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CABLE AND VIDEO: COMPETITIVE CHOICES

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BUSINESS RIGHTS, AND COMPETITION

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CABLE AND VIDEO: COMPETITIVE CHOICES

WEDNESDAY, APRIL 4, 2001

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, BUSINESS RIGHTS, AND COMPETITION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:04 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Mike DeWine, Chairman of the Subcommittee, presiding.

OPENING STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Present: Senators DeWine, Specter, and Kohl.

Chairman DEWINE. Good morning. Let me welcome all of you to our hearing this morning on competitive choices in the cable and multichannel video industry.

Since I became Chairman of this Subcommittee, we have examined the competitive status of the cable industry on several different occasions. We do so again today in our oversight role in an effort to raise questions about competition and other concerns that remain unresolved in the industry.

We must view today's competitive conditions in the context of the deregulation of cable rates resulting from the Telecommunications Act of 1996. Under that law, rate regulation ended for many small cable operators, with most remaining services being deregulated in 1999. The results of this deregulation appear to me at least to be mixed.

Deregulation appears to have done little to halt the trend of increasing cable rates. Understandably, many cable viewers are frustrated with these rates, rates that continue to rise at a pace of approximately three times the rate of inflation. Critics of the industry blame these rate increases on the lack of competition, and believe that the industry is taking advantage of consumers.

In response, many within the industry believe that deregulation has been a success and that competition is, in fact, accelerating. These people continue to argue that rate increases are not a result of monopoly power, but are justified by higher programming costs and expensive system and equipment upgrades that are required to provide broadband services, as envisioned under the Telecommunications Act. They also, I might add, say that the consumer is getting more channels and getting more product.

This is one issue that we will explore today. In doing so, I would like to hear what our witnesses believe accounts for the continuing

increases in cable rates. Whatever the reasons, however, it is clear that we did not anticipate such extensive and ongoing rate inflation when the Congress passed the Telecommunications Act. As a result, we now must ask, can consumers expect to see cable rates decrease any time soon, or are they going to continue to see cable rates increase and increase and increase?

Notwithstanding the rate hikes, cable competition does seem to be increasing to some extent, mostly due to the growing success of direct broadcast satellite service. In fact, some reports indicate that the majority of new subscribers to multichannel video services are choosing DBS over cable. Recent estimates indicate that DBS has captured close to 17 percent of the total multichannel video market.

Several questions, however, remain concerning the degree of competition that DBS is providing to cable television. Some consumers can't receive DBS because of technical problems, and DBS does not have sufficient capacity to provide local broadcast channels in many areas. Finally, it is unclear to what extent DBS is able to provide true price competition to basic cable television service because of the up-front costs consumers must bear when switching to DBS service. I hope today that we can gain a better understanding of these a competitive issues during this hearing.

Another area we will be discussing is the competition between current incumbent cable providers and the so-called overbuilders, companies seeking to build new cable systems to compete directly with the cable systems already operating in a given service area.

In the areas where overbuilders have broken into the market and started a head-to-head competition with incumbent cable providers, consumers have benefited. This competition offers consumers more options and ultimately better service and lower rates. Unfortunately, it is very difficult for potential overbuilders to gain widespread entrance into existing cable markets. I would like to examine the reasons why we haven't seen more overbuilder companies and the kind of cable competition that they would bring to the market.

In summary, consumers of cable and satellite continue to have questions—questions about competition, questions about service, questions about rates. It is my hope that through this hearing we can provide consumers with some answers on the state of the industry today and how it will serve consumers better in the future.

Let me at this point turn to our ranking minority member of the Subcommittee, Senator Herb Kohl.

Senator Kohl?

STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. I thank you, Mr. Chairman, for holding this hearing today. This is an important time for us to consider competition in the cable television industry. American consumers continue to face rising cable rates and they don't like it. Price hikes are almost as predictable as changes in the seasons.

In 1996, we passed the Telecommunications Act in part to increase cable competition, but it has not lived up to its promise. Phone companies tried to compete with cable, but have since with-

drawn. What is worse is that cable rates have climbed enormously since passage of the Telecom Act.

We know that cable has made huge infrastructure investments, for which they deserve credit. We also know that programming costs have increased, but the cable's industry's cash-flow per subscriber, which is roughly the equivalent of profit, has increased 33 percent since the Telecom Act.

Compare the cable price increases to the regular price decreases we see in consumer electronics. From televisions to VCRs, computers to stereos, almost every electronic device today is cheaper and better than it was 10 years ago. So the average consumer has a simple question, which is when will my cable rates go down?

Today's hearing will examine how we can bring more competition to cable. Price and service competition is the best way to assure the best deal for consumers, but perhaps it is time to do more to open up this market to competition.

There is some emerging competition to cable. Thanks in part to the Satellite Home Viewer Improvement Act that we passed last Congress, satellite has become a stronger competitor. By allowing satellite providers to offer local channels for the first time, satellite has become a more viable choice for many consumers. And in a few cities, startup head-to-head competitors like our witness here today, RCN, have built new cable systems to compete with the incumbent operators with encouraging results.

Despite these developments, the competitive situation in the cable industry is far from ideal. Satellite services appear to have little effect on cable rates, since the cost of satellite is generally the same as expanded basic cable service.

Furthermore, satellite service is often unavailable to consumers in densely populated urban areas, particularly those who live in apartment buildings. New cable companies are up and running, but only in a few locations, so their positive effect on competition has been limited.

The best way to ensure that consumers pay the lowest prices possible and have the highest quality of service is to increase the competitive choices. Perhaps Congress can take steps to help level the playing field. We should consider three simple proposals that may increase competition.

First, we should strongly consider extending the life of the program access rules beyond 2002, and maybe we can make them even better by closing loopholes that permit certain exclusive deals.

Second, the time has come to consider building access legislation that will open the bottleneck blocking the last mile into the home.

Finally, we need to explore the lack of competition in the so-called set-top box industry, the charges for which may account for up to 10 percent of a consumer's monthly cable bill. If we are serious about unleashing competition, then we need a plan of action and not rhetoric to do just that.

That being said, we shouldn't ignore the real improvements made by the cable industry. Cable companies today offer more and better service than they did 10 years ago. Companies like Charter Communications have done a great deal to serve their consumers. In the third quarter of last year alone, Charter invested over $74 million to upgrade its cable infrastructure in Wisconsin. Charter

serves over 250 communities in Wisconsin and deserves credit for doing well, and we thank Mr. Kent for appearing here today.

We thank all the witnesses for appearing before this Subcommittee today. We look forward to hearing what our distinguished panel has to say about how we can bring more competition to the cable television market.

Thank you, Mr. Chairman.

Chairman DEWINE. Senator Kohl, thank you very much.

We will turn now to Senator Specter.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chairman, and I thank you for convening this hearing on a very important subject to America's consumers—television, to which America is addicted and a great deal of their service comes from cable or satellite.

When we passed the Telecommunications Act, there were very forceful assurances that there would be competition. I had expected long ago that there would be competitive cable lines running to my house and to the houses of other Philadelphians and Pennsylvanians and Americans, and that has not happened.

Where there is a monopoly, the practice in America is to have regulation, in Pennsylvania through the Public Utilities Commission. However, Congress relied upon the representations of the industry that there would be competition and it has not happened. In fact, it may be that there have been very direct efforts to thwart competition.

I am very concerned, Mr. Chairman, that a number of invitees have not responded—Time Warner, Comcast and AT&T, according to your staff. There are ways to assure attendance other than by invitation which I think has to be considered by this Subcommittee if we are to have people present to give us answers to allegations which are present from those who are here.

I had considered having a field hearing in Philadelphia on some of these issues and had deferred until the Subcommittee held this hearing. In anticipation of this hearing, I held an informal meeting in my office on March 26th, and one of the concerns that I had is that RCN had made an effort to provide cable competition in Philadelphia and in a sequence of events starting in June 1998 until February 14, 2001, RCN withdrew its proposal, citing delays in having action taken by the requisite authorities. That is a matter of enormous concern to me.

I am served by Old Wade, now Time Warner, but I have real questions about the quality of service. I have a constituent who can never get the cable company on the telephone, and she is a very important constituent because when I come home that is all I hear about. I won't detail the problems that we have had with our cable company. I don't pay as much attention as I should to the bill, but I wonder about the bill in light of the absence of competition.

When we had the informal hearing, officials from RCN told me about problems that they have in terms of getting the sports network, SportsNet, and they were only able to get it on a 3- to 5-month renewal period, which was a material handicap in dealing with their customers. Comcast at that meeting made the disclosure

that they were prepared to give a long-term arrangement. But I wondered why that commitment had to come at a meeting in a Senator's office, why that commitment couldn't come between the parties.

The Congress and the Senate and this Subcommittee would much prefer not to have these hearings and not to be involved in the activities of these private concerns, but that requires a modicum of good faith and negotiation among the parties so that the Senators don't have to intervene.

We have got a lot of other issues on our plate which we have to take care of, and when we are called into these meetings we don't come with a whole lot of composure and good feelings about the issues, when we have had these assurances of competition.

I am told by DIRECTV that because they are a satellite, they can't get SportsNet. You have the equivalent of SportsNet, Cablevision, in New York which refuses to give RCN access to their accommodations.

If I may ask just one question before finishing my opening statement, is it true that RCN cannot get Cablevision in New York to give them access to sports programs?

Mr. CURREY. That is correct, and I will deal with that in my comments.

Senator SPECTER. Well, I am sure you will and after you deal with it, this Subcommittee will try to deal with it. Maybe the whole Congress will try to deal with it.

We are finding more of these arrangements made. We are about to have arrangements made in the Washington, D.C. area, and I find that the NFL will not give access to television so that viewers might be able to watch a variety of television games.

Mr. Kimmelman, may it note for the record, is nodding in the affirmative.

I believe the NFL owes America a little something by virtue of having an antitrust exemption. I have spoken about that at some length in this room about why Pennsylvanians are paying $1 billion for stadium construction when the NFL has a $17.6 billion, multi-year television contract which they are able to have as a result of a special exemption that Congress has given to them.

These are some of the questions on my mind, Mr. Chairman. I am writing to the president of Comcast today about some of the issues which we heard about and I hate to impose another hearing on this Subcommittee, but it may be necessary to do more than invite Time Warner and Comcast and AT&T to appear.

It is my expectation to schedule a hearing in Philadelphia with enough lead time to see if the invitation will be sufficient or whether there would have to be something more than an invitation. The Congress of the United States is entitled to answers to these questions.

I thank you, Mr. Chairman and Senator Kohl, for pursuing this important subject.

Chairman DEWINE. Senator Specter, thank you very much.

Before we start, a couple of housekeeping items. We would ask you to keep your opening comments to 5 minutes or less. Maybe as a little extra incentive, the Senate has two votes in a row sometime between 10:30 and 11, and once we break it will be at least

half an hour. So if we are done at that point, you all can go home, and if we are not done, welcome back.

Let me maybe follow up on what Senator Specter said. As chairman, I don't spend a lot of time using this podium talking about people who didn't come, whom we invited and who had "scheduling problems." Let me just say that I do have a long memory, and also state, as Senator Specter has said, there is always another opportunity, and we would expect that people would not have scheduling problems two times in a row.

Let me turn to our panel. Mr. Hartenstein is Executive Vice President of Hughes Electronics, and Chairman of DIRECTV Global. Robert Sachs is President and Chief Executive Officer of the National Cable Television Association.

Jerry Kent is President and Chief Executive Officer of Charter Communications, which he co-founded in 1993. Mr. Currey is Vice Chairman of RCN Corporation, and Gene Kimmelman is Co-Director of the Washington, D.C., office of Consumers Union, and certainly a person who has appeared before this panel I can't tell you how many times in the last 4 years.

We appreciate all of you being here. We appreciate your patience, and we will start on my left and on your right with Mr. Hartenstein and we will go right down the panel.

Let me just say that the written statements which we have received will certainly be made a part of the record.

STATEMENT OF EDDY W. HARTENSTEIN, CORPORATE SENIOR EXECUTIVE VICE PRESIDENT, CONSUMER SECTOR, HUGHES ELECTRONICS CORPORATION, AND CHAIRMAN, DIRECTV, GLOBAL, EL SEGUNDO, CALIFORNIA

Mr. HARTENSTEIN. Thank you, Mr. Chairman, Senator Kohl, Senator Specter. Thanks for the opportunity to have us here and hear from us today.

The last time I appeared before this Subcommittee was in October 1997, when DIRECTV had been in business a little over 3 years and we had a mere 2.9 million subscribers nationwide. Today, as we approach our seventh anniversary this summer, we have more than 9.5 million customers, and that equates to about 1 out of every 11 households in the United States with DIRECTV. Seventy percent of that customer base comes from areas where cable is available.

