensured that any benefits of competition, including potentially lower prices, would be made available to all residents of the County because of the build-out requirements.[27] As part of its recommendation for approval, Fairfax County staff further reported to the Board that the General Accounting Office (now the Government Accountability Office), in its 2003 report, "*Issues Related to Competition and Subscriber Rates in the Cable Television Industry*," had reported that cable prices were as much as 15% lower in areas in which incumbent cable operators faced head-to-head competition from another wireline cable service provider.[28] After considering the terms of the franchise agreement and forecasted cost and service benefits for all residents, the Board unanimously approved the Verizon VA Franchise Agreement on September 26, 2005, with an effective date of October 1,

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[26] The mission of the Fairfax County Consumer Protection Commission is to help protect Fairfax County consumers from illegal, fraudulent or deceptive consumer practices in the marketplace, and to advise the Board of Supervisors on issues regarding consumer affairs and cable communications. For more information, *see* http://www.fairfaxcounty.gov/consumer/consumer_protection_comm.htm.

[27] Fairfax County Franchising NPRM Comments at 8.

[28] *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, General Accounting Office Report 04-8 (2003) at 3, *available at* http://www.gao.gov/new.items/d048.pdf.

2005, and Verizon VA began to offer competitive cable service in Fairfax County in November 2005.

Wireline competition for video services in Fairfax County is still in the nascent stage and any conclusions drawn are preliminary in nature. It appears that incumbent providers are responding to competition by offering promotional discounts to new subscribers and lower-priced bundled packages with more limited features to match the competitor's bundled rate. However, it is difficult to compare digital cable and bundled service packages between providers because of the differences between each providers' package content. In addition, more research is needed to determine what impact bundled service options have on consumer freedom to mix and match video, high-speed Internet, and telephone service options between providers, including any issues associated with the lack of portability of provider-based e-mail addresses.

At this time, Fairfax County is unable to determine whether competition has caused monthly cable rates in the County to grow at a slower rate than in franchise areas without wireline cable competition, because the most recent cable pricing data released by the Commission analyzes cable prices as of January 1, 2005,[29] and wireline competition in Fairfax County began in November 2005. It appears that in Fairfax County the competitive entrant is now offering consumers a stand alone cable package with a larger number of channels at a price point similar to the incumbents' rates. Fairfax County will continue to analyze pricing data as it becomes available.

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[29] *In the Matter of Implementation of Section 3 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 (Dec. 27, 2006) ("*2005 Cable Price Report*") *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-179A1.doc.

A. Bundled Cable Service Prices in Fairfax County.

1. Analysis of Bundled Cable Service Rates.

Comparisons of bundled cable service rates are difficult because providers do not offer identical service packages. Rather than attempting to force a comparison of different bundled service packages between providers, Fairfax County presents the following information comparing each provider's bundled packages with the price if similar services were purchased separately from that same provider. Most but not all of the bundled service offerings offered by the franchised providers suggest price discounts for services in a bundled package versus if provided separately. However, it is unclear how much if any of the applicable bundle service package discounts are attributable to competitive forces in the marketplace, or to generally accepted industry practices (which occur in both noncompetitive and competitive markets) to provide discounts to bundled services.

a. *Cox VA Bundled Service Packages.*

In January 2007, Cox VA will offer three bundled service packages:[30]

COX VA BUNDLED PACKAGE COMPARISON

"Value" Bundle	"Preferred" Bundle	"Value Plus" Bundle
Expanded Basic Cox High Speed Internet Value (768 Kbps download) Primary Telephone Line	Expanded Basic Digital Gateway One Digital Tier Digital Receiver Cox High Speed Internet Preferred (5 Mbps download) Primary Telephone Line	Expanded Basic Cox High Speed Internet Preferred (5 Mbps download) Cox Connections Unlimited (Unlimited local and long distance, caller ID, call waiting, voice mail)
Additional Equipment Costs	Additional Equipment Costs	Additional Equipment Costs
Converter Box & Remote Cable Modem	Converter Box & Remote (Unbundled Service Only) Cable Modem	Converter Box & Remote Cable Modem

[30] Attachment A – 2, Cox 2006 Annual Customer Notice – Prices Effective November 1, 2006.

COX VA BUNDLED PACKAGE COMPARISON

"Value" Package	"Preferred" Package	"Value Plus" Package
Purchased Separately: $ 102.87	Purchased Separately: $ 126.82	Purchased Separately: $ 154.92
Purchased as Bundled Package: $ 96.98	Purchased as Bundled Package: $ 114.99	Purchased as Bundled Package: $ 133.98
Bundled Savings: $ 5.89 / 5.73%	Bundled Savings: $ 11.83 / 9.33%	Bundled Savings: $ 20.94 / 13.52%

The lowest priced Cox VA Value Bundle package does not include digital programming, would require a separate analog receiver rental fee, and provides an Internet connection that, while at the lower threshold of broadband service, is comparable to DSL speed.[31] This package may have appeal to consumers who have minimum video, Internet and telephone needs. Cox VA's Preferred Bundled package is the only Cox VA bundle that offers digital video programming. Finally, the Value Plus package offers the greatest bundling discount, saving consumers over thirteen percent.

This package is comparably priced to match Verizon VA's standard bundled package – both the Cox VA and Verizon VA bundled package offer unlimited long distance and local calling and Internet download speeds of up to 5 Mbps, and both require an additional equipment rental charge – but the Cox VA Value Plus Bundle does not offer digital programming and the consumer would have to pay an additional $10.95 to receive digital programming comparable to the Verizon VA bundled package.[32]

[31] In advertisements, Cox VA states that Internet service requires a cable modem but offers a free cable modem to new subscribers while supplies last. Attachment A – 1, Cox Connections Bundle Advertisement (offer ends January 8, 2007).

[32] Attachment A – 2, Cox 2006 Annual Customer Notice – Prices Effective November 1, 2006; Attachment C – 7, Verizon FiOS TV Channel Line Up, Fairfax County/Falls Church/Herndon Channel Lineup (1/06).

b. *Comcast VA Bundled Service Packages.*

Comcast VA offers discounts on its high-speed Internet service when bundled with analog or digital cable programming packages and also offers discounts on its Voice-over-Internet-protocol ("VoIP") telephone service when bundled with either cable or Internet services. However, Comcast VA does not advertise prices for its triple play bundle packages on its rate card.[33] Comcast VA does offer its cable subscribers a $15.00 discount on the purchase of its 6Mbps/768Kbps or 16Mbps/1Mbps high-speed Internet service. Based on telephone conversations with Comcast VA's customer service representatives, if an existing Comcast VA customer would like to purchase Comcast VA's unlimited local and long distance VoIP telephone service, Comcast will discount the regular $57.95 rate to $39.95.

COMCAST VA SAMPLE BUNDLED PACKAGE COMPARISON

Analog Bundle	**Digital Bundle**	**Fastest High Speed Bundle**
Full Basic High Speed Internet (6 Mbps download) Digital Voice (Unlimited local and long distance, caller ID, call waiting, on-line voice mail)	Full Basic Digital Plus High Speed Internet (6 Mbps download) Digital Voice (Unlimited local and long distance, caller ID, call waiting, on-line voice mail)	Full Basic Digital Plus Highest Speed Internet (16 Mbps download) Digital Voice (Unlimited local and long distance, caller ID, call waiting, on-line voice mail)
Additional Equipment Costs Digital Converter Box & Remote Cable Modem	Additional Equipment Costs Digital Converter Box & Remote Cable Modem	Additional Equipment Costs Digital Converter Box & Remote Cable Modem
Analog Package Purchased Separately: $ 173.52 Purchased as Bundled Package: $ 140.52 Bundled Savings: $ 33.00 / 19.02%	**Digital Package** Purchased Separately: $ 188.47 Purchased as Bundled Package: $ 155.47 Bundled Savings: $ 33.00 / 17.51%	**Fastest High Speed Package** Purchased Separately: $ 198.47 Purchased as Bundled Package: $ 165.47 Bundled Savings: $ 33.00 / 16.63%

[33] Attachment B – 3, Comcast Reston Rates, Service Charges & Channel Lineup – Effective 10/06.