Although more than 15 million households in total for the DBS industry subscribe to DBS, 80 percent of all of the subscribers in the country that take multichannel video services receive their programming from a franchised cable operator. So there still remain a few cable customers we can target for conversion to satellite.

We think that the new, enhanced products and services that we are offering in the interactive space—things like Wink, things like TIVO, things like Ultimate TV from Microsoft, and our new programming offerings, DIRECTV PARA TODOS, a Spanish-language service—will help us attract new subscribers.

Just yesterday, we completed our acquisition of Telocity. That is a leading nationwide provider of high-speed services through DSL technology. Coupled with our new satellite two-way high-speed service called DirecPC, which provides users with a nationwide

high-speed broadband Internet service, we will be the first entity that can offer customers wherever they reside in the U.S. a whole-house entertainment and information solution.

Certainly, our recent success, I think, is in large part due to the passage, Senator Kohl, as you indicated, of the Satellite Home Viewer Improvement Act of last year, which allowed us for the first time to offer local broadcast channels. Imagine that, having a level playing field with cable where we now, just a little more than a year since that legislation was passed was passed and signed, offer local network stations in some 41 major metropolitan markets, which represents about 61 percent of the television households in the country.

Now, in some markets more than 66 percent of our customers are purchasing local channels. While it is difficult to differentiate the effect of the availability of local channels from other factors, overall through the end of 2000, with just 1 year in the marketplace, our new customer growth in those markets where we did offer local channels was about 20 percent higher compared to those that we aren't yet able to deliver them to.

While the ability to offer local channels has certainly been a major advance for us, I think several statutory and regulatory obstacles are inhibiting us to complete the competition with cable operators.

First, the biggest impediment to offering local channels in additional communities above the ones that we already have is the "must carry" requirement imposed by the Satellite Home Viewer Improvement Act. By imposing "must carry," Congress has decided that it is more important for us to carry all 23 stations in Los Angeles and all 23 or 22 stations in New York, and have that be more important than to offer residents in cities such as Buffalo, Green Bay, Harrisburg, Wichita, just to name a few, even a single channel of local content.

We would much rather use the almost $300 million we have invested to launch this new spot beam satellite later this year to extend our local channel offerings to additional smaller markets than to use it to deliver little-watched channels in markets where we have already substantially satisfied consumer demand for localism.

But even if we are able to get relief from the "must carry" and get a "most carry" interpretation through the constitutional challenge that we have filed in Federal court, that would only be the first step. We would still not have sufficient capability and capacity to offer local channels in all 210 local markets across the country. For direct broadcast satellite to become more full-fledged competition to cable, we need more spectrum, and we would urge Congress to direct the FCC to do that.

Second, the passage of the program access provision of the 1992 Cable Act. I think I can say honestly I wouldn't be here before you today if that hadn't happened. It is going to expire next year, and we think it is going to still be necessary to provide that competition.

I think using recent events as were mentioned by you, Senator Specter, we are unable to receive from Comcast the ability to transmit the Philadelphia sports channels to Philadelphia residents, and that is because Comcast owns the rights to that. We would like to

do that, and I would urge the FCC to conclude that program access is important and necessary, and perhaps even strengthen it in a few ways so that it can't flaunt the interest of Congress in providing competition.

I think, finally, the FCC has not yet taken full advantage of the preemptive authority Congress has intended to convey in 1992 which has restrictive covenants and other impediments, including exclusive long-term cable contracts to prevent residents of apartment buildings and condos from subscribing to alternate video services such as DIRECTV and relegate them to second-class status.

Finally, our efforts to bring a robust, competitive alternative to cable in the marketplace will be undermined if the primary spectrum used by DBS is allowed to be invaded by terrestrial wireless point-to-multipoint services such as those proposed by Northpoint Technology to interfere with the millions of consumers that are already getting DBS at home. I think that today's happy customers of DBS could easily become tomorrow's unhappy constituents if that kind of ill-considered Government action would be allowed to happen and create interruptions.

Before I close, I realize the time, but we are trying to be good citizens, as well, and follow the lead of cable in going with a DIRECTV Goes to School public service initiative, where we are going to provide some 50,000 schools, public and private, across the country with free access, free equipment, to School Choice, which is a programming package we have put together. And we hope that schools in all 50 States and the District of Columbia will participate.

As I mentioned at the outset, we have come a long way. We have still got a way to go before we can achieve our goal of being in a pure competitive position on par with cable, and in the Q and A I will be happy to go through the value propositions that we offer to consumers to be that competitive alternative.

[The prepared statement of Mr. Hartenstein follows:]

STATEMENT OF EDDY W. HARTENSTEIN, CORPORATE SENIOR EXECUTIVE VICE PRESIDENT, CONSUMER SECTOR, HUGHES ELECTRONICS CORPORATION AND CHAIRMAN, DIRECTV GLOBAL

Mr. Chairman, Senator Kohl, and members of the Subcommittee, thank you for inviting me to appear before the Subcommittee. I appreciate the opportunity to present our views on the competitive choices in video.

The last time I appeared before this Subcommittee in October 1997, DIRECTV had been in business a little over three years and had 2.9 million subscribers nationwide. Today, as we approach our seventh anniversary this summer, we have more than 9.5 million customers. One in every 11 households in the United States has DIRECTV®. And 70% of our customer base comes from areas in which cable is available.

Direct broadcast satellite ("DBS") is the principal competitor to cable, with more than 15 million subscribers. Nevertheless, according to the Federal Communications Commission, cable television still is the dominant technology for the delivery of video programming to consumers with 80 percent of all subscribers to multichannel video services receiving their programming from a franchised cable operator.[1] So there remain quite a few cable customers we can target for conversion to satellite.

We think the new enhanced products and services we are offering, such as DIRECTV Interactive™ Powered by Wink, the DIRECTV Receiver with TiVo, and

[1] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report, CS Docket No. 00–132, FCC 01–1, at In §§ 5, 61 (released Jan. 8, 2001).

the DIRECTV™ Receiver with UltimateTV Service from Microsoft, as well as our Spanishlanguage service, DIRECTV PARA TODOS™, will help us attract new subscribers. And this week we are completing our acquisition of Telocity, a leading nationwide provider of high-speed broadband services through DSL technology. Coupled with our forthcoming two-way DirecPC® service, which provides users with nationwide high-speed broadband Internet service via satellite, we will be able to offer our customers a "whole house" entertainment and information solution.

Certainly our recent success is due in part to the passage by Congress of the Satellite Home Viewer Improvement Act (SHVIA). While we did not agree with every provision of that legislation, on balance we viewed it as worthy of our support. Most importantly, the legislation allowed satellite TV companies—for the first time—to offer local broadcast channels.

We have moved quickly to bring the benefits of that legislation to consumers. We are offering local network stations in 41 major metropolitan markets, which represent more than 61 percent of the television households in the country. We are very pleased with the rate at which our subscribers are purchasing local channels. In some markets, more than 66 percent of customers are purchasing local channels. Overall, we are seeing a take rate of more than 43 percent for all customers. And for new subscribers, the take rate is more than 59 percent.

While it is difficult to differentiate the effect of the availability of local channels from other factors, through the end of 2000, customer acquisition in local channel markets was up about 20 percent compared to similar markets where local channels are not offered.

The ability to deliver local content enables DIRECTV to offer consumers a service that is fully competitive with cable in terms of content and price in the markets in which we are offering local channel service. For example, a DIRECTV subscriber who chooses our most popular programming package, Total Choice®, plus their local channel package receives 141 channels for just $37.98 per month. His next-door neighbor in Philadelphia who subscribes to Comcast's analog and digital tiers receives 124 channels for $45.95—fewer channels at a higher price. And his friend in Los Angeles who subscribes to Charter's analog and digital tiers receives 154 channels for $46.95—13 more channels, but at an additional cost of $8.98.[2]

While the ability to offer local channels has certainly been a major advance for us, cable's continued market dominance requires ongoing oversight, and where necessary, intervention by Congress and the Commission to foreclose attempts by incumbent cable television providers to stifle competition. Moreover, several statutory and regulatory obstacles are inhibiting our ability to compete with local cable operators.

EXPANSION OF LOCAL CHANNEL SERVICE

While the availability of loan guarantees may create incentives for some entities to explore expanded local channel offerings, our ability to broaden the delivery of local channels has not been limited by access to capital. Rather, the biggest impediment to serving additional communities is the "must carry" requirement imposed by SHVIA. Even absent that constraint, we are ultimately limited by the amount of spectrum allocated to us by the FCC. Let me explain.

Unlike cable operators, which have the ability to increase their channel capacity indefinitely, DBS providers face very tangible channel capacity constraints. There are only three DBS orbital slot locations that are "full-CONUS"—that is, capable of serving the entire continental United States. The FCC has licensed all of the frequencies at those three orbital locations to DIRECTV and EchoStar.

The must carry provision of SHVIA requires us to carry every full-power local broadcast station in a market in which we offer any local channels no later than January 1, 2002. This means that we have to use our limited satellite capacity to deliver stations for which, frankly, there is negligible consumer demand. For example, in both New York and Los Angeles, we could be required to carry up to 23 stations. Many of these stations have, based on their ratings, minuscule audiences. Carrying such a station is a poor use of our limited satellite capacity. The practical implications of this requirement are clear: by imposing must carry, Congress has decided that it is more important for us to carry all 23 stations in New York and all 23 stations in Los Angeles than to offer the residents of cities such as Buffalo, Dayton, Green Bay, Harrisburg, and Wichita even a single channel of local content.

We will launch in the fourth quarter of this year a new high-power spot beam satellite. The spot beam satellite will enable us to make the most efficient use of

[2] "Cable Industry Outlook," Credit Suisse First Boston, Feb. 5, 2001, Table 12, DBS versus Digital Cable Offering Comparisons, at 20.

our existing capacity in order to meet the must carry obligation. But I can tell you that we would much rather use that new $275 million satellite to extend our local channel offering to additional, smaller markets than to use that satellite to deliver little-watched channels in markets in which we have already substantially satisfied consumer demand for localism.

Even if we were to get relief from the must carry obligation through the constitutional challenge we have filed in federal court, along with EchoStar and the Satellite Broadcasting & Communications Association (SBCA), we still would not have sufficient available capacity to provide local channels in all 210 television markets in the United States. For direct broadcast satellite to become the full-fledged competitor to cable that Congress desires, we need more spectrum. To achieve this objective, we would urge Congress to direct the FCC to make additional spectrum available to the DBS providers, which could be used to bring local channels to those markets we cannot serve with our existing limited capacity.

EXTENSION OF THE PROGRAM ACCESS LAW

Without Congress' passage of the program access provision of the 1992 Cable Act, I would not be here before you today. That provision allows cable's competitors to gain access to cable-affiliated programming, such as CNN, Headline News, TBS, TNT, and HBO. Without this programming, we cannot compete. The program access law is scheduled to expire in October of next year, unless the FCC finds, in a proceeding it is required to begin later this year, that the law continues to be necessary to "protect competition."[3] Using recent events as a likely indicator of future cable industry behavior, I can predict with some confidence that the program access provision will continue to be necessary to protect competition after 2002, and to ensure that DIRECTV's subscribers continue to receive the programming they've been enjoying.

In particular, Comcast, the nation's third largest cable operator, has refused to negotiate with DIRECTV for carriage of Comcast SportsNet, the Philadelphia-area regional sports network. Comcast's action has disenfranchised tens of thousands of Philadelphia-area DIRECTV subscribers and hundreds of thousands of other DIRECTV subscribers who enjoy out-of-market sports. Comcast has used what it perceives to be a "loophole" in the program access law, claiming that because it has chosen to distribute Comcast SportsNet using terrestrial rather than satellite facilities it does not have to make the regional sports network available to its DBS competitors.

DIRECTV's experience with Comcast SportsNet is not an isolated one. There is every indication that other cable operators are contemplating similar strategies to attempt to evade the program access law, particularly with regard to regional sports networks. Thus, it is our hope that the FCC will conclude that the program access law continues to be necessary, and that Congress will consider tightening the law to ensure that cable operators cannot evade the law simply by delivering programming by terrestrial means instead of via satellite, as Comcast is attempting to do. The law should be revised to cover programming owned by cable operators, no matter the delivery mechanism they choose.

IMPROVED ACCESS FOR MDU RESIDENTS

Our penetration rates in apartment buildings, condominiums, and other multiple dwelling units (MDUs) continue to lag behind our single-family home rates. The FCC has not yet taken full advantage of the preemptive authority Congress intended to convey in the 1992 Cable Act with respect to restrictive covenants and other impediments, including exclusive, long-term cable contracts, that prevent both MDU owners and renters who do not have exclusive use of areas suitable for antenna installation from subscribing to alternative video services such as DIRECTV. For years, DIRECTV has urged the Commission to amend its rules to require landlords, condominium associations, and other homeowner groups to provide access to at least two multichannel video services to residents who do not have exclusive use of areas suitable for antenna installation. I do not believe Congress ever intended to discriminate against residents of multiple dwelling units (MDUs) by depriving them of the benefits of competition available to single-family homeowners, and we would ask Congress to help rectify this situation.

[3] 47 U.S.C. § 548(c)(5).

ILL-ADVISED SPECTRUM SHARING PROPOSALS

All of our efforts to bring a robust competitive alternative to cable to the marketplace will be undermined if the primary spectrum used by DBS operators to downlink programming to subscribers across the United States is invaded by terrestrial wireless point-to-multipoint services such as those proposed by Northpoint Technology. One of the top reasons consumers switch from cable to DBS is the greater service reliability of DBS. Millions of U.S. consumers who use and rely upon the DBS service will see increased interference in the form of longer and more frequent service outages if a mass market fixed wireless service is introduced into the DBS band. Today's happy customers could easily become tomorrow's unhappy constituents if, as a result of an illconsidered government action, they begin to see increased service interruptions.

Let me assure you that our opposition to the deployment of a terrestrial service in the DBS band has nothing to do with fear of facing another competitor. We compete every day against the cable giants, so it's ridiculous to say that we're afraid of competition. And we will compete against these proposed terrestrial services if they're properly located in a different spectrum band, such as those specifically set aside for similar "wireless cable" services. Our only concern is protecting the level of service our customers have come to expect and which we have spent hundreds of millions of dollars to ensure. The extensive efforts Congress has undertaken to increase cable competition will be undermined if the FCC allows the spectrum intended for DBS use to be shared with terrestrial fixed wireless services.

PUBLIC SERVICE INITIATIVE

As a company, we believe in public service. That is why last month we launched DIRECTV GOES TO SCHOOL™, a public service initiative that will provide up to 50,000 public and private schools around the country with free access to our SCHOOL CHOICE™ programming package. Participating schools will receive more than 60 channels of educational programming, including such networks as CNN, Discovery Channel, The History Channel, A&E, The Learning Channel, and of course, C–SPAN2, which teachers can use to enhance their lesson plans. In addition, we will provide freeof-charge to participating schools special issues of DIRECTV—The Guide™, which will include feature articles on the educational programming offered in the SCHOOL CHOICE package. We hope that schools in all 50 states and the District of Columbia will participate in the program.

CONCLUSION

As I mentioned at the outset, we've come a long way in the three years since I last appeared before this Subcommittee. While we still have a way to go before we can achieve our goal of a competitive position on par with local cable operators, the next time I appear before this Subcommittee I hope to be able to tell you we're even closer to that goal.

I appreciate the opportunity to share my views.

Chairman DEWINE. Thank you very much.

Mr. Sachs?

STATEMENT OF ROBERT SACHS, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL CABLE TELEVISION ASSOCIATION, WASHINGTON, D.C.

Mr. SACHS. Mr. Chairman, Senator Kohl, Senator Specter, thank you for this opportunity to testify on the state of competition in the multichannel video market.

Five years ago, Congress passed the landmark Telecommunications Act of 1996. Some have argued that the Act is not working, especially when one considers the lack of local residential phone competition. But we should not let this eclipse the fact that the Act has successfully spawned competition in the video market.

Moreover, as cable companies complete system upgrades, consumers are realizing benefits in the form of digital cable, high-speed Internet, and cable telephone service. And in every one of these businesses, cable faces real competition.

Competition in the video market is now well-established. Today, consumers can choose from a variety of multichannel video providers. As a result of this competition, nearly 20 million consumers, more than 22 percent of subscription television customers, now obtain multichannel video programming from some company other than their local cable operator.

The total number of direct broadcast satellite subscribers jumped from 10.7 million to 15.3 million between February 2000 and February of this year, a 43-percent annual growth rate. With nearly 10 million subscribers, DIRECTV now has more customers than all but two cable operators, AT&T broadband and AOL Time Warner. The number-two DBS provider, EchoStar, has more customers than all but the top five cable companies.

In 38 States, satellite subscribership now exceeds 15 percent of all television homes. In Ohio, it is over 15 percent, in Wisconsin over 20 percent; in Utah almost 25 percent, and in Vermont over 40 percent. Today, most consumers enjoy the choice of two DBS providers, in addition to cable, and some have other multichannel video choices as well.

The ability to sell telephone high-speed Internet and an expanded number of video programming channels over a single broadband facility is providing new incentives for facilities-based broadband competition. Companies like RCN, Wide Open West, Carolina Broadband, Grande Communications, and Western Integrated Networks have obtained franchises to provide consumers with competitive broadband services. Although relatively new, these companies have raised billions of dollars. Incumbent local exchange carriers and some electric utilities are also adding video to their product mix.

Cable companies have responded by aggressively upgrading facilities and launching new services. Since passage of the 1996 Act, the cable industry has invested $42 billion to deploy broadband plant in order to offer consumers a wide array of advanced services. As the 1996 turned 5 in February, cable added its 10 millionth digital video customer, 4 millionth high-speed data customer, and millionth residential phone customer. American consumers are realizing the benefits.

Mr. Chairman, I would be remiss if I did not address the subject of cable prices. Despite escalating programming costs, especially higher sports rights fees, and billions spent on system upgrades, cable prices have remained stable on a per-channel basis. In a recent report, the FCC found that cable rates stayed unchanged in the year 2000 on a cost-per-channel basis.

Industry critics may point to the fact that the average monthly cable price increased 5.8 percent, compared to the inflation rate of 3.7 percent, during the 12-month period ending July 1, 2000. But such criticism fails to take account of the fact that cable customers also received an average of three additional channels of programming.

As cable systems are upgraded and new satellite services are launched, cable operators regularly have added new products. Price comparisons which fail to consider the increased number of channels can therefore create a misleading picture. In fact, data from the FCC and GAO show that the inflation-adjusted price per chan-

nel of cable's video services has actually declined since 1986. Cable customers today are receiving more channels and better value than ever before.

In summary, cable will continue to be a leader in providing consumers with choice, not only in video, but also in high-speed Internet and telephony. At the same time, consumers will be able to choose from among multiple vendors. In this highly competitive environment, companies that succeed will be those who offer consumers the best quality, value and customer service. It is not possible to forecast precisely who will be most successful, but one thing is certain. American consumers will be the ultimate winners in this new competitive era.

Thank you very much.

[The prepared statement of Mr. Sachs follows:]

STATMENT OF ROBERT SACHS, PRESIDENT AND CEO, NATIONAL CABLE TELEVISION ASSOCIATION

1. INTRODUCTION

Mr. Chairman, members of the Subcommittee, my name is Robert Sachs and I am President and CEO of the National Cable Television Association. NCTA represents cable companies serving more than 90 percent of the nation's 69 million cable customers and more than 200 cable program networks. Thank you for providing us with this opportunity to testify before your subcommittee. In my testimony today, I will describe the state of competition in the multichannel video market and highlight what cable operators are doing to provide consumers with new products and services over advanced broadband facilities.

Five years ago, Congress passed the landmark Telecommunications Act of 1996. The goals of this Act were to: (1) bring competition to telecommunications and video; (2) expand consumer choice; (3) encourage investment in new technologies; and (4) speed the introduction of advanced services, including digital television. Some have argued that the Act is not working—especially when one considers the lack of widespread competition in local residential telephone markets. But we should not let slow progress in local exchange competition eclipse the fact that the Act has successfully spawned competition in the multichannel video market. As cable companies complete system upgrades across the country, consumers are realizing benefits in the form of digital cable, cable modems, and cable telephone service. As I will describe more fully, cable faces real competition in every one of these businesses.

Before 1996, cable operators faced video competition primarily from over-the-air television, C-band satellite receivers, video rentals, and movie theaters. Direct broadcast satellite (DBS) competition has changed that forever. Being digital from the start, and having the advantage of substantially greater channel capacity, DBS spurred cable operators to replace hundreds of thousands of miles of coaxial cable with fiber optics so that they too could offer consumers hundreds of channels of digital video and audio services. In responding to vigorous competition from DBS, cable operators have made enormous investments in not just plant but computers, billing systems, personnel, and training—resulting in significant improvements in the quality of service we provide to our customers.

Market Share of Multichannel Video Program Distributors (MVPDs)

MVPD	Subscribers (in Millions)	Percent of MVPD Market
DBS	15.34	17.40
C–Band	1.12	1.30
MMDS	0.70	0.80
SMATV	1.50	1.70
Local Telephone Companies	0.43	0.49
Broadband Competitors	0.66	0.75
Total Non-Cable	19.75	22.44
Cable	68.28	77.56
Total Multichannel Subscribers	88.03	100.00

Source: NCTA Research Department estimate based on data from A. C. Nielsen, Paul Kagan Associates, Cable World, SkyREPORT, and public reports of individual companies.

2. Competition in the Video Market is Well Established and Growing Steadily

A. NEARLY 20 MILLION CONSUMERS NOW SUBSCRIBE TO CABLE'S COMPETITORS

Today, consumers can choose from a variety of multichannel video providers, including DBS, alternative broadband providers like RCN, phone companies, and utilities. As a result of this competition, nearly 20 million consumers—more than 22 percent of subscription television customers—now obtain multichannel video programming from some company other than their local cable operator. In contrast, five years after passage of the 1996 Act, the regional Bell companies still control 97 percent of all residential telephone lines.

B. DBS IN PARTICULAR HAS BECOME A COMPETITIVE SUBSTITUTE FOR CABLE

With the passage of the Satellite Home Viewer Improvement Act (SHVIA) in November 1999, DBS companies can now retransmit local broadcast signals into their market of origin ("local-into-local"). As of December 2000, DirecTV and EchoStar made available local TV signals to over 61 million television households in 41 markets. When combined with their ability to offer hundreds of channels of digital video and CD quality sound, DBS companies compete vigorously with cable. Just ask Drew Carey.

The total number of DBS subscribers jumped from 10.7 million to 15.3 million between February 2000 and February 2001—a 43 percent annual growth rate. DirecTV now has more subscribers (9.8 million) than all but two cable operators—AT&T and AOL Time Warner making it the third largest multichannel video provider in the U.S. The number two DBS provider, EchoStar, has more customers than all but five cable companies.

C. TOTAL DISH SUBSCRIBERSHIU (C–BAND AND DBS) NOW EXCEEDS 15 PERCENT IN 38 STATES.

According to SkyREPORT, Direct-to-Home (DTH) subscribers (all dish customers, including DBS and C–Band) grew from 13.44 million to 16.45 million between February 2000 and February 2001, an increase of 22 percent (versus 1 percent for cable). In 38 states, DTH satellite subscribership now exceeds 15 percent of all television homes. As of January 2001, DTH penetration exceeded 20 percent in 28 states, 25 percent in 11 states, 30 percent in 4 states, and 40 percent in 1 state. For example, DTH penetration in Ohio is over 15 percent, in Wisconsin over 20 percent, in Utah almost 25 percent, and in Vermont more than 40 percent. Today, most consumers have the choice of two DBS providers in addition to cable, and some have other multichannel video choices as well.

States With Direct-To-Home (DTH) Dish Penetration of Fifteen Percent or More (January 2001)

State	Percent of VHH w/DTH
Vermont	40.63
Montana	38.39
Wyoming	33.16
Mississippi	30.76
North Dakota	28.42
Arkansas	28.42
Idaho	27.91
North Carolina	26.71
Kentuck	26.38
West Virginia	25.39
Missouri	25.27
South Dakota	24.46
South Carolina	24.42
Utah	24.00
New Mexico	23.83
Texas	23.64
Indiana	23.51
Tennessee	23.02
Alabama	23.01
Oklahoma	22.43
Maine	22.33
Virginia	22.10
Iowa	21.88
Georgia	21.78
Colorado	20.88
Wisconsin	20.68
Nebraska	20.62
Oregon	20.03
Arizona	19.82
Kansas	19.80
Minnesota	219.04
Michigan	17.78
Louisiana	17.10
Florida	16.79
Washington	16.42
New Hampshire	15.32
Ohio	15.27
Nevada	15.26

Source: SkyTRENDS SkyMAP January 1, 2001; ***www.skyreport.com***

D. DBS IS NOT THE ONLY COMPETITOR TO CABLE

The ability to sell telephone, high speed Internet access, and an expanded number of video programming channels over a single broadband facility (or in conjunction with wireless or satellite providers) is providing new incentives for facilities-based broadband competition. Companies like RCN, Knology, WideOpenWest, Altrio, Carolina Broadband, Everest Connection, Grande Communications, and Western Integrated Networks have obtained franchises to provide consumers with competitive broadband services. Although relatively new, and despite recent difficulties in the capital markets, these companies have raised billions of dollars to construct alternative broadband facilities in various areas across the country.