The Comcast VA video package most comparable to Verizon VA's standard video packages is Comcast VA's Digital Plus package. However, the Comcast VA package includes several premium (commercial free) Encore movie channels and the Sundance channel that are only available at additional cost from Verizon VA. Thus it is difficult to compare Comcast VA's video programming bundled rate component with either Verizon VA or Cox VA's packages because Comcast VA offers additional Premium channels in its bundling offers.[34]

c. *Verizon VA Bundled Service Packages.*

Verizon VA entered the market with an all digital fiber optic network, whereas Cox VA and Comcast VA have upgraded their systems to create hybrid coaxial fiber systems. Thus, Verizon VA offers only a digital tier package and does not offer smaller channel packages equivalent to the analog packages offered by Cox VA and Comcast VA. In comparing all three providers' expanded basic tier packages, Verizon VA's expanded basic, now named FiOS Premium, is equivalent to Cox VA's Digital Gateway plus Digital Discovery and Digital Variety packages and Comcast VA's Digital Plus package (albeit, Comcast VA's Digital Plus package includes several premium movie channels available for an additional fee to Verizon VA subscribers).[35]

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[34] *Id.*

[35] Attachment C – 7 Verizon FiOS TV Channel Line Up, Fairfax County/Falls Church/Herndon Channel Lineup (1/06); Attachment A-2, Cox 2006 Annual Customer Notice – Prices Effective November 1, 2006; Attachment B-2, Comcast Reston Rates, Service Charges & Channel Lineup – Effective 10/06.

VERIZON VA SAMPLE BUNDLED PACKAGE COMPARISON

Local Phone Bundle	Unlimited L/D Bundle	Fastest High Speed Bundle
FiOS Premium	FiOS Premium	FiOS Premium
FiOS Internet (5 Mbps download)	FiOS Internet (5 Mbps download)	Fastest FiOS Internet (15 Mbps download)
Unlimited Local	Verizon Freedom Value (Unlimited local and long distance)	Verizon Essentials (Unlimited local and long distance, caller ID, call waiting, and voice mail)
Additional Equipment Costs	Additional Equipment Costs	Additional Equipment Costs
Digital Converter Box & Remote	Digital Converter Box & Remote	Digital Converter Box & Remote
Local Phone FiOS Package	**FiOS Freedom Value Package**	**FiOS Essentials Package**
Purchased Separately: $ 105.85	Purchased Separately: $ 123.80	Purchased Separately: $ 138.80
Purchased as Bundled Package: $ 100.85	Purchased as Bundled Package: $ 118.80	Purchased as Bundled Package: $ 133.80
Bundled Savings: $ 5.00 / 4.72%	Bundled Savings: $ 5.00 / 4.04%	Bundled Savings: $ 5.00 / 3.60%

Verizon VA recently announced that it would be increasing the prices of its FiOS Premium Package and Movie and Sports Tiers, effective January 22, 2007, for all new customers and new service additions, but also announced that it would drop its Existing Outlet Hookup initial installation charge from $50.00 to no charge. Thus after January 22, 2007, Verizon sample package rates would be as follows:[36]

VERIZON VA BUNDLED PACKAGE COMPARISON

As of January 22, 2007

Local Phone FiOS Package	FiOS Freedom Value Package	FiOS Essentials Package
Purchased Separately: $ 109.93	Purchased Separately: $ 127.88	Purchased Separately: $ 142.88
Purchased as Bundled Package: $ 104.93	Purchased as Bundled Package: $ 122.88	Purchased as Bundled Package: $ 137.88
Bundled Savings: $ 5.00 / 4.55%	Bundled Savings: $ 5.00 / 3.91%	Bundled Savings: $ 5.00 / 3.50%

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[36] Attachment C – 3, Letter from Paul Miller, Franchise Service Manager, Verizon VA, to Director of Communications, Fairfax County, (Nov. 20, 2006), and Attachment C – 4, Verizon FiOS TV 2006 Annual Customer Notification: Programming and Equipment Rates – Effective January 14, 2006. On December 20, 2006, a Verizon VA representative informed the County that Verizon VA would delay implementation of its planned price increases from January 14, 2007 until January 22, 2007.

However, if service is cancelled between two and eleven months, an early termination fee of $99.00 may apply. Verizon's digital service also requires rental of a digital converter box, which will increase in price from $3.95 to $4.99 effective January 14, 2006. Thus, after entering the Fairfax County market with an initial $118.80 bundled service and equipment rate, in under fourteen months, Verizon will have increased its bundled service and equipment package rate by 3.43% to $122.88.[37]

2. Comparisons of Bundled Service Rates Adjusted for Promotional Offers Do Not Provide a Meaningful Picture of Long Term Pricing.

The County notes that the Bank of America Equity Research report cited as support for FTTH Council arguments that cable operators have dropped their bundled service package prices "by over 20%" as a result of Verizon's entry into the market,[38] is based on the inclusion of unpublished promotional prices. Bank of America itself stated that its bundled price comparisons reflect the value of temporary price promotions and unpublicized offers provided over the telephone by customer service representatives and <u>do not reflect long term prices</u>:

> As we wrote last quarter, we note that these are in many cases un-advertised offers and we believe that they do not necessarily represent the equilibrium pricing that will prevail longer term in these markets. Some organizations have cited our report as evidence that competitive video entry by the Bells will substantially reduce cable prices. Since these are unadvertised prices, we would disagree with the assertion that these prices represent a snapshot of potential future equilibrium pricing.[39]

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[37] Verizon also offered an additional $5.00 to $10.00 initial promotional discount. *See* Attachment C – 6, FiOS Internet/Phone Advertisement (Expires 8/31/06), and Attachment C – 5, FiOS Video/Internet/Phone Advertisement (Expires 12/31/06).

[38] FTTH Council Comments at 11-12.

[39] Bank of America Equity Research, *Battle for the Bundle: Consumer Wireline Services Pricing*, April 18, 2006, at 18. *Available upon request.*

Therefore, data reported in the Bank of America report should not be used as evidence that future bundled service rates will decrease as competition enters the market.

3. The Commission Should Examine the Consumer Impact of Bundled Service Packages.

Finally, the County also asks the Commission to investigate how the bundling of services affects consumer choice among providers and service packages. As NCTA notes, Internet speed matters less to "those who use the Internet mainly for sending e-mail and reading online newspapers and blogs."[40] To what extent are consumers required to purchase additional Internet services to receive pricing discounts on video services? To what extent are consumers required to pay higher Internet prices if they do not agree to also purchase video services?[41] To what extent are providers pricing stand alone services at higher prices to encourage consumers to purchase bundled services? These questions and other consumer-based inquiries should also be part of the Commission's inquiry to determine the effect that head-to-head competition has had on bundled pricing of cable services.[42]

B. Stand Alone Cable Rates in Fairfax County.

As discussed above, prior to the entry of Verizon VA, Fairfax County had two franchised wireline cable operators who did not compete against each other head-to-head. Fairfax County's three non-overlapping cable franchise areas are North County, South County, and Reston.[43] Cox

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[40] NCTA Comments at 42.

[41] In Fairfax County, 78.1% of all households currently have some form of Internet access, but only 58.7% of households with an annual household income between $50,000 and $25,000, and 35.4% of households with an annual household income of less than $25,000, have Internet access. *2000 Fairfax-Falls Church Community Assessment: General Overview* at p.3, *available at* http://www.fairfaxcounty.gov/demogrph/pdf/cas_overview.pdf.

[42] *See Notice* at ¶ 7.

[43] Fairfax County Code Section 9.1-7-1.

VA and its predecessor have provided service in the North and South County franchise areas since 1982. Comcast VA and its predecessors have served Reston since 1988. Verizon VA has a franchise to serve all three franchise areas and began providing competitive service in November 2005. Thus, Fairfax County cable pricing data includes cable rates in a noncompetitive environment, prior to Verizon's market entry, and cable rates in a competitive environment. Fairfax County is also including data regarding providers' announced cable rates as of January 1, 2007, and rates effective January 22, 2007, for Verizon VA.

1. Fairfax County 2004 Stand Alone Cable Rates Are Consistent with Commission Reported National Average Cable Rates In Noncompetitive Franchise Areas.

In the *2004 Cable Price Report*, the Commission reported a national average monthly cable rate which included the cost of expanded basic tier programming service and converter box and remote control equipment.[44] The Commission also broke out and compared the average monthly cable rate in areas not subject to effective competition, denoted as "Noncompetitive Areas," and the average monthly cable rate in areas subject to effective competition, denoted as "Competitive Areas." In December 2006, the Commission released similar data for cable rates as of January 1, 2005 in the *2005 Cable Price Report.* Fairfax County urges the Commission to complete its work on the 2006 Cable Price Report and to release data regarding cable prices as of January 1, 2006, and January 1, 2007, as soon as possible.

On January 1, 2004, the monthly cable rate charged by Fairfax County's largest incumbent cable operator was slightly more than the national monthly competitive rate reported

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[44] *In the Matter of Implementation of Section 3 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 (Feb. 4, 2005) at Table 1 ("*2004 Cable Price Report*").

by the Commission but substantially less than the national monthly noncompetitive rate reported by the Commission in the *2004 Cable Price Report*. However, on January 1, 2004, the monthly cable rate charged by Fairfax County's smaller incumbent cable operator was more than the national noncompetitive rate reported by the Commission. By January 1, 2005, Fairfax County largest incumbent had raised its monthly cable rate by two percent while the County's smaller incumbent had not raised its rate. But in comparison to the national monthly cable rate data reported by Commission in the *2005 Cable Price Report*, on January 1, 2005, Fairfax County's largest incumbent charged less than the both the national competitive and noncompetitive rates, and the County's smaller incumbent charged slightly less than the national noncompetitive rate.

Table 1
FCC Reported National Average Monthly Cable Rates As Compared To Fairfax County Monthly Cable Rates Jan. 2004

Service Elements	FCC Average[i]	FCC Competitive[ii]	FCC Noncompetitive[iii]	Cox VA[iv]	Comcast VA[v]
	Jan. 1, 2004	Jan. 1, 2004	Jan. 1, 2004	Jan. 1, 2004	Jan. 1, 2004
Basic Service	$ 13.80	$ 14.58	$ 13.73	$ 12.70	$ 13.45
Expanded Basic (includes Basic)[vi]	**$ 41.04**	**$ 38.17**	**$ 41.29**	**$ 40.40**	**$ 44.85**
Converter & Remote Control	$ 4.28	$ 4.31	$ 4.27	$ 2.61	$ 2.59
Monthly Cable Rate[vii]	**$ 45.32**	**$ 42.48**	**$ 45.56**	**$ 43.01**	**$ 47.44**

[i] *2004 Cable Price Report* at Table 1.
[ii] *2004 Cable Price Report* at Table 3. Competitive rates are derived from communities in which the FCC has made a finding of effective competition.
[iii] *2004 Cable Price Report* at Table 3. Noncompetitive rates are derived from communities in which the FCC has not made a finding of effective competition.
[iv] Cox 2003 Annual Customer Notice – Prices Effective November 1, 2003.[45]
[v] Comcast FCC Form 1240 at Worksheet 8 - True-Up Rate Charged contains information for 12/01/03 to 11/30/04 (filed Nov. 29, 2004).[46] (Comcast Channel Lineup & Rates – Effective 1/04 lists the monthly rate for Expanded Basic as $19.00. However, the FCC Form 1240 True-Up Rate is listed as $13.45, and Comcast Channel Line-Up & Rates – Effective 8/03 and 10/04 list the Expanded Basic Rate as $13.45, consistent with the True-Up Rate. Therefore, the 1/04 Channel Lineup & Rates is presumed to contain a typographical error.)[47]
[vi] "Expanded Basic" is the combined costs of the Basic and Expanded Basic Service programming tiers. Expanded Basic cannot be purchased separately.
[vii] "Monthly Cable Rate" includes the cost of the Expanded Basic Service tier (in combination with the Basic Service Tier if the Basic Service Tier is sold separately), Analog Addressable Converter Box and Remote Control.

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[45] Attachment A – 5.

[46] Attachments B – 6.

[47] *See* Attachments B – 5, B –6, B – 8, B – 9 and B – 7.

Table 2 FCC Reported National Average Monthly Cable Rates As Compared To Fairfax County Monthly Cable Rates Jan. 2005					
Service Elements	FCC Overall[i]	FCC Competitive[ii]	FCC Noncompetitive[iii]	Cox VA[iv]	Comcast VA[v]
	Jan. 1, 2005	Jan. 1, 2005	Jan. 1, 2005	Jan. 1, 2005	Jan. 1, 2005
Basic Service	$ 14.30	$ 14.80	$ 14.25	$ 14.70	$ 13.45
Expanded Basic (includes Basic)[vi]	**$ 43.04**	**$ 40.15**	**$ 43.33**	**$ 40.40**	**$ 44.85**
Converter & Remote Control	$ 4.28	$ 4.54	$ 4.38	$ 3.50	$ 2.59
Monthly Cable Rate[vii]	**$ 45.32**	**$ 44.69**	**$ 47.71**	**$ 43.90**	**$ 47.44**

[i] *2005 Cable Price Report* at Table 1 (Basic and Expanded Basic); Table 5 (Analog Equipment Prices); and Table 6 (Average Monthly Price for Programming and Equipment).
[ii] *2005 Cable Price Report* at Tables 1, 5, and 6. Competitive rates are derived from communities in which the FCC has made a finding of effective competition and relieved cable operators from rate regulation.
[iii] *2005 Cable Price Report* at Tables 1, 5, and 6. Noncompetitive rates are derived from communities in which the FCC has not made a finding of effective competition.
[iv] Cox 2004 Annual Customer Notice – Prices Effective November 1, 2004.[48]
[v] Comcast Channel Lineup & Rates – Effective 10/04.[49]
[vi] "Expanded Basic" is the combined costs of the Basic and Expanded Basic Service programming tiers. Expanded Basic cannot be purchased separately.
[vii] "Monthly Cable Rate" includes the cost of the Expanded Basic Service tier (in combination with the Basic Service Tier if the Basic Service Tier is sold separately), Analog Addressable Converter Box and Remote Control.

Between January 1, 2004 and January 1, 2005, monthly cable rates in Fairfax County rose at a slower rate than all monthly cable rate increases reported by the Commission in areas without effective competition, with any form of effective competition, with effective competition from a second wireline cable provider, or with effective competition from a DBS provider. As the Commission makes more current cable pricing data available, the Commission may be able to use the following data supplied by Fairfax County as a test case to determine whether rates in Fairfax County are rising at a slower rate as compared to rates in "Noncompetitive Areas."