As utilities face a newly deregulated and competitive marketplace, they—like other telecommunications companies—have incentives to offer and package additional services over their facilities. Consequently, utilities like Sigecom in Indiana and Seren Innovations in California are joining the new class of broadband overbuilders in offering multichannel video programming services to consumers.

Incumbent local exchange carriers are also adding video programming to their product line-ups. For example, Qwest has introduced a means of delivering video programming to telephone subscribers in the metropolitan Phoenix area over existing fiber-optic and residential copper-wire telephone facilities. The new technology—

VDSL (very high speed digital subscriber line)—is similar to the DSL service used by the telephone companies to provide high speed Internet service.

3. Cable Operators are Upgrading Their Systems and Competing With Other Providers to Bring Consumers New Broadband Services

Cable companies have responded to competition in the video market by aggressively upgrading their facilities and launching new services. Since passage of the Telecommunications Act of 1996, the cable industry has invested $42 billion to deploy broadband plant in order to offer a wide array of advanced services, including digital video, digital music, high speed access to the Internet, and telephony. These upgrades involve rebuilding more than a million miles of cable plant. At year-end 2000, they were approximately 75 percent complete. As the 1996 Act "turned five" in February 2001, cable added its 10 millionth digital video customer, 4 millionth high-speed data customer, and 1 millionth residential cable telephone customer.

A. DIGITAL VIDEO

Among the new options that cable customers have are digital video services. Digital video provides increased channel capacity through compression of multiple video signals in the same 6MHz slot previously occupied by a single analog channel. As a result, customers are able to receive dozens of new programming services from cable operators. Digital video also offers crystal-clear video images, CD-quality sound, on-screen menus, interactive program guides, search capabilities, and expanded parental controls.

Cable program networks have already launched some 60 new digital channels, offering consumers additional choice and further program diversity. Examples include the Biography Channel and History Channel International (from A&E); Science, Civilization, and Kids (from Discovery); Noggin, Nick Too, and Nickelodeon Games & Sports (from Nickelodeon); and style. (from E!). There are six new Hispanic channels from Liberty Canales, new music channels from MTV and BET, and separate channels targeting Indian, Italian, Arabic, Filipino, French, South Asian and Chinese viewers from The International Channel. There are also many new premium offerings from HBO (HBO Family, ActionMAX, and ThrillerMAX), Showtime (Showtime Extreme, Showtime Beyond) and Starz! Encore (Starz! Family, Cinema, Movies for the Soul, and Adventure Zone).

Consumers are responding by signing up for digital tiers in record numbers. Cable operators started 2000 with just under five million digital video subscribers but doubled that number to 10 million by March 2001. A survey released in March 2000 by the Cable and Telecommunications Association for Marketing (CTAM) showed positive customer response to their upgraded, digital cable offerings: of nearly 2,600 consumers polled, 95 percent expressed satisfaction with their service.

With millions of digital set-tops now deployed in cable networks, and thousands more installed every week, cable operators are beginning to look beyond simple broadcast services toward new, interactive services that meet the needs of individual customers. One service that many operators are aggressively pursuing is video-on-demand (VOD, which includes "subscription video-on-demand"). This 'personalized' television service allows customers to watch new movie releases or favorite TV programs, with real-time control of such features as pause, fast-forward, and rewind.

B. CABLE MODEMS: HIGH SPEED ACCESS TO THE INTERNET

Cable's upgraded broadband facilities also enable consumers to access any website of their choice at speeds 50 to 100 times faster than standard dial-up services. In addition, cable modem service is "always-on": there is no waiting for a connection to the network or the Web. Customers can download information instantaneously with cable modems, which can be purchased at retail stores or leased from a cable operator. The industry ended last year with 3.7 million customers—more than double its 1999 total of 1.6 million. By March 2001, the number of cable modem subscribers exceeded 4 million.

Cable's entry into high speed data services has also benefited consumers by prompting a strong competitive response from incumbent telecommunications companies. For example, cable's deployment of cable modems has led local telephone companies to offer digital subscriber line (DSL) service, a broadband data technology that has been available for over a decade. When there was no competition from cable, companies like NYNEX and Bell Atlantic (now Verizon) chose to sell more expensive T–1 and ISDN lines to consumers. However, as soon as cable offered broadband access to the Internet, local exchange carriers took DSL off the shelf and

began selling it aggressively to millions of households across the nation. By year-end 2000, DSL subscribership reached the two million mark. In addition, companies such as Worldcom and Sprint provide broadband fixed wireless service, while satellite operators have begun to offer two-way broadband service.

C. CABLE TELEPHONY

The local residential telephone market has proven to be most resistant to the introduction of competition. Despite strong incentives provided by the Telecommunications Act of 1996, the vision of CLECs purchasing unbundled network elements and reselling local loops has not materialized as planned. However, with upgraded digital broadband facilities, cable operators are well positioned to offer facilities-based competition to local telephone companies.

Cable telephony provides numerous enhanced services, including voice mail, caller ID, and call forwarding. AT&T Broadband, Cox Cable, and Cablevision are today offering such services at rates 10–50 percent below those charged by incumbent telephone providers. For example, Cox communications offers its 200,000 residential phone customers a first line at 10 percent below the prevailing Bell rate; additional lines at up to 50 percent discounts; and feature packages such as call waiting at 30–75 percent discounts.

Cable operators started the year 2000 with 200,000 residential telephone customers and ended it with 850,000. They added a record 280,000 new residential telephone subscribers during the fourth quarter of 2000, and currently serve more than 1 million telephone customers. In addition, cable companies such as Cox, Adelphia Business Solutions, and Cablevision Lightpath are providing more than two million telephone lines to business customers.

Although still a new business, telephony is a key component of cable's business strategy for the future. This includes both switched voice service and Internet protocol (IP) telephony over broadband networks. Cable companies like Charter, Comcast, AOL Time Warner, and others are already field-testing IP telephony. Just as the first five years of the Act have seen video, wireless, and Internet competition flourish, I believe the next five will see Congress' vision of local phone competition finally realized.

4. PROGRAMMING OWNERSHIP

Today there are 224 national cable networks, compared with 76 in 1989. At the same time that cable is expanding its service offerings, vertical integration in the cable industry has declined from 53 percent in 1989 to 35 percent in 2000. This percentage will drop even further when AT&T completes its plans to divest Liberty Media.

In contrast, major companies like Disney, General Electric, Viacom, and News Corp (who respectively own the ABC, NBC, CBS and Fox networks), are increasing their ownership of cable networks. Each of the major commercial broadcast TV networks today is owned by a media company that has financial interests in 10 to 20 cable networks. Some are nationally distributed channels like CNBC, while others are regional channels like Fox Sports Net. Recently, Viacom (the owner of CBS) completed the acquisition of Black Entertainment Television, adding to its array of popular cable networks, which already includes Showtime, MTV, and Nickelodeon.

Broadcast Network Investments in Cable Networks

Walt Disney/ABC

The Disney Channel
SoapNet
Toon Disney

Partial Ownership:
ESPN
ESPN2
ESPNews
ESPN Classic
Lifetime Television
Lifetime Movie Network
E! Entertainment Television
A&E Television
The History Channel
The Biography Channel
The History Channel International

News Corp./Fox/Fox Entertainment
Fox News
Fox Sports Americas
Fox Sports World
fX
fXM: Movies on Fox
The Health Network
Fox Sports (regional networks):
Southwest, West,
West 2, Pittsburgh, Rocky Mountain, Northwest,
Utah, Midwest, Arizona, Detroit, North

Partial Ownership:
National Geographic
TV Guide
Fox Family
Outdoor Life
Speedvision
Golf Channel
Fox Sports (additional regional sports networks)

Viacom/CBS/UPN

BET Holdings: BET, BET Action Pay-Per View, BET on Jazz, BET Gospel
The Box
MTV Nickelodeon/Nick at Nite
TV Land
VHi
TNN: The National Network
Showtime
The Movie Channel
Flix
The Suite (digital networks): Noggin, Nickelodeon GAS, Nick Too, M2, MTV X, MTV S, VH1 Country, VHI

Smooth

Partial Ownership:
Comedy Central
Sundance Channel

General Electric/NBC
CNBC

Partial Ownership:
MSNBC
A&E Television
The History Channel
The Biography Channel
The History Channel International
AMC
Bravo
Independent Film Channel
MuchMusic
WE: Women's Entertainment
Valuevision
Fox Sports (regional networks): Chicago, Bay Area, Florida, New England, New York, Ohio, Madison Square Garden Network

5. Cable Prices

Despite escalating programming costs (especially higher sports rights fees) and billions spent on system upgrades, cable prices have remained relatively stable on a per-channel basis. For example, the Federal Communications Commission found that cable rates stayed unchanged in the year 2000 on a cost-per-channel basis (*Report on Cable Industry Prices*, FCC 01–49, MM Docket No. 92–266, released February 14, 2001). According to the same report, during the 12month period ending July 1, 2000, average monthly prices for basic service tiers (BST), cable programming service tiers (CPST), and equipment increased by 5.8 percent. This represents a very slight increase (from 5.2 percent) for the year ending July 1, 1999—during which CPST prices were subject to FCC regulation from July 1, 1998, to March 31, 1999.

Industry critics may seize on the fact that average monthly cable prices increased 5.8 percent compared to the inflation rate of 3.7 percent during the 12-month period ending July 1, 2000. But their criticism fails to take into account the fact that cable subscribers also received an average of three additional channels of BST and/or CPST programming. As cable systems are upgraded and new satellite programming services are launched, cable operators have added new channels that consumers want. Year-to-year comparisons which fail to consider the increased number of channels that operators provide to customers therefore create a misleading picture. In fact, data from the FCC and General Accounting Office show that over time, the price per channel of cable's video services has declined since 1986 when adjusted for inflation:

Price Per Cable Channel, 1986—2000

	12/1/86	4/1/91	7/31/97	7/31/00
Nominal Price per Channel	$0.44	$0.53	$0.63	$0.66
Price Per Channel Adjusted for Inflation (in 2000 dollars)	$0.69	$0.68	$0.68	$0.66

Source: GAO Survey of Cable Television Rates and Services, July 1991; FCC Reports on Cable Industry Prices, released 12–15–97 and 2–14–01; Bureau of Labor Statistics, CPI–U.

This drop in real per-channel cable prices has occurred even though programming costs have skyrocketed since 1986. For example, between 1996 and 2000, the cable industry spent over $36 billion on basic and premium programming—roughly 75 percent more than the $20.6 billion it spent during the previous five years. Cable

customers today are receiving more channels and better value for their dollar than ever before.

Cable Systems' Programming Expenditures: 1986–2000

Year	Expenditures (in Billions)
1986	$2.030
1987	2.289
1988	2.599
1989	2.918
1990	3.195
1991	3.463
1992	3.811
1993	4.000
1994	4.370
1995	4.963
1996	5.656
1997	6.413
1998	7.466
1999	8.000
2000	8.882

Source: NCTA Research Department estimate, based on data from Paul Kagan Associates, Inc. and the U.S. Copyright Office

5. CONCLUSION

Over the last five years, there has been rapid and unabated growth of competition in the video market. The job is not yet done, but the convergence of video, voice, and data services in the digital broadband marketplace will only accelerate this trend. Cable will continue to be a leader in providing consumers with choice—not only in video services, but also in high speed Internet services and telephony. At the same time, consumers will be able to choose from among multiple vendors when making their purchases. In this highly competitive business environment, companies that succeed will be those who offer consumers the best quality, value, and service. While it is not possible to forecast precisely which companies will be most successful, one thing that can be said with certainty is that American consumers will be the ultimate winners of this competition.

Thank you again for this opportunity to present our industry's views. I would be happy to answer the Subcommittee's questions.

Chairman DEWINE. Thank you.

Mr. Kent?

STATEMENT OF JERRY KENT, PRESIDENT AND CHIEF EXECUTIVE OFFICER, CHARTER COMMUNICATIONS, ST. LOUIS, MISSOURI

Mr. KENT. Good morning. Thank you, Mr. Chairman, Senator Kohl, Senator Specter, for inviting me to testify today.