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[48] Attachment A – 4.

[49] Attachment B – 7.

Table 3 **Fairfax County Monthly Cable Rates As Compared to FCC National Average, Noncompetitive, Cable-Competitive, and DBS-Competitive Monthly Cable Rates, Jan 2004 and Jan. 2005.**						
Average Price for Programming and Equipment	Cox VA	Comcast VA	FCC Average/ Overall	FCC Noncompetitive	FCC Cable Competition	FCC DBS Competition
2004 Monthly Cable Rate[i]	$ 43.01	$ 47.44	$ 45.32	$ 45.56	$ 39.37	$ 43.94
2005 Monthly Cable Rate[ii]	$ 43.90	$ 47.44	$ 47.43	$ 47.71	$ 40.23	$ 47.77
2004 – 2005 Annual Change	$ 0.89	$ 0.00	$ 2.11	$ 2.15	$ 0.86	$ 3.83
2004 – 2005 Percentage Increase	**2.07%**	**0.00%**	**4.66%**	**4.72%**	**2.18%**	**8.72%**

[i] "Monthly Cable Rate" includes the cost of the Expanded Basic Service tier (in combination with the Basic Service Tier if the Basic Service Tier is sold separately), Analog Addressable Converter Box and Remote Control or Verizon's Standard Definition Digital Converter Box for Fairfax County. County Average source is Table 1 herein. FCC Average source is *2004 Cable Price Report* at Table 1 and all other FCC rates are from *2004 Cable Price Report* at Attachment 6.
[ii] County Average source is Table 2 herein. FCC data source is the *2005 Cable Price Report* at Table 6.

2. Competition Has Not Yet Reached the Majority of Fairfax County Households and Does Not Yet Appear to Be Restraining Monthly Cable Rates.

Head-to-head competition between wireline cable operators did not exist in Fairfax County prior to November 2005. During the period between January 1, 2004, and January 1, 2005, in which there was no direct head-to-head wireline cable competition, Cox VA's monthly cable rate rose by two percent but Comcast VA's monthly rate did not rise. Verizon VA provided almost no competition in 2005, and between January 1, 2005 and January 1, 2006, Cox VA's monthly cable rate rose by more than three percent and Comcast VA's monthly cable rate rose by almost eleven percent. Verizon offered service throughout 2006, but by the end of 2006, Fairfax County staff estimates that Verizon system will only serve one-third of Fairfax County households. During the period of limited head-to-head wireline cable competition, between January 1, 2006 and January 22, 2007, Cox VA monthly cable rates will rise by more than five percent, Comcast VA's monthly cable rates will rise by almost four percent, and Verizon VA's monthly cable rates will rise by more than nine percent. Thus, despite head-to-head competition from Verizon VA, albeit geographically limited, every cable provider in

Fairfax County has announced a rate increase in the past year and cable rates have risen at a faster rate as compared to when no head-to-head wireline cable competition existed in the County.[50] Moreover, as of January 22, 2007, Verizon VA will raise its total monthly cable rate for services and equipment to match exactly the $47.98 total monthly rate of its largest competitor Cox VA.[51]

Table 4
Fairfax County Monthly Cable Rates January 2004 to January 2006

Service Elements	January 1, 2004 to January 1, 2005				January 1, 2005 to January 22, 2006					
	2005 Noncompetitive Operators				2006 Competitive Operators					
	Cox VA[i] Jan. 1, 05	Annual % Change[ii]	Comcast VA[iii] Jan. 1, 05	Annual % Change	Cox VA[iv] Jan. 1, 06	Annual % Change	Comcast VA[v] Jan. 1, 06	Annual % Change	Verizon VA[vi] Jan. 22, 06	Annual % Change
Basic Service	$ 14.70	15.75%	$ 13.45	0.00%	$ 17.99	22.38%	$ 14.95	11.15%	$ 12.95	NA
Expanded Basic[vii]	$ 40.40	0.00%	$ 44.85	0.00%	$ 41.99	3.94%	$ 49.88	11.22%	$ 39.95	NA
Converter & Remote Control[viii]	$ 3.50	34.10%	$ 2.59	0.00%	$ 3.50	0.00%	$ 2.74	5.79%	$ 3.95	NA
Monthly Cable Rate[ix]	$ 43.90	2.07%	$ 47.44	0.00%	$ 45.49	3.62%	$ 52.62	10.92%	$ 43.90	NA

[i] Cox 2004 Annual Customer Notice – Prices Effective November 1, 2004.[52]
[ii] "Annual % Change" is the change as of the date shown compared to one year early ((Current Year – Previous Year) / Previous Year).
[iii] Comcast Channel Lineup & Rates – Effective 1/1/05.[53]
[iv] Cox 2005 Annual Customer Notice – Prices Effective November 1, 2005.[54]
[v] Letter from Marie Schuler, Director of Government & Community Affairs, Comcast Cable, to Walter Munster, Cable Regulatory Division, Fairfax County, Virginia (Nov. 1, 2005) at p.2.[55] Letter from Marie Schuler, Director of Government & Community Affairs, Comcast Cable, to Walter Munster, Director, Communications Policy and Regulation Division, Fairfax County, Virginia (May 27, 2005) at p.1.[56]
[vi] Verizon FiOS TV Rates & Packages (11/05).[57] Verizon's Expanded Basic includes channels offered as part of the other providers' digital tiers and Verizon only offers digital converter boxes.
[vii] "Expanded Basic" is the combined costs of the Basic and Expanded Basic Service programming tiers. Expanded Basic cannot be purchased separately. Comcast marketed this tier as "Basic Plus" in 2005 and as "Standard Basic" in 2006.
[viii] "Converter & Remote Control" includes Cox VA and Comcast VA's Analog Addressable Converter Box and Remote Control and Verizon's Standard Definition Digital Converter Box as Verizon does not offer analog converter boxes.
[ix] "Monthly Cable Rate" includes the cost of the Expanded Basic Service tier (in combination with the Basic Service Tier if the Basic Service Tier is sold separately), Analog Addressable Converter Box and Remote Control or Verizon's Standard Definition Digital Converter Box.

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[50] In addition, on December 28, 2006, Comcast VA notified the County that Comcast will increase its Expanded Basic and Converter Box rates effective March 1, 2007.

[51] Attachment A – 2, Cox 2006 Annual Customer Notice – Prices Effective November 1, 2006; Attachment C – 1, Letter from Paul Miller, Franchise Service Manager, Verizon VA, to Gail Condrick, Department of Cable Communications and Consumer Protection, Fairfax County, (Nov. 15, 2006);Attachment C – 2, Verizon Rates Effective 1/14/07; Attachment C – 8, Verizon FiOS TV rates & Packages (11/05).

[52] Attachment A – 4.

[53] Attachment B – 5.