I cofounded Charter as an entrepreneurial company in 1993 and we have grown to be the fourth largest cable company in the country, serving approximately 6.5 million customers in 40 States. Today, Charter is facing increasing competition in the video marketplace from direct broadcast satellite and from terrestrial competitors such as local utilities, phone companies, and cable overbuilders. Approximately 20 percent of the homes in Charter's service areas have chosen to subscribe to a competitor, and that is growing daily.

To compete effectively, Charter has chosen to capitalize on what we perceive to be our greatest competitive advantage, our advanced broadband delivery system. We believe that we have the best tech-

nology to transmit voice, video, and data services with the speed, capacity, and interactive capability that our customers demand. That belief in our broadband pipe was the main driver in my founding of Charter Communications.

Subsequently, in 1998, Paul Allen bought controlling interest in Charter to help realize his vision of a wired world in which cable's broadband capabilities will facilitate the convergence of television with computers and the Internet.

Today, we are delivering on that wired world vision by upgrading our plant and equipment to state-of-the-art technology that is second to none. Our strategy is to invest in and deploy a plethora of services through that broadband pipe that will give us a competitive advantage in the open marketplace.

We are well into a 3-year, $3.5-billion program to upgrade and rebuild Charter's systems to the highest broadband standards in the industry. The billions of dollars we are investing to convert our plant from a one-way analog video delivery service into a two-way interactive digital platform is in large part fueled by the competition we face.

In response to this competition, we also made converting our systems to digital our top priority in the year 2000. Charter started the year with just 155,000 digital customers. By the end of the year, we had over 1 million digital customers, accounting for almost 15 percent of our customer base. In the first quarter of 2001, we added well over 20,000 new digital customers per week. Through the end of this year, Charter will have invested approximately $1 billion in the conversion to digital, which is over and above our $3.5 billion plant upgrade program.

Now, of course, rebuilt plant is more than just increased programming choices and better quality. Using our new capacity, we are able to offer our customers exciting, new interactive services, including high-speed Internet access, Internet access over the television set, and video on demand. And we have begun trials on Internet protocol, or IP telephony, in order to offer our customers a choice in local phone service.

In 2000, we nearly tripled customers to our high-speed Internet service, called Charter Pipeline. In the first quarter of this year, we have added 6,000 new data customers per week. Charter Pipeline cable modem service competes directly with the telephone industry's fast-growing DSL service.

We also recently launched Video on Demand in two of our markets. With this new service, customers have access to a library of more than 400 movie titles and can enjoy full VCR functionality while viewing their selection. By the end of 2001, we are projecting 2.2 million Charter homes will have access to Video on Demand technology.

But in a competitive environment, it all comes down to taking care of your customer. They vote with their pocketbook everyday in this competitive environment, and that is why we are continuing to enhance our customer service program.

For example, in Wisconsin we have invested more than $500 million to upgrade our plant and swiftly deploy advanced cable services. To service our newly upgraded systems, we opened our first state-of-the-art regional customer contact center in Fond du Lac,

which is staffed 24 hours a day, 7 days a week. This center will serve as a template for six additional regional centers that we are building just this year at a total cost of over $60 million.

Charter is also undertaking telephony initiatives focusing on the testing of Internet protocol calling technologies. We are working currently on a trial in Wisconsin and in the St. Louis market, and we expect to compete in local telephone service when our IP technology is ready.

In conclusion, Charter is working on several other advanced technology initiatives because we acknowledge a new era of competition. As I say in investor conferences, we do not bury our head in the face of competition. By investing in broadband technologies and deploying new services through innovation, Charter is well positioned to compete effectively in this vibrant new marketplace. The American consumers are the real winners, with an increasing array of digital, data, and interactive services available from a growing number of competitive providers.

Thank you.

[The prepared statement of Mr. Kent follows:]

STATEMENT OF JERRY KENT, PRESIDENT AND CEO, CHARTER COMMUNICATIONS

Good morning. I am Jerry Kent, President and CEO of Charter Communications. I cofounded Charter as an entrepreneurial company in 1993, and we have grown to be the fourthlargest cable company in the country. With the closing of a pending acquisition, Charter will be serving approximately 7 million customers in 40 states. Thank you for inviting me to testify this morning on how Charter Communications is responding to the intense competition we face in the multichannel video marketplace.

The cable industry is facing increasing competition in the video marketplace from direct broadcast satellites and from terrestrial competitors such as local utilities, phone companies and cable overbuilders. More than 20% of the homes in Charter service areas have chosen to subscribe to a competing DBS provider. Terrestrial competitors include Knology, which competes with us in several markets in the southeast; Wide Open West, which has obtained franchises in Fort Worth, Texas and in several communities in our hometown of St. Louis; and several local utilities and phone companies in communities including Wisconsin Rapids, Wisconsin; Newnan, Georgia; and St. Cloud, Minnesota.

In order to compete effectively, Charter has chosen to capitalize on what we perceive to be our greatest competitive advantage: our advanced local delivery system. We have the ability to transmit voice, video and data services with the speed, capacity and interactive capability that our customers demand. That belief in our broadband pipe was the main driver in my founding of Charter Communications. In 1998, Paul Allen bought controlling interest in Charter to help realize his vision of a Wired World, in which cable's broadband capabilities will facilitate the convergence of television with computers and the Internet.

Based upon our potential, my management team in 1999 completed what was then the third largest IPO in U.S. history.

Today we are delivering on that Wired World vision by upgrading our plant and equipment to state-of-the-art technology that is second to none. Our strategy is to invest in and deploy a plethora of services through that broadband pipe that will give us the ability to compete effectively in the open marketplace.

We are well into a three year $3.5 billion program to upgrade and rebuild our systems to the highest broadband standards in the industry. Today, nearly 70% of our customers are served by systems that are newly upgraded and capable of providing digital video, high speed Internet access and other exciting interactive services. And by the end of next year, almost 90 percent of our customers will be served by systems of 750 MHz or greater.

This massive rebuilding project is not occurring in a vacuum. Charter is engaged in a fierce competitive battle with DBS providers, telephone companies, utilities, and cable overbuilders. The billions of dollars we are investing to upgrade our plant from a one-way analog video delivery service into a two-way interactive digital platform is in large part fueled by the competition we face in the marketplace. We are

deploying advanced services to set us apart from the competition in the eyes of the consumer.

In response to this competition, we made converting our systems to digital our top priority in 2000. Our digital conversion has been occurring at a rapid rate and our customers are responding with great enthusiasm. Charter started the year 2000 with just 155,000 digital customers. By the end of the year, we had over one million digital subscribers accounting for almost 15 % of our customer base-a 550% rate of growth. On average, we added 17,500 new digital customers per week, a 560% rate of growth. In the first quarter of 2001, we added well over 20,000 new digital customers per week and we expect to end the year with over 30% of our customers subscribing to digital services.

Of course, rebuilt plant is more than just increased programming choices and better picture quality. Using our new capacity, we are able to offer our customers exciting new interactive services including high speed Internet access, Internet access over the television set and video on demand. And we have begun trials on Internet Protocol (IP) telephony in order to offer our customers a choice in local phone service.

In 2000, we nearly tripled customers to our high speed Internet service, called Charter Pipeline, ending the year with 250,000 data customers. We added over 3,500 new data customers per week last year. In the first quarter of this year, we have added 6,000 new data customers per week. Charter Pipeline cable modem service competes directly with the telephone industry's fast growing DSL service, and our prices are very competitive. In fact, it was the deployment of cable modem service that sparked competition from DSL providers. We also provide significant discounts for a bundled video and data product to attract and retain customers.

We also recently launched Video on Demand in two of our markets. With this new service, customers have access to a library of more than 400 movie titles and can enjoy full VCR functionality while viewing their selection. Customer response has been extraordinarily positive. We have seen Video on Demand take rates double that of traditional pay-per-view and we will roll out Video on Demand in 10 more markets this year. By the end of 2001, we are projecting 2.2 million Charter homes will have access to Video on Demand technology.

But in a competitive environment, it all comes down to taking care of your customer. They vote with their pocketbook every day in this competitive environment. That is why we are continuing to enhance our customer service program.

For example, in Wisconsin, we have invested more than half a billion dollars to upgrade our plant and swiftly deploy advanced cable services. To service our newly upgraded systems, we opened our first state-of-the-art regional customer contact center in Fond du Lac. The center does not replace our local offices, but adds a level of specialized customer support for advanced digital products, available 24 hours a day, seven days a week. This center will serve as a template for six additional regional centers that we are building this year at a total cost of over $60 million, culminating in twelve regional call centers at a cost of over $100 million in the next two years.

Charter is also undertaking telephony initiatives focusing on the testing of IP calling technologies and developing back-office support. We are working with Cisco, Telecordia and Motorola on a trial in Wisconsin and another home-user trial with Nortel and Antec in the St. Louis market. We expect to compete in local telephone service when our IP technology is ready. We anticipate this to be 2003.

Charter is working on several other advanced technology initiatives including video streaming, which will be available to our customers in the third quarter; home networking, and web cams for video conferencing that will benefit our residential customers.

Charter fully recognizes that we are in a new era of competition for the various services we offer to our customers. By investing in broadband technologies and deploying new services through innovation, Charter is well positioned to compete effectively in this vibrant new marketplace. The American consumers are the real winners with an increasing array of digital, data and interactive services available from a growing number of competitive providers.

Thank you again, Mr. Chairman, for inviting me to appear before you today. I would be happy to answer any questions you might have.

Chairman DEWINE. Thank you, Mr. Kent.

Mr. Currey?

STATEMENT OF ROBERT CURREY, VICE CHAIRMAN, RCN CORPORATION, PRINCETON, NEW JERSEY

Mr. CURREY. Mr. Chairman, Ranking Member Kohl, and members of the Antitrust Subcommittee, I am pleased to be here to discuss the importance of competition in the cable market.

RCN was formed in 1996 with the unique mandate to provide bundled telephone, cable, and Internet access all on one pipe, through one provider, on one bill—true convergence. We operate in 7 of the 10 largest U.S. markets, and for the first time in these markets consumers have a choice.

RCN is the largest cable competitor in the country, with about 1 million customer connections. We are also unique because unlike telecom startup companies, we focus on serving residential consumers.

Today, the cable industry is dominated by a small number of multiple-system operators who also own programming and who are now clustering their systems geographically for greater local control. The country's 10 largest cable monopolies now serve almost 90 percent of all subscribers.

Despite this David-and-Goliath scenario, RCN is aggressively competing in the market. We are spending large amounts of time and money and we are making healthy progress, but we continue to face serious anti-competitive practices by entrenched incumbent cable operators. Their anti-competitive practices include withholding vital programming, restricting our access to apartment buildings, and pressuring local authorities to deny competitive franchises.

As to the programming, consumers simply will not switch to RCN if we cannot guarantee first-rate programming, especially local sports. Naturally, incumbents are trying to keep the best programming away from us. In New York City, for example, Cablevision owns or controls the programming rights to 7 of the 9 professional sports teams and their venues, and Cablevision has withdrawn from our consumers an important tier of local sports programming by claiming the so-called terrestrial bypass loophole.

In Philadelphia, Comcast serves about 90 percent of the market and controls the programming for professional basketball, baseball, and hockey. Yet, Comcast won't give us more than a rolling 3-month contract for that programming. This is simply not sustainable commercially.

Congress has tried to prevent this abuse by requiring vertically integrated cable companies to make their programming available to competitors. But the FCC's mistaken interpretation of the law allows the incumbents to withhold that programming by simply delivering it by terrestrial means. We urge Congress to close this loopholes.

Incumbents also attempt to deter our access to the market by preventing us from serving apartment buildings through exclusive agreements with building owners and operators, or in an even more insidious way by claiming ownership to the inside wire inside the building walls. These buildings are a crucial core market for a new competitor providing residential service in urban areas. Incumbents also pressure local franchise authorities to delay grant-

ing competitive franchises. If that doesn't work, they push for commercially unreasonable obligations on the potential competitor.

In Philadelphia, Comcast heavily lobbied the city against our entry. Eventually, the city government became indifferent, even hostile to our efforts. After 2 1/2 years, we reluctantly abandoned our plans to spend more than $200 million and bring hundreds of new jobs to the city, as well as introduce choice for the first time for cable and phone service. This is not in the public interest.

Competition is such a powerful force that merely announcing our entry into a market dramatically changes the incumbent's behavior. Price increases are moderated or delayed and channel lineups and customer service are improved. These facts are documented for a number of markets in detail and covered in my written testimony.

Incumbent monopolists are aggressively pushing a message that oversight is no longer necessary because competition has arrived. Well, competition has begun to arrive, but during the transition to a fully competitive environment we need the Government's active oversight and enforcement of the existing rules.