Table 5 Fairfax County Announced Monthly Cable Rates January 2007						
Service Elements	Cox VA[i] Jan. 1, 2007	Annual Percentage Change[ii]	Comcast VA[iii] Jan. 1, 2007	Annual Percentage Change	Verizon VA[iv] Jan. 22, 2007	Annual Percentage Change
Basic Service	$ 17.99	0.00%	$ 14.95	0.00%	$ 12.99	0.31%
Expanded Basic Service[vi]	$ 43.99	4.76%	$ 51.88	4.01%	$ 42.99	7.61%
Converter & Remote Control[vii]	$ 3.99	14.00%	$ 2.84	3.65%	$ 4.99	26.33%
Monthly Cable Rate[viii]	**$ 47.98**	**5.47%**	**$ 54.72**	**3.99%**	**$ 47.98**	**9.29%**

[i] Cox 2006 Annual Customer Notice – Prices Effective November 1, 2006.[58]
[ii] "Annual Percentage Change" is the change as of the date shown compared to one year early ((Current Year – Previous Year) / Previous Year).
[iii] Comcast Reston Rates, Service Charges & Channel Lineup – Effective 10/06.[59]
[iv] Verizon FiOS TV 2006 Annual Customer Notification, Programming and Equipment Rates – Effective January 14, 2007.[60] Verizon's Expanded Basic includes channels offered as part of the other provider's Digital Tier and Verizon only offers digital converter boxes. In 2007, Verizon will market its service Tiers as FiOS TV Local (Basic) and FiOS TV Premier. Verizon's price increase is effective 1/14/07 for new customers or new services but will not affect rates of existing customers. Verizon subsequently verbally notified the County that the price increase would not take effect until 1/22/07.
[v] "Annual Change" is the change as of the date shown compared to one year early ((Current Year – Previous Year) / Previous Year).
[vi] "Expanded Basic" is the combined costs of the Basic and Expanded Basic Service programming tiers. Expanded Basic cannot be purchased separately. Comcast will market this tier as "Full Basic" beginning in 2007.
[vii] "Converter & Remote Control" includes Cox VA and Comcast VA's Analog Addressable Converter Box and Remote Control and Verizon's Standard Definition Digital Converter Box as Verizon does not offer analog converter boxes.
[viii] "Monthly Cable Rate" includes the cost of the Expanded Basic Service tier (in combination with the Basic Service Tier if the Basic Service Tier is sold separately), Analog Addressable Converter Box and Remote Control or Verizon's Standard Definition Digital Converter Box.

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54 Attachment A – 3.

55 Attachment B – 3.

56 Attachment B – 4.

57 Attachment B – 8.

58 Attachment A – 2.

59 Attachment B – 2.

60 Attachment C – 4.

Table 6 **Fairfax County Percentage Change in Monthly Cable Rates Between January 2004 and January 2007.**				
Service Elements	Cox VA[i]	Comcast VA[i]	Verizon VA[ii]	
	Jan. 1, 2004 – Jan. 1, 2007	Jan. 1, 2004 – Jan. 1, 2007	Jan. 1, 2004 – Jan. 1, 2006	Jan. 1, 2006 – Jan. 22, 2007
Basic Service	41.65 %	11.15 %		0.31 %
Expanded Basic Service[iii]	8.89 %	15.67 %		7.61 %
Converter & Remote Control[iv]	52.87 %	9.65 %		26.33 %
Monthly Cable Rate[v]	**11.56 %**	**15.35 %**	**NA**	**9.29 %**

[i] Tables 1 and 4 herein.
[ii] Table 4 herein.
[iii] "Expanded Basic" is the combined costs of the Basic and Expanded Basic Service programming tiers. Expanded Basic cannot be purchased separately.
[iv] "Converter & Remote Control" includes Cox VA and Comcast VA's Analog Addressable Converter Box and Remote Control and Verizon's Standard Definition Digital Converter Box as Verizon does not offer analog converter boxes.
[v] "Monthly Cable Rate" includes the cost of the Expanded Basic Service tier (in combination with the Basic Service Tier if the Basic Service Tier is sold separately), Analog Addressable Converter Box and Remote Control or Verizon's Standard Definition Digital Converter Box.

3. Impact of Nascent Competition On Cable Rates Is Uncertain.

The Commission should not premise its attempts to restrict local franchising on the argument that competitive wireline cable competition will reduce consumer cable prices until a more reliable factual record on cable pricing can be developed. Given that head-to-head wireline cable competition is in its nascent stage, sufficient time has not elapsed to compile a comprehensive record regarding the impact of such competition on monthly cable rates. In the *2004* and *2005 Cable Price Reports*, the Commission reported that in areas with effective competition, average monthly cable rates (programming services and equipment combined rates) were 15.7% and 17% lower than in areas not subject to effective competition.[61] Verizon cites this rate differential from the Commission's *2004 Cable Price Report* and other circumstantial

[61] *2004 Cable Price Report* at Table 4; *2005 Cable Price Report* at ¶ 2. Fairfax County notes, however, that without explanation, in the *2005 Cable Price Report*, the Commission reports average monthly rates in effective as of January 1, 2004, that vary from average monthly rates in effective as of January 1, 2004, as reported in *2004 Cable Price Report.*

data as evidence that "competition works" to create "reduced prices."[62] Fairfax County disputes this argument – the *2004 Cable Price Report* and the *2005 Cable Price Report* are not predictors of the future impact of competition on cable pricing, but rather are only a measure of past rates. Other commenters have cited promotional rates as evidence that competition will dramatically lower rates.[63] But when the impact of nascent competition on non-promotional rates is assessed, as demonstrated in the preceding Tables, there is no apparent evidence to suggest that nascent competition lowers stand alone cable rates. And absent the release of more current data by the Commission that would indicate otherwise, it is difficult to determine whether nascent competition is restraining the growth of cable rates, as compared to other franchise areas without wireline cable competition.

The Board recognizes that total price is but one measure of competitive impact. Competition can bring consumers greater video choice and spur improved customer service.[64] There may also be compelling economic incentives for new competitors to develop business plans that match incumbent prices and offer more channels and services, such as expanded

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[62] Verizon Comments at 9, 8.

[63] FTTH Council Comments at 11-12.

[64] Verizon Comments at 8. Moreover, Verizon VA's all digital system is capable of carrying more channels in the expanded basic tier, whereas Cox VA and Comcast VA must place additional channels beyond each systems' analog capacity in a digital tier, and charge consumer additional fees to receive digital tier programming. The County notes that the Commission's *2004 Cable Price Report* calculates the cost per channel, but in part because this implies that all channels are of equal value and that a cable system offering more channels with lower viewership is providing a better per channel value than a system offering fewer but more popular channels at the same price, the Commission opted not to report per channel costs in the *2005 Cable Price Report*. Fairfax County suggests that the Commission consider comparing the monthly cable price to receive the top fifteen programming services by prime time rating, *i.e.*, the most popular non-broadcast channels. These programming services as reported in the *2004 Cable Price Report* are in order: Nickelodeon, TNT, Nick at Night, USA Network, Disney, Lifetime, Toon Disney, TBS, Spike TV, Fox News Channel, History Channel, ESPN, MTV, Discovery Channel and Sci Fi Channel.

video-on-demand libraries, rather than business plans that dramatically lower prices, the rates of capital recovery, and per subscriber revenues. In this proceeding, Verizon reported that it will spend almost $1,600 per home to deploy its fiber network, and the FTTH Council reports that the industry will expend over $11 billion during 2006 in capital improvements.[65] The *2005 Cable Price Report* did not likely reflect significant fiber network costs, but future cable pricing data likely will,[66] and it may be that high capital costs of deploying new fiber optic systems offset the potential impact of competition on stand alone monthly cable rates.

Yet, the Board must agree with Comcast that the Commission's policy analysis must "be driven by marketplace facts, not preconceived notions."[67] Just as there is little evidence to support claims that elimination of local franchising and build-out requirements will spur deployment, there is scant evidence that competition will reduce stand alone cable rates, and indeed is not consistent with developments in Fairfax County.[68]

IV. THE 2006 VIRGINIA CABLE FRANCHISING LEGISLATION HAS NOT LED TO A MARKED INCREASE IN CABLE SYSTEM DEPLOYMENT IN VIRGINIA.