Most immediately, the provisions of the Cable Act of 1992, barring exclusivity in the distribution of vertically integrated programming, will sunset next year unless the FCC acts to retain them. Congress should urge the FCC to prevent the sunset of this rule. Further, Congress should close the terrestrial bypass loophole and make clear the FCC's power to enforce pro-competitive policies. These actions are vital to guarantee consumers the benefits of competition.

I will be happy to answer any questions you may have. Thank you very much.

[The prepared statement of Mr. Currey follows:]

STATEMENT OF ROBERT CURREY, VICE CHAIRMAN, RCN CORPORATION

Mr. Chairman and Members of the Subcommittee:

My name is Bob Currey. I am the Vice Chairman of RCN Corporation ("RCN"), which is one of the largest new competitive entities in the cable, or Multichannel Video Programming Distribution ("MVPD") industry. I am grateful for the opportunity to testify today before the Antitrust Subcommittee to give you my company's perspective on the state of competition in an industry which historically has been dominated by entrenched monopolists.

I. INTRODUCTION

RCN, which was created in response to the pro-competitive policies adopted in the Telecommunications Act of 1996, is unique in a number of respects. We offer our customers a variety of bundled services, including competitive local exchange carrier and interstate telephone service, high speed internet access services and cable services. We focus our efforts on bringing competition to residential consumers. We are building out, and relying on, our own state-of-theart broadband fiber optic cable network, an investment of many billions of dollars. We operate in the Northeast corridor, from Boston to Washington, D.C., and in the San Francisco, Los Angeles, and Chicago areas. Through our Resilinksm plan, we offer our customers the option of subscribing to one or more of our services. In respect to each we seek to provide higher value than the competition and, in addition, we offer discounts for those who participate in all three. The focus of my testimony today, however, is on the video aspect of our business and specifically on the state of competition in the cable, or MVPD marketplace. In such capacity we are frequently described as a "cable overbuilder."

Before describing RCN's business model and activities, let me briefly outline the state of the cable market as I see it. Given the very strong economies of scale and scope which exist in the construction, installation and servicing of a broadband facil-

ity, the cable industry has historically been characterized by monopoly in any given area. There has been some minor competition in certain markets, coming from wireless (so-called SMATV and MMDS) operators, especially in large apartment buildings, but on the whole incumbent cable operators have accounted for virtually all of the market.[1]

Competing with an existing cable operator in an urban area is not for the faint-hearted or the thinly-capitalized. Since passage of the Telecommunications Act of 1996, however, with its strong emphasis on encouraging competition in the telecommunications and broadband markets, and legislation addressing certain problems faced by the Direct Broadcast Satellite ("DBS") industry, competitive entry has taken root. In its January, 2001 annual survey of the MVPD industry, the FCC concluded that traditional cable now accounts for only 80% of the market, with DBS having captured some 15%, and other market participants, such as overbuilders of traditional cable systems and wireless operators, accounting for the remainder.[2] The terrestrial wireless and DBS systems suffer from line-of-sight limitations which do not hinder RCN's fiber optic based service. For that reason, it is particularly important for city dwellers to have access to a cable-based competitor like RCN.

Nevertheless, it is worth emphasizing that, even as modest competitive entry has been occurring, the cable industry has grown ever more concentrated, with the 10 largest multiple system owners ("MSOs") now accounting for some 52.5% of the market, and with the vertical integration of cable companies and programming vendors growing ever more concentrated.[3] This continuing concentration expresses itself also geographically, through the development of "clustering," by which large, multiple system owners ("MSO"s) trade systems among themselves with the goal of concentrating an entity's ownership in one or a few areas, rather than having widespread but less market-dominant operations. The industry claims that this clustering allows it to undertake system and program upgrades, and no doubt it does. Unfortunately, it also has the effect of making a local cable company's entrenchment in a metropolitan area even more unassailable than it may have been before the clustering took place.

While this is not the place to recite the long and complex regulatory history of the cable industry, a few very brief observations are necessary to understand the current situation. The basic Communications Act of 1934, of course, had no reference to cable service, although in the late 1950's and mid 1960's the FCC did take regulatory steps to protect the television industry from the rapidly growing power of cable operators. Congress itself did not specifically impose regulation on the cable industry until 1984, when it passed the Cable Communications Policy Act of 1984,[4] which established the basic federal regulatory scheme by which local franchise authorities have jurisdiction to authorize cable systems, subject to a limited degree of federal oversight. This legislation, however, only provoked growing concern about the monopolistic power of the cable industry and the need to impose some greater degree of regulation on it. As a result, the Cable Television Consumer Protection and Competition Act of 1992 was adopted.[5] This legislation followed three years of contentious congressional hearings, was heavily oriented toward regulation, and

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[1] In a very few markets cable-to-cable competition has existed for some years, for example in Allentown, Pennsylvania, in which RCN has been competing with another local franchisee for many years. Both companies have wired most of the community and most homes have immediate access to two sets of cable wires.

[2] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 7th Annual Report, CS Docket No. 00–132, FCC O1–1, rel. January 8, 2001. According to the FCC, cable's share of the MVPD market has declined in 2000 from 82% to 80%, although the number of cable subscribers has grown from 66.7 million to 67.7 million. Non-cable MVPD subscribership has grown from 14.2 million to 16.7 million, an 18% increase. Most of this growth is attributable to DBS, whose share of total MVPD subscribers has grown from 10.1 million to 13.0 million, or 15.4% of all MVPD subscribers. Local exchange carrier (telephone) participation in the MVPD industry is slowing; there is little OVS activity (less than. 1%) and little cable participation in telephony.

[3] The Commission states flatly that the market for the delivery of video programming "continues to be highly concentrated and characterized by substantial barriers to entry which serve to increase the cost of potential entry into a rival's market." (¶ 137). The 7th Annual Report notes that the top four MSOs serve more than 50% of all subscribers: ATT (19.1%);T/W (14.9%); DirecTV (10.3%); and Comcast (8.4%). The Report notes also that the top 10 MSOs served 75% of the MVPD universe in 1999 but 84% in 2000. (¶ 169). One or more of the top five MSOs holds ownership interests in each of the 99 vertically integrated services. (¶ 174). Nine of the top 20 video programming networks ranked by subscribership are vertically integrated with a cable MSO. (¶ 175). A "significant amount" of video programming is controlled by only 11 companies, including cable MSOs. (*Id.*).

[4] Pub. L. No. 98–549, 98 Stat. 277 (1984), codified at 47 U.S.C. §§ 521, et seq.

[5] Pub. L. No. 102-385, 106 Stat. 1460 (1992), codified in scattered sections of Title VI of the Communications Act. See 47 U.S.C. § 521, et seq.

added to the FCC's authority to control cable's rates and practices in an effort to address widespread and vocal public concern about the economic power and poor service performance of the cable industry. Yet it too failed to quell rising unhappiness with the prices and services offered by the industry.

Accordingly, the Congress again addressed the issue in the Telecommunications Act of 1996 which contains a number of provisions specifically intended to encourage competitive entry into the MVPD market. The most important of these is section 653,[6] which creates a new mode of competitive entrant, known as an open video system ("OVS") operator. The OVS, a mixture of cable operator and common carrier, was designed by Congress to permit local exchange telephone companies and others to enter the cable business, enjoy a reduced degree of regulation, and offer unaffiliated programmers the opportunity, in effect, to program their own small capacity system, riding on a portion of the high capacity pipe installed by the OVS operator.

RCN has become the country's largest OVS operator,[7] and has entered local markets either as an OVS operator or as a traditional Title VI franchised cable company, depending on the circumstances in each community. Specifically RCN currently operates as an OVS in certain suburbs of Boston, in New York City, in Washington, D.C. and certain of its suburbs, as well as in South San Francisco. We are also developing traditional franchised cable operations in the Boston, New York, Philadelphia, Washington, D.C., San Francisco, Los Angeles, and Chicago metropolitan areas. Unfortunately, the OVS model has not proven as attractive as one might have hoped due to a variety of factors. These include a court decision which struck down the FCC's rule eliminating the need for local franchising of OVS systems, the hesitation and even reluctance of many local franchising bodies to put aside the traditional franchise as a regulatory model and to adopt the new OVS concept, and, in addition, certain regulatory decisions of the FCC which have had a chilling effect on the OVS approach by permitting local cable competitors, in certain circumstances, to require the OVS operator to divulge its service and operational plans to a local competitor.

Another of the procompetitive steps taken in the Telecommunications Act of 1996 was the amendment of section 224 of the Communications Act to compel pole-owning utilities to make their poles accessible to cable companies and to telecommunications companies and to impose additional pro-competitive conditions on the utilities.[8] RCN has found it invaluable to have the benefit of this legislation. As a telecom entity which plans to build its own facilities to serve primarily residential customers, rather than the more limited universe of commercial subscribers targeted by the great majority of competitive local exchange carriers ("CLECs"), and as a cable competitor, RCN must run its facilities up every residential street and down every alley.

In Massachusetts, for example, we are currently on 72,000 poles and will require access to some 60,000 more. In Pennsylvania we are currently licensed for almost 16,000 poles and, ultimately, may need access to over 100,000. In Queens, New York, we are on 5,200 poles. This means that suitable access to poles is far more important to RCN than it is to other telecom competitors. Indeed, we have had to rely on the pro-competitive policies embodied in section 224 of the Communications Act to address circumstances in which RCN has been unable to secure what it deems just and reasonable terms for access to utility poles.[9] In both the Boston and Washington, D.C. markets RCN has entered into partnerships with affiliates of local power companies in part to assure access to utility poles.

Earlier, I noted that competing with entrenched monopolists is a daunting challenge. The entrant must be able to market its services against entrenched cable operators who have substantial advantages in the competitive battle: name recognition, an embedded customer base, strong economies of scale, established relationships with local franchise and governmental authorities, a corporate presence in the community, and vertically integrated programming affiliates or established contracts for programming.

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[6] 47 U.S.C. § 573.

[7] Indeed, there exist no other significant OVS operations although Congress and the FCC intended OVS to be the primary source of facilities based competition to cable operators. *See, e.g., Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order*, 11 FCC Rcd 18223, 18259 (1996)(Subsequent history omitted).

[8] 47 U.S.C. § 224(e), 224(f)(1).

[9] RCN has experienced difficulties securing access to the poles of Verizon in both Massachusetts and Pennsylvania. In the Philadelphia suburbs RCN has filed a formal Pole Access Complaint against the local power company, Exelon, alleging that Exelon's pole attachment fees are excessive, and in other respects unjust and unreasonable. *See RCN Telecom Services of Philadelphia, Inc.* v. *Exelon Corp*, PA No. 01–_____, filed March 16, 2001.

The new entrant has no captive subscribers; no initial revenue and enormous start-up expenses such as securing the local franchise. This latter process alone generally takes six months to a year. Local franchise authorities usually attempt to secure as high a price as possible for granting a franchise and typically require high standards of proof of a franchise applicant's financial and operational experience and capability. Multiyear construction commitments are normally required. Accordingly, the potential competitor must earmark funds, purchase long lead time items, enter into programming commitments, hire hundreds of employees in each market, and, most important, fight for each subscriber because the local citizens who want cable service are probably already customers of the incumbent. To use a well-worn metaphor, the lowhanging fruit has been picked. Installing fiber optic or coaxial cable throughout a community can cost tens to hundreds of thousands of dollars per mile. As a result, it has generally been thought that competitive MVPD service based on construction of a second local broadband distribution network is not sustainable financially[10] and there has been relatively little of it, either before passage of the Telecom Act of 1996, or thereafter.

Of course, RCN also enjoys certain competitive advantages: its newly designed and installed fiber optic network is among the most advanced in the world,[11] it is able to offer bundled service combining local and long distance telephony, high speed Internet access, and broadband video from day one. Because it is not an incumbent cable operator it is not generally disdained or disliked by the general public, as are so many established cable companies whose reputation for poor service and high price is well deserved. In fact, almost without exception RCN has found that local franchise authorities and local residents enthusiastically welcome the introduction of a cable competitor.

In each of the markets in which we have made a bridgehead in spite of the numerous and daunting entry barriers, we have been able to fulfill the fundamental pro-competitive premise of the 1996 Act. This Subcommittee, of course, does not need to be persuaded that competition is a good thing, nor that competition in the video marketplace is both desirable and necessary. The continuous increase in customers' cable rates, typically well in excess of inflation, is a constant topic of concern.[12] Yet it is interesting to see the theory at work. Economic theory recognizes that the cable incumbents, who have enjoyed a quiet but very prosperous life for decades, do not welcome new competition.[13] Over the last three years we have been subjected to a barrage of anticompetitive activities by incumbent cable companies: we have been harassed by pleadings seeking the withdrawal of our OVS authority on various specious grounds—pleadings filed both by individual cable companies and by cable trade associations. We have been subjected to multiple administrative proceedings instigated by the cable incumbent in Boston—our first OVS market—as well as litigation in federal court brought by the incumbent cable operator which the presiding judge urged be withdrawn because it was so lacking in merit. We have been denied access to critical programming by our video competitors both in Boston and New York and threatened with such denial in the Philadelphia area.