Verizon VA initially approached the County to negotiate a cable franchise agreement in late 2004. However, Verizon VA immediately abandoned that effort and instead worked to get legislation introduced in the Virginia General Assembly to eliminate or dramatically restrict local cable franchising. While that legislation was pending, Verizon VA made no further attempt to

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[65] Verizon Comments at 10; FTTH Council Comments at 27.

[66] Verizon began offering video service on September 22, 2005, *see* FTTP Chronology *available at* http://newscenter.verizon.com/kit/fiber/events.html; and AT&T began video service in December 2005, *see* AT&T U-Verse Timeline *available at* http://www.att.com/Uverse/files/UverseTimeline.pdf.

[67] Comcast Comments at 6.

[68] *See* Table 5 herein.

negotiate a franchise with the County. At that time, the County and Comcast VA were concluding their negotiations on a renewal franchise, and Comcast VA suspended its negotiations with the County to focus its resources on the legislature. After that 2005 legislation proved unsuccessful, Comcast VA resumed its negotiations and the Board approved the Comcast renewal franchise agreement in May 2005. Verizon VA also re-initiated contact with the County and undertook negotiations, and the Board awarded Verizon VA its cable franchise in September 2005.

Soon after, however, Verizon again lobbied during the 2006 Virginia state legislative session to limit the authority of local governments in the state to negotiate franchise terms and conditions. Fairfax County opposed such legislation unless it was amended to preserve more local authority. The proposed legislation subsequently was amended to include a grandfather provision to preserve the terms of existing cable franchise agreements in any locality that granted a competitive cable franchise before the effective date of the legislation. Verizon and other cable operators did not oppose the grandfather provision but added an additional provision that would allow existing franchisees to demand all applicable terms and conditions in their entirety granted to any future franchisee in lieu of an existing franchise. House Bill 1404 and Senate Bill 706 were approved by the Virginia General Assembly and subsequently enacted into the Virginia Code.

As the Commission voted to issue new regulations that reportedly would impose a shot clock on negotiations, the County is concerned that the Commission's analysis in the *Notice* of time limits contained in the new Virginia legislation suffers from a lack of detail. In footnote 13 of the *Notice*, the Commission summarizes: "The Virginia statute allows telecommunications providers with existing authority to public rights-of-way to begin providing video service within

75 days of filing a request to negotiate with a local franchising authority." (emphasis added) As added by the new legislation, the relevant Virginia statute states: "An applicant shall request and make itself available to participate in cable franchise negotiations ... at least 45 calendar days prior to filing a notice electing an ordinance franchise."[69] There is nothing to suggest that the state requirement to make one's self available to participate in cable franchise negotiations was intended to be a mere *pro forma* notice requirement. As previously recounted in the County's Franchising NPRM Comments, a provider's commitment to allocate sufficient staff resources and to meaningfully engage in negotiations is a determinative factor in a successful franchise negotiation.[70] The County urges the Commission to consider these factors in its franchising requirement deliberations.

In addition, as a practical matter, the County notes that a significant period of time may elapse between the date on which an applicant files a request to begin negotiations and the date an applicant actually makes itself available to participate in negotiations. A fourth cable operator recently notified the County that it was making itself available to participate in negotiations. Within seven business days, Fairfax County responded by providing potential meeting dates for the following week. But due to the applicant's limited staff resources and scheduling conflicts, the applicant held its initial negotiation meeting with the County some sixty days after the date its initial notice was received by the County.

Furthermore, the Virginia statute continues: "Thereafter [following the 45 days in which the applicant has made itself available to participate in negotiations], an applicant ... shall file notice ... that it elects to receive an ordinance cable franchise at least 30 days prior to offering

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[69] Va. Code Ann. § 15.2-2108.21(C) (2006).

[70] County's Franchising NPRM Comments at 5-6.

cable in such locality."[71] Although the County is aware of a provider filing two such elections in other jurisdictions, in both instances the provider opted to continue with the negotiation process.[72] It is still too early to measure the full impact of the new state legislation, but it appears that Verizon has continued to negotiate franchise agreements rather than to demand ordinance cable franchises under the new state law.[73]

Finally, in response to the Commission's inquiry, "Are state or local regulatory issues the initial determinate in whether LECs choose to enter a market or not?,"[74] the Board notes that the available evidence seems to suggest that restrictions on local franchising authority have not

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[71] Va. Code Ann. § 15.2-2108.21(C) (2006).

[72] Verizon now has a total of fourteen negotiated cable franchises in Virginia. Press Release, Verizon Communications Inc., "*Consumer Choice for Cable Service Leaps Forward in Washington Metropolitan Area – Verizon Obtains Franchises in Arlington and Loudoun Counties; Region's Franchises Now Total 13, Covering 2.4 Million Potential Viewers*," Jun. 21, 2006, *available at* http://newscenter.verizon.com/press-releases/verizon/2006/page.jsp?itemID=29670050; and Press Release, Verizon Communications Inc., *Leesburg, Virginia, Consumers Major Step Closer to Real Choice for Cable TV – Verizon Obtains 13th Washington Metro Area Cable Franchise; Expects to Quickly Offer FiOS TV to Leesburg Residents*, Jun. 28, 2006, *available at* http://newscenter.verizon.com/press-releases/verizon/2006/page.jsp?itemID=29669918. Press Release, Verizon Communications Inc., *Consumers in Spotsylvania County, Virginia, Major Step Closer to Real Choice for Cable TV –Verizon Obtains 14th Virginia Cable Franchise; Expects to Begin Offering FiOS TV to County Residents in Next Few Weeks*, Oct. 25, 2006, *available at* http://newscenter.verizon.com/press-releases/verizon/2006/consumers-in-spotsylvania.html.

[73] Since the new state law took effect, Verizon reported that it negotiated two additional Virginia cable franchises in the Town of Vienna and Spotsylvania County. Press Release, Verizon Communications Inc., "*Vienna, Virginia, Consumers Major Step Closer to Real Choice for Cable TV – Company Obtains Cable Franchise; Will Begin All-Fiber Network Upgrade, Offering FiOS Internet, TV Service to Most of Town Over Next Year*," Sept. 12, 2006, *available at* http://newscenter.verizon.com/press-releases/verizon/2006/vienna-virginia-consumers.html; Press Release, Verizon Communications Inc., *Consumers in Spotsylvania County, Virginia, Major Step Closer to Real Choice for Cable TV –Verizon Obtains 14th Virginia Cable Franchise; Expects to Begin Offering FiOS TV to County Residents in Next Few Weeks*, Oct. 25, 2006, *available at* http://newscenter.verizon.com/press-releases/verizon/2006/consumers-in-spotsylvania.html.

[74] *Notice* at ¶ 49.

resulted in a significant or even marked increase in competitive deployment.[75] Perhaps the more salient issue the Commission should consider is: To what extent does the date a provider's system will be able to offer service drive the provider's decision to engage in the regulatory process? As the County previously reported to the Commission, because Verizon opted to focus its efforts on lobbying for state legislation, eight months elapsed between August 2004, when Verizon VA first expressed to the County an interest in negotiating a franchise, and April 2005, when Verizon VA's first negotiation meeting with the County was held. One week after this first negotiation, Verizon informed the County that its system could be capable of delivering video service by October or November 2006. The County and Verizon VA reviewed the Board's meeting schedule, local public hearing requirements, and State law requirements for public notice, and then established a negotiating schedule that would allow Verizon VA to offer service on October 1, 2006. The parties were able to negotiate all major terms and conditions in approximately seven weeks, and in less than three months, completed negotiation of a proposed franchise agreement for the Board's consideration.[76] Again, the County emphasizes that the provider's decision to devote sufficient staff resources, and its willingness to engage in meaningful negotiations, were essential components of the negotiation process.[77] Thus, the Commission should consider carefully the motivation and incentives for providers to fully engage in the negotiation process as part of any inquiry into the impact of the local franchise process on entry into local markets.[78]

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[75] *See* NCTA Comments at 17. In Texas, where Verizon and AT&T have both been granted statewide franchises, Verizon serves fewer than 5% of total homes in the state and AT&T serves fewer than half of one percent.