For any prospective competitor to have a meaningful chance to be commercially successful in introducing competition into a community served by an entrenched cable operator, whether or not that incumbent is one of the large vertically integrated multiple system operators, the competitor must have deep pockets, an ability to postpone profits for some years, the most modern technology, and the patience to negotiate franchise agreements and rights-of-way agreements with local governments, pole attachment agreements with local utilities, and all the associated real estate, employment, marketing and related business relationships. But all of these

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[10] Typically, it is said that "[o]nce an incumbent system has captured a large share of the viewing public in a particular area, it is quite difficult for a new system to come into the market and offer potential subscribers as favorable pricing and viewing options as those available from the incumbent system." Piraino, A Proposal For the Antitrust Regulation of Professional Sports, 79 B.U.L. Rev. 889 (1999) at n. 387.

[11] *See* Morgan Stanley Dean Witter Report, March 31, 1999. RCN has been rated number 2 out of 100 of the most innovative telecommunications companies in America. See Forbes ASAP Dynamic 100 List, April 5, 1999.

[12] *See, e.g.*, FCC 7th *Annual Report on Competition in Video Markets* (Jan. 2001), ¶155, reporting an overall increase in cable rates of 4.8% as compared with a CPI increase of 3.2%; Communications Daily, July 15, 1998, p. 2, reporting CPI data showing cable rate increases of 7.3% over the previous 12 months as compared with a 1.7% inflation rate.

[13] See Predation In Local Cable TV Markets, Antitrust Bulletin, 9/1/95 by T.W. Hazlett: "Cable television operators pursue a predictable set of reactions. . . to a potential CATV entrant. . . beginning with a vigorous lobbying campaign to deny entry rights. . . selective price cutting, preemptively remarketing the first submarkets to be competitively wired. . . tying up cable network programming. . . delaying access to . . . poles and/or underground conduits. . . and creating customer confusion . . .." *Id*. at 11.

pale into relative insignificance compared with the need to acquire the product which is to appear on the screens of the competitor's subscribers.

Programming is of course essential to MVPD competition since in the absence of appealing programming nothing else matters. RCN is not aware that any participant in the MVPD industry disputes this proposition. Even the Commission has accepted its root importance: "A major component of the ability to compete with cable systems is the ability to secure programming. Ensuring fair and equitable program access is the key to fostering the development of vigorous multichannel competitors to cable."[14] The general public does not know or care about technology, corporate structure, or abstract theories of competition. It cares only about the programming and the costs of that programming, and it is here—at this core issue—that RCN faces a key barrier to the successful implementation of its competitive services.

Of course, we anticipated resistance but to be candid the extent and intensity of that resistance—the prevalence of anticompetitive practices—has really surprised us. I hasten to add the important point that it has not deterred us but merely required allocating more time and resources to establishing ourselves in various local markets than we had initially anticipated.

II. Competitive Improvements

With this brief background, let me turn to illustrations both of the advantages to the public of competitive entry and to the various difficulties we have encountered. RCN's introduction or announced introduction to a market benefits consumers because it leads the incumbent to improve its existing offering in one or more ways. Sometimes these are voluntary adjustments by the incumbent. Sometimes they occur in the context of a franchise renewal when RCN is awaiting the award of its own franchise, a process which gives the local franchise authority more leverage on the incumbent:

SOMERVILLE, MA

Incumbent Time Warner announced rate freezes in Somerville, a Boston suburb, upon RCN's entry, even though it was raising rates in most of the eastern Massachusetts communities in which it was the franchisee by 10% to 15%.

BOSTON, MA

The City was able to negotiate a franchise renewal with Cablevision which imposed obligations on the incumbent more favorable to the public than would otherwise have been possible because RCN was already operating in the city as an OVS. Cablevision agreed to increase its commitment to public, educational and government ("PEG") channels and increase the channel capacity of its system. Cablevision also moderated its regional rate increase in the Boston area because it faced competition from RCN.

NEW YORK CITY

In Manhattan the incumbent, Time Warner, adopted an aggressive bulk discount plan for apartment buildings targeted for service by RCN.

SUBURBAN PHILADELPHIA

As RCN has rolled-out its competitive cable and local telephone services in suburban Philadelphia communities such as Folcroft, the incumbent, Comcast, began offering rate locks and service improvements in towns to which RCN was offering or about to begin offering service. These special offers were highly selective, and focused specifically on the imminent arrival of RCN's competitive service.

ALLENTOWN, PA

Allentown is one of the very few communities in the United States which has been served for 20 years by competitive cable companies. In Allentown the competitors are RCN and Service Electric. Both have almost fully built-out the city, so that most residences have two broadband wires available at each house. As a result of the competition, cable rates are significantly below the national average, and penetration is higher than the national average (approximately 90% of the city is wired by

[14] *In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, Report, 5 FCC Rcd 4962 (1990) ("FCC 1990 Cable Report"), at ¶ 112.

both companies). There are also fewer customer complaints on a percentage basis than the industry experiences nationally.

WASHINGTON, D.C. METROPOLITAN AREA

RCN's affiliate in Washington, D.C., Starpower, has provoked dramatic changes in the offerings of incumbent cable operators, discouraging price increases and improving service offerings. Upon the announcement of Starpower's entry into the market, the D.C. incumbent's rate increases moderated from previously announced annual increases in the range of 7% to a mere 2% in 1998. Starpower's basic rate in Washington, D.C. is $31.95 for 96 channels and no installation fee. Comcast charges $33.87 for 56 channels with a $39.95 installation fee. In anticipation of competitive entry, Cox Cable announced that it would upgrade its cable to 860 MHz capacity in Fairfax County. In Prince George's County, Comcast announced an upgrade of its plant beyond its franchise obligation in light of Starpower's arrival. Comcast in Arlington announced a major overhaul of its channel line-up with significant additional channel capacity and digital upgrades to make its offerings more competitive with newly-franchised Starpower.

IN GENERAL

The FCC has broadly addressed this issue in its annual reports on the status of competition in the MVPD market.[15] Typical observations are the following: "[C]ompetition often results in lower prices, additional channels, improved services, or additional non-video services."[16] "Generally, we find that in communities where head-to-head competition is present, the incumbent cable operator has responded to competitive entry in a variety of ways, such as lowering prices, providing additional channels at the same monthly rate, improving customer service, adding new services including high speed Internet and telephone services, or by challenging the legality of the entrant's activities."[17]

III. Opposition From Incumbent Cable Operators

Almost without exception RCN has found that incumbent cable operators will attempt to inhibit, delay, complicate or, if possible, preclude altogether competitive entry. Such obstinance deprives consumers of the benefits of competition and should not be tolerated by policy makers. Among RCN's experiences is the following:

IN GENERAL

RCN has seen a troubling trend among incumbents to consolidate their holdings in a limited number of metropolitan areas, i.e. to "cluster," and then to build a fiber distribution network in those communities. The advantage of using fiber optic distribution is that the FCC has held (wrongly, in our view) that the program access provisions of section 628 of the Cable Act of 1992 do not apply to any programming not distributed by satellite. With clustering, the economics of fiber distribution becomes more practical, allowing the incumbent to evade the provisions of section 628 of the Act by buying the rights to local professional sports programming and refusing to share that programming with competitors. This is what Cablevision has-done to RCN in New York City, and is what Comcast threatened to do to RCN in Philadelphia.

In the Washington, D.C. area, in which Comcast has the dominant position, it refused the request of a member of the Arlington, Va. County Board to agree in principle to make its vertically integrated programming available to competitors but appears to have been deterred from curtailing access to Home Team Sports, now renamed "Comcast SportsNet," because the Justice Department carefully reviewed Comcast's proposed acquisition of that programmer and negotiated an agreement with Comcast. Local sports programming is critical to entrants because many consumers subscribe to cable programming solely or primarily to view such programming; many consumers will not switch providers without it.[18] Starpower also has

[15] *See, e.g., Fourth Annual Report, Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034 (1998), at ¶¶ 131–132; *Fifth Annual Report*, 13 FCC Rcd 24284 at ¶¶ 121 and 136–137, and Sixth Annual Report, 15 FCC Rcd 978 at ¶¶ 129–133; *Seventh Annual Report, supra*, at ¶¶ 213–238.

[16] FCC, *Seventh Annual Report* at ¶ 39.

[17] *Id.*, at ¶ 213.

[18] RCN's business plan anticipates a penetration rate of about 30% of the homes it passes in each market it builds out. As the surveys it has taken indicate, approximately 40–58% of any local market would essentially be impenetrable to an overbuilder if it lacked access to the bulk

Continued

been as yet unable to secure the rights to carry certain other programming, including News Channel 8 and MSNBC, due to claims of exclusivity. Clearly the public is not served by its inability to view those channels on Starpower's system.

BOSTON, MA

In Boston the incumbent refused to make certain programming it controlled available to RCN. It also attempted to use the FCC's OVS rules to pry proprietary and confidential data from RCN concerning its market plans. The FCC rejected the effort. The incumbent also filed suit in Federal Court against the City of Boston and RCN's Boston affiliate to try to delay the build out of RCN's competitive system.[19] The incumbent refused to share its cable inside wiring with RCN in multi dwelling units (MDUs) where the building owners would not allow RCN to install its own wiring. Another incumbent, operating in the suburbs, sought acquisition of RCN's OVS data. In this instance, the FCC ruled partially in favor of the incumbent and partially in RCN's favor. The full Commission has been asked to reconsider its ruling and the U.S. Court of Appeals for the D.C. Circuit has been asked to review the FCC's decision.[20]

NEW YORK CITY

In New York City one of the incumbents, Cablevision, with some 2.7 million subscribers, controls programming rights for seven of the nine local professional sports teams[21] and their venues. In early 1999, Cablevision revised its sports programming distribution system from satellite to terrestrial so as to preclude RCN's carriage of an important tier of extremely popular local sports programming. As RCN explained to the FCC, the loss of a full slate of local sports programming is a serious detriment in marketing RCN's new service.[22] Another New York City incumbent, Time Warner, sought access to RCN's competitively sensitive OVS data as Cablevision had done in Boston. In this instance the FCC ultimately ruled partially in favor of Time Warner and partially in favor of RCN.[23] Time Warner also declined to carry RCN's advertising on its Manhattan cable system, and for a long time refused to permit RCN to share apartment building inside cable wiring or to use Time Warner's poles to distribute its competitive programming.

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of local sports programming. The result would be a penetration rate of about 15%, a rate so low that no entrepreneur would be willing to risk the hundreds of millions of dollars required to overbuild an urban area with modern fiber optic plant. In essence, this is the plan of the entrenched MSOs. Both the Commission and the Congress have repeatedly recognized the special importance of sports programming. RCN can provide further detail on this crucial issue if it would be helpful to the Subcommittee.

[19] The filing of this suit, *Cablevision of Boston, Inc.* v. *Public Improvement Commission, et al.*, 38 F. Supp. 2d 46 (D. Mass. 1999), *affirmed*, 184 F. 3d 88 (1999), neatly illustrates the anticompetitive motives of incumbents. In its suit Cablevision sought to have the Court stay further implementation by RCN of its business plan to use existing conduit and fiber to accelerate the roll-out of RCN's competitive OVS services in the City of Boston. The District Court denied any injunctive relief to Cablevision and found that Cablevision's case was not likely to succeed on the merits. Indeed, the Court characterized RCN as "a paradigm of the new entrant that Congress contemplated," and observed that:

Cablevision has brought this suit, which In have preliminarily found has little chance of succeeding, just as the people of Boston have a realistic hope of receiving the benefits of fair competition in the cable television industry. Those benefits include more choices, better service and the prospect of lower prices. It would be contrary to the public interest to issue the preliminary injunction Cablevision now seeks. *Id.*, at 63. The First Circuit Court of Appeals sustained the denial of stay, and found that the suit had little merit. Cablevision ultimately dismissed it with no decision on the merits.

[20] *See, e.g., Time Warner Co.* v. *RCN BecoCom*, LLC, 15 FCC Rcd 1124 (2000), *recon. pending, appeal pending sub nom. RCN Telecom Services of New York, Inc.* v. *FCC,* D.C. Cir. Case No. 00–1043, filed February 9, 2000.

[21] These teams are the Yankees, Mets, Knicks, Nets, Rangers, Islanders, and the N.J. Devils. Cablevision owns outright two of these teams: the Knicks and the Rangers.