[76] Fairfax County Franchising NPRM Comments at 5-6.

[77] *Id.*

[78] *See Notice* at ¶ 12.

V. LOCALLY ORIGINATED AND FOREIGN LANGUAGE PROGRAMMING

Consistent with authority granted by Congress, Fairfax County has negotiated channel capacity and capital grant support for public, educational, and governmental access ("PEG") channels and institutional network use in initial and renewal franchises.[79] The franchise agreements between Fairfax County and cable operators Cox VA, Comcast VA and Verizon VA require each cable operator to set aside up to eighteen channels on its cable system for PEG use. Currently, each cable operator provides four public access channels,[80] three educational channels programmed by the Fairfax County Public School system, two higher education educational access channels programmed by George Mason University and Northern Virginia Community College, and two channels for governmental use programmed by the Fairfax County government.[81] The remainder of the set aside may be activated by the Board based on future community needs.[82] On all cable systems in Fairfax County, the Fairfax County PEG channels are the largest source of locally originated programming and a significant source of foreign language programming both produced locally and originally in a language other than English. Moreover, under terms of the franchise agreements negotiated by the County, almost all of this

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[79] 47 U.S.C. §§ 531(b) and 531(c); *see also* 47 U.S.C. § 542(g)(2)(C).

[80] Verizon and Comcast are currently negotiating to permit Verizon VA to carry Channel 28 Reston Community TV. While other public access channels in Fairfax County are independently-run non-profit organizations, Reston Community TV is owned and operated by Comcast VA. The Fairfax County Access Corporation ("FCAC") is developing a promotional campaign to facilitate carriage of FCAC's foreign language channel on Comcast VA's Reston Virginia system in 2007.

[81] The FCPS Teacher Channel 11 and Fairfax County's Fairfax County Training Network channel are closed training channels transmitted over the cable systems in scrambled format and may viewed only in County and FCPS facilities using specialized receivers. The County will migrate these training channels to the County's institutional network by June 2007.

[82] Cox Franchise Agreement at Sec. 7(a); Comcast VA Franchise Agreement at Sec. 7(a); and Verizon VA Franchise Agreement Sec. 6.1.

locally originated and foreign language programming is carried on each operators' most affordable and accessible Basic Service Tier.

The Fairfax County Public Schools ("FCPS") educational access channels provide programming devoted to children's programming and to local and community affairs programming as it relates to the Fairfax County public school system. The FCPS instructional programs enhance the educational experience of K-12 students, and the community affairs programming keeps both parents and County taxpayers informed about practices, policies and issues affecting the public school system. FCPS educational access channels provide 52 hours per month of first-run locally originated programming of which 2.5 hours is public information originally produced in Arabic, Farsi, Korean, Spanish, and Vietnamese, and 8 hours of which is provided with real-time closed captioning. FCPS educational channels also provide 13.5 hours per month of first-run locally originated foreign language instruction. All of the FCPS foreign language programming is designed to inform non-English speaking community members and parents about the public school system. This information is also often essential in improving the experience of English as second language students. Overall, FCPS channels each month provide 433 hours of locally originated programming, 89.5 hours of foreign language programming and 447 hours of closed captioned programming.

The Northern Virginia Community College education access channel, NVCC-TV, provides 96 hours per month of first-run locally originated programming, of which 8 hours is provided with real-time closed captioning. Overall, each month NVCC-TV provides 152 hours of locally originated programming, 16 hours of foreign language programming, and 184 hours of closed captioned programming. The George Mason University education access channel, GMU-

TV, provides 36 hours per month of first-run locally originated programming and 82 hours per month of locally originated programming.

Fairfax County Government Channel 16, FCGC-16, each month provides 83 hours of first-run locally originated programming, 21 hours of which is public affairs programming provided with closed captioning in real time. FCGC-16 also provides 13.5 hours per month of locally originated programming produced in Spanish, Korean, and Arabic, and 42.5 hours per month of programming with real-time closed captioning. Overall, each month FCGC-16 provides 350 hours of locally originated programming, 13.5 hours of foreign language programming, and 345 hours of closed captioned programming.

The Reston Community TV Channel 28 public access channel, RCTV-28, each month provides 45 hours of first-run locally originated programming, including community meetings, festivals and sporting events. RCTV-28 provides production and editing training to the general public, and airs locally originated programming produced by members of the general public on a space available, first-come first-served basis. Overall, RCTV-28 each month provides 90 hours of locally originated programming and 2 hours of foreign language programming.

Fairfax Public Access operates three public access channels – FPA Channel 10, providing public access programming, WRLD 30, providing international and world culture programming, and WEBR, cable radio programming. Combined, FPA Channel 10 and WRLD 30 each month provide 84 hours of first-run locally originated programming, of which 45 hours are produced in Korean, Vietnamese, Spanish, Russian, Eritrean, Ethiopian, Farsi, and Arabic. Overall, each month FPA Channel 10 and WRLD 30 provide 252 hours of locally originated programming and 135 hours of foreign language programming. In addition, WEBR each month provides 332 hours of first-run locally originated programming, of which 45 hours are produced in languages other than English.

While each cable system carries national broadcast network affiliates and local public broadcast system stations, these broadcast channels provide primarily non-locally originated nationally syndicated programming and/or regional news programming produced to serve the four million residents of the Washington DC metro area market.[83] Each month, the 1,691 hours of locally-originated Fairfax County programming represents a bulwark of locally-originated programming provided to Fairfax County's million plus residents. In addition, the 301 hours per month of programming produced in languages other than English and the 976 hours of closed captioned programming provided each month of Fairfax County PEG channels represent important avenues of information for the County's diverse population.

VI. TECHNICAL ISSUES

Fairfax County urges the Commission to more aggressively exercise its regulatory authority in regard to resolving issues relating to consumer equipment, navigation devices, CableCARDS, and technical standards. In the ten years since Congress authorized the Consumer Electronics Equipment Compatibility and Competitive Availability of Navigation Devices provisions of the Telecommunications Act of 1996,[84] the Commission has yet to implement regulations to ensure that consumers fully realize the goals of these provisions. That is to say, in the ten years since Congress directed the Commission to address these issues, Fairfax County consumers still do not have the ability to view all cable channels – including premium channels – directly on their television receivers without passing through a converter box, cannot use all

[83] Source: Media Info Center, *available at* http://www.mediainfocenter.org/compare/top50/#radio

features of their televisions – including picture-in-picture – when a converter box is used, and cannot purchase a commercially available converter box to view all programming – including electronic programming guides and video-on-demand services. As noted above, the necessity to rent a converter box represents almost eight percent of the end cost to consumers of analog cable service and seven percent of the end cost to consumers of digital cable service.[85]

A. Emergency Alert System and Emergency Message System Capabilities.

Although not specifically raised as an issue by the Commission in the Notice, Fairfax County requests that the Commission also include in its Report to Congress information regarding emergency alert capabilities of cable systems with regional or national instead of franchise area headends. If a cable operator's headend serves a specific franchise area, a local emergency override can be utilized to provide specific local emergency information, such as tornado warnings, and can direct viewers to turn to local government access channels for additional local emergency information, such as boil water alerts after a hurricane or storm damage to water systems. It is unclear at this time whether cable operators employing super headends to serve large states or multiple states encompassing a large geographic area will have adequate capabilities to provide sufficiently localized emergency information.

B. E-911 and Battery Back-Up Systems For Cable Telephony Phone Service.

Consistent with existing County policy, Fairfax County does not attempt to promote any specific telephone, broadband or Internet technology, but rather attempts to provide consumers with easy to understand information about different technologies so that consumers may make informed decisions about their communication service providers. In 2006, the Fairfax County

[84] 47 U.S.C. §§ 544a and 549.

Department of Cable Communications and Consumer Protection worked with all three franchised cable operators to produce "Connecting Your Home," an overview of emerging communications technologies and their impact on Fairfax County telephone, cable television, and internet subscribers. "Connecting Your Home" information was cablecast over Fairfax County Government Channel 16,[86] produced as a printed brochure, and posted onto the County's website.[87] Working with the County's cable operators, the County provided the following information regarding E-911 service and battery back up systems to the general public:[88]

[85] *See* table 5 herein.

[86] This video program is available as video on demand at http://www.fairfaxcounty.gov /cable/channel16/asx/connecting_home.asx.

[87] *Available at* http://www.fairfaxcounty.gov/cable/channel16/connecting/welcome.htm.

[88] *Available at* http://www.fairfaxcounty.gov/cable/channel16/connecting/ph_summary.pdf.

Service Provided / Condition Encountered	Cox Digital Voice	Verizon (POTS) Traditional	Verizon POTS via FTTP	Verizon VoiceWing
VOIP Based?	NO	NO	NO	Yes. Customer must have broadband.
If the power fails in my house is there a backup battery located inside my house that will provide power for me to make a call from a standard phone?* Backup hours available?	Yes, back-up power is supplied for 4 to 8 hours to customers with a battery -- or IVP -- in their home	Not Applicable Powered by Central Office	YES Up to 8 hours	NO
If the power fails in my house, does the provider supply external power for me to make a call from a standard phone?* Hours of backup should provider power also fail (Hrs).	Yes, back-up power is supplied via a generator for customers with external power sources	YES	No, but the battery backup supplies up to 8 hours	NO
If power fails in the home, can 911 be called?*	Yes, while provider power lasts	YES	YES Up to 8 hours	NO
E911 Capability*(emergency operator can locate where I am calling from)	YES	YES	YES	YES
If Internet broadband service is disabled (not power) can 911 be called?	YES	YES	YES	NO
If provider network is congested, can 911 be called?	YES	YES	YES	YES
Is a Fax Machine Compatible with this service?	YES	YES	YES	Contact Verizon
Under what conditions will my Medical Alarm dialer not operate?	Full system failure	Contact Verizon	Contact Verizon	Contact Verizon
Under what conditions will my Home Alarm not operate with this service?	Full system failure	Contact Verizon	Contact Verizon	Contact Verizon

*If your telephone (for example, cordless phone) usually requires additional power from the household electricity supply (power outlet) to operate, you should be aware that if there is a power failure in your home your telephone may not work. It is best to keep a traditional or "standard" telephone handy that can be used during such circumstances that normally only requires to be connected to a telephone jack to operate.

VII. CONCLUSION.

Local franchising has had a positive impact for consumers in Fairfax County. Because of the reasonable build-out requirements negotiated by the County, all households will have access to two wireline competitors providing video and high speed Internet access within the next six years, and cable operators will make such service available to at least eighty-five percent of all County households without line extension charges.

Competition does appear to be impacting bundled service packages, but there is insufficient data to determine whether competition is slowing the growth of cable rates. However, there is no evidence to date in Fairfax County that competition has lowered non-promotional cable rates. Additional data, including an updated *Cable Price Report* from the Commission, is needed to more fully evaluate the impact of competition on cable pricing, and it is too early to determine whether the 2006 Virginia cable franchising legislation is improving deployment or whether deployment continues to be driven by providers' technical abilities and financial resources.

Finally, Fairfax County notes that local public, educational, and governmental access channels are important sources of local, foreign language and closed captioned programming and emergency information. The Commission should consider these important public policy considerations in any related cable franchising proceedings.

Respectfully submitted,

FAIRFAX COUNTY VIRGINIA

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Fairfax County Reply Comment Attachments
MB Docket No. 06-189

Attachment A – Cox VA Rate & Channel Line-Up Information

A - 1. Cox Connections Bundle Advertisement (offer ends January 8, 2007).

A - 2. Cox 2006 Annual Customer Notice – Prices Effective November 1, 2006.

A - 3. Cox 2005 Annual Customer Notice – Prices Effective November 1, 2005.

A - 4. Cox 2004 Annual Customer Notice – Prices Effective November 1, 2004.

A - 5. Cox 2003 Annual Customer Notice – Prices Effective November 1, 2003.

Attachment B – Comcast VA Rate & Channel Line-Up Information

B - 1. Letter from Marie Schuler, Director of Government & Community Affairs, Comcast Cable, to Gail Condrick, Cable Regulatory Division, Fairfax County (Dec. 28, 2006).

B - 2. Comcast Reston Rates, Service Charges & Channel Lineup – Effective 10/06.

B - 3. Letter from Marie Schuler, Director of Government & Community Affairs, Comcast Cable, to Walter Munster, Cable Regulatory Division, Fairfax County, Virginia (Nov. 1, 2005).

B - 4. Letter from Marie Schuler, Director of Government & Community Affairs, Comcast Cable, to Walter Munster, Director, Communications Policy and Regulation Division, Fairfax County, Virginia (May 27, 2005).

B - 5. Comcast Channel Line-Up & Rates – Effective 1/05.

B - 6. Comcast FCC Form 1240 at Worksheet 8 - True-Up Rate for 12/01/03 to 11/30/04 (Nov. 29, 2004).

B - 7. Comcast Channel Line-Up & Rates – Effective 10/04.

B - 8. Comcast Channel Lineup & Rates – Effective 1/04.

B - 9. Comcast Channel Line-Up & Rates – Effective 8/03.

Attachment C – Verizon VA Rate & Channel Line-Up Information

C - 1. Letter from Paul Miller, Franchise Service Manager, Verizon VA, to Gail Condrick, Department of Cable Communications and Consumer Protection, Fairfax County, (Nov. 15, 2006).

C - 2. Verizon Rates Effective 1/14/07, attachment to Letter from Paul Miller, Franchise Service Manager, Verizon VA, to Gail Condrick, Department of Cable Communications and Consumer Protection, Fairfax County, (Nov. 15, 2006).

C - 3. Letter from Paul Miller, Franchise Service Manager, Verizon VA, to Director of Communications, Fairfax County, (Nov. 20, 2006).

C - 4. Verizon FiOS TV 2006 Annual Customer Notification: Programming and Equipment Rates – Effective January 14, 2007, Letter from Paul Miller, Franchise Service Manager, Verizon VA, to Director of Communications, Fairfax County, (Nov. 20, 2006).

C - 5. FiOS Video/Internet/Phone Advertisement (Expires 12/31/06).

C - 6. FiOS Internet/Phone Advertisement (Expires 8/31/06).

C - 7. Verizon FiOS TV Channel Line Up, Fairfax County/Falls Church/Herndon Channel Lineup (1/06).

C - 8. Verizon FiOS TV rates & Packages (11/05).