[22] "From the viewpoint of marketing, it is not good enough to say we offer 'most' local sports, or 'almost all' local sports. The public does not want to have to analyze what is missing; they want to know they will get it all, and this is especially important in a fiercely competitive environment such as the New York City MVPD market. Stated differently, having, for example, 85% of the local sports programming is not 85% as good as having 100%; it is a significant competitive disadvantage, and this is true whether we have 75% or 85% or even 95%." Reply of RCN Telecom Services of New York, Ex. A, pp. i-ii, June 28, 1999.

[23] This proceeding, consolidated with the Boston case described above, is subject to FCC reconsideration and Court of Appeals review.

PHILADELPHIA

In the Philadelphia metropolitan area the overwhelmingly dominant incumbent, Comcast,[24] acquired the great bulk of the local sports programming, as well as their venues, and threatened to deny RCN long term access.[25]' The threat was mitigated only when Comcast faced Justice Department review of its plan to acquire Home Team Sports in the Washington area. To this day, however, Comcast has refused to enter into a multi-year industry-standard contract for local sports programming in Philadelphia, but keeps RCN on a revolving three month renewal. This is no way to run a business and puts us at constant risk. Comcast also was successful in making RCN's effort to secure a franchise from the City of Philadelphia so difficult, expensive, and time consuming that RCN ultimately abandoned the effort altogether. This withdrawal removed some 200 million of potential investment in the City and the prospects of hundreds of jobs.

WASHINGTON, D.C.

In the Washington, D.C. metropolitan area Media General, which operated in a number of suburban counties, followed the approach pioneered by Cablevision and Time Warner when faced with competition from RCN, and attempted to use the FCC's OVS rules to get access to proprietary and confidential business data of Starpower, RCN's affiliate. The matter is still pending before the Commission. In various D.C. metropolitan area jurisdictions incumbents have sought to delay the granting of franchises to Starpower and to influence local franchise authorities to impose financially and operationally unrealistic obligations on Starpower. Comcast has adopted the practice of paying MDU owners up front to sign contract renewals, and seeks exclusive agreements wherever it can get them. In northern Virginia in particular, Starpower has been locked out of numerous buildings because the incumbent has the benefit of an exclusive right to provide service to that structure.

IV. Critical Issues

There are other impediments to the successful roll-out of competitive cable service. These include the following:

DENIAL OF ACCESS TO INSIDE WIRING

Competitive cable providers must have access to tenants in apartment and office buildings to survive. About 30–35% of the total population lives in multiple dwelling units (MDUs), such as apartments, cooperatives or condominiums. The ability to serve this sector of the market is crucial because it is generally more profitable due to the large number of subscribers in each MDU. For a start-up company, MDU access is especially vital since it allows a more rapid build up of operating revenue than developing market share by building out service to individual homes. However many MDU owners fear that new entrants will disrupt the building to install their own wiring to each apartment, and incumbents frequently claim that they own the existing wiring and by law or contract have the right to remain in the building and need not share their wiring with the newcomer. The result is that the new competitor is effectively blocked or, at the least, significantly impeded in this especially valuable segment of the market. RCN has encountered this problem in every metropolitan area.

The inside wiring issue has been a problem for cable overbuilders for some time. Section 624(i) of the Communications Act,[26] which Congress adopted in the Cable Act of 1992, directed the FCC to adopt rules governing the disposition of wiring

[24] Comcast serves 1.9 million subscribers in the Philadelphia metropolitan area, about 90% of the total subscribership. Nationally it is one of the largest MSOs, with some 8.2 million subscribers.

[25] Through subsidiaries, Comcast owns a controlling interest in the Philadelphia Flyers National Hockey Team, the 76ers National Basketball team and two area arenas. It also holds a controlling interest in SportsNet which controls the great bulk of the professional area sports programming in the Philadelphia DMA. SportsNet carries approximately 66% of the games of the Philadelphia Flyers (NHL) and 73% of the Philadelphia 76ers' (NBA) regular season games as well as 49% of the Phillies' games (MLB). Comcast also owns exclusive rights to broadcast games of the Philadelphia Phantoms (American Hockey League), Philadelphia Wings (National Lacrosse League), and Philadelphia Kixx (National Professional Soccer League), as well as numerous football and basketball games of regional colleges and universities. This programming is distributed terrestrially to 2.7 million subscribers in the Philadelphia DMA. In its own promotional material Comcast has touted the strategic importance of SportsNet: "SportsNet provides a significant marketing advantage against satellite TV and other competitors."

[26] 47 U.S.C. § 544(i).

within the cable subscriber's home when such subscriber voluntarily terminates service. The FCC subsequently adopted such rules setting forth the rights to such wiring of the cable provider, the resident, and the building owner, and any new competitor. However, the FCC restricted the application of these new rules to the wiring inside individual units and up to 12 inches beyond such units.[27] In 1997 the Commission adopted rules governing access to home run wiring in cases where an incumbent does not have an enforceable right to remain on the property.[28]

In formulating its inside wiring rules, the FCC anticipated that incumbent cable companies, especially in the case of service to MDUs, might not cooperate with new video competitors and adopted rules specifically designed to address such situations. The Commission has therefore gone to great lengths to resolve the many complex bottleneck issues related to inside wiring within MDUs, and has adopted regulations that attempt to moderate the anticompetitive inclinations of incumbents. In explaining these procedures, the Commission accurately described some of the problems RCN has faced:

> [W]e believe that disagreement over ownership and control of the home run wire substantially tempers competition. The record indicates that, where the property owner or subscriber seeks another video service provider, instead of responding to competition through varied and improved service offerings, the incumbent provider often invokes its alleged ownership interest in the home run wiring. Incumbents invoke written agreements providing for continued service, perpetual contracts entered into by the incumbent and previous owner, easements emanating from the incumbent's installation of the wiring, assertions that the wiring has not become a fixture and remains the personal property of the incumbent, or that the incumbent's investment in the wiring has not been recouped, and oral understandings regarding the ownership and continued provision of services. Written agreements are frequently unclear, often having been entered into in an era of an accepted monopoly, and state and local law as to their meaning is vague. Invoking any of these reasons, incumbents often refuse to sell the home run wiring to the new provider or to cooperate in any transition. The property owner or subscriber is frequently left with an unclear understanding of why another provider cannot commence service. . .. The result, regardless of the cable operators' motives, is to chill the competitive environment.[29]

Unfortunately, the Commission's inside wiring rules are grossly deficient. They are limited to instances in which the incumbent does not have a legal right to retain its wiring on the premises. In many states the incumbent cable companies have persuaded the legislature to adopt what are known as "mandatory access laws." These laws, with variations from state to state, grant cable companies a legal right to install their service in MDUs even over the objection of the building's owners or managers.[30] Because the mandatory access laws were crafted only for the benefit of Title VI cable companies, they are one-sided relics of a by-gone era and have been relied on repeatedly by the incumbents to claim that they own inside wiring, even when they can not provide any proof of ownership. For its part, the Commission has declined to draft its rules so as to preempt these anticompetitive statutes, instead expressing hesitation about the scope of its authority to do so.[31]

PROGRAM ACCESS

Section 628 of the Communications Act,[32] adopted in the Cable Act of 1992, is vitally important to the development of broadband competition. Section 628(b) was enacted in response to widespread difficulties experienced by competitors gaining access to programming controlled by the incumbent cable companies. The statute therefore provides that vertically integrated cable companies cannot engage in unfair methods of competition or unfair or deceptive practices in an effort to hinder competitors' access to programming controlled by the integrated cable companies. It also prohibits discrimination in the terms under which such programming is made

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[27] *See* 47 C.F.R. §§ 76.801–2 and 76.5(mm).

[28] *See Telecommunications Services, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, Report and Order and Second Further Notice of Proposed Rulemaking*, CS Docket No. 95–184 and MM Docket No. 92-260, 13 FCC Rcd 3659 (1997) ("Inside Wiring Order"), *recon. pending and appeal pending, Charter Communications, Inc.* v. *FCC*, Case No. 97–4120 (8th Cir.).

[29] *Id.* at ¶38 (footnotes omitted).

[30] There are about 18 such statutes.

[31] Report and Order and Second Further Notice of Proposed Rulemaking, in Docket No. 95-784, MM Docket No. 92-260, at page 81-101.

[32] 47 U.S.C. § 548.

available to competitors.[33] The FCC however, has interpreted the statute to be inapplicable to instances in which such programming is distributed by terrestrial, as compared with satellite, distribution.[34] This interpretation of the law makes no practical sense whatever, and has created a giant loophole which is being used by a number of incumbent cable companies to shift programming previously distributed by satellite to terrestrial transmission and then to refuse to make it available to local competitors.[35]

As I have noted above, in three of our principal markets we have had serious concerns about access in particular to local sports programming. This is not an accident. The cable industry appears to have adopted ownership or control of local sports programming as a device to capture or assure dominance in local markets. It has long been recognized that sports programming is crucial.[36] Cablevision is not only dominant in the New York City sports programming market but has investments in a wide variety of sports programming activities.[37] Industry commentators recognize the value of the sports programming monopoly to cable operators:

> [P]rofessional sports leagues have further extended their economic power by allying with other monopolies in related markets. The leagues' relationships with broadcast networks and cable systems have limited competition in local media as well as sports markets. The New York Yankees, for instance, have granted Cablevision the exclusive right to broadcast games in the New York area in exchange for a payment of $486 million over twelve years. Such a relationship, however, does not only increase the Yankees' monopoly profits. By giving Cablevision exclusive control over sports programming critical to any cable system's success, the Yankees have allowed Cablevision to preclude potential competitors from entering the New York cable market.[38]

The FCC's narrow interpretation of Section 628 has acted as a substantial barrier to entry and we urge Congress to amend the law so that the method of program distribution is irrelevant to the applicability of the program access provisions. Another important provision of section 628 limits the ability of vertically integrated cable companies which own programming to enter into exclusive agreements that result in denying such programming to new competitors.[39] However, this provision sunsets on October 5, 2002, unless the Commission determines in a rulemaking that continuing that provision beyond the termination date is necessary to preserve and protect competition and diversity in the distribution of video programming.[40] Failure to extend those provisions would be a disaster for new entrants like RCN. In

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[33] See 47 U.S.C. § 548(b) and § 548(c)(2)(B). The following excerpt from the legislative history of section 628 containing remarks by Representative Tauzin provides considerable insight into Congressional intent: "[My] amendment, very simply put, requires the cable monopoly to stop refusing to deal, to stop refusing to sell its products to other distributors of television programs. In effect, this bill says to the cable industry, 'You have to stop what you have been doing, and this is killing off your competition by denying it products.'. . . Programming is the key. . .. Without programming, competitors of cable are . . . stymied and who is the big loser? The big loser is everyone in America who pays a cable bill. . .." What does it mean? It means that cable is jacking the price upon its competitors so high that they can never get off the ground. In some cases they deny programs completely to those competitors to make sure they cannot sell a full package of services. So the hot shows are controlled by cable. . .. It is this simple. There are only five big cable integrated companies that control it all. My amendment says to those big five, "You cannot refuse to deal anymore.'" 138 Cong. Rec. H6533–34 (July 23, 1992) (statement of Rep. Tauzin) (emphasis added).

[34] *See, e.g. RCN Telecom Services of New York, Inc.,* v. *Cablevision, et al.*, 14 FCC Rcd 17093 (CSB, 1999), *application for review pending*.

[35] *See, e.g., id, and DirecTV, Inc., et al.* v. *Comcast*, 15 FCC Rcd 22802 (2000).

[36] *See, e.g., Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992; Inquiry into Sports Programming Migration*, Final Report, 9 FCC Rcd 3440 (1994).

[37] According to Multichannel News, Cablevision's Rainbow Media Holdings Inc. and Fox/Liberty Networks (with which Cablevision has sports affiliations) "either own or are affiliated with more than 20 regional sports networks that have programming deals with most professional teams: 25 of 30 MLB teams, 26 of 29 National Basketball Association teams and 19 of 26 National Hockey League squads." Multichannel News, May 4, 1998, p. 74. The article also comments that such programming is a "gold mine" for the regional sports networks, "[L]ocal events often generate the highest ratings of any cable program . . .." *Id*.

[38] Piraino, *supra*, at 891 (footnotes omitted). Cablevision has tied up programming rights to the Mets for 30 years, and the Yankees for 12 years. Possessing the rights for seven of the nine teams in the New York metro area has allowed Cablevision to triple its previous subscribership. *Id.*, at 919.

[39] 47 U.S.C. § 548(c)(2)(D).

[40] 47 U.S.C. § 548(c)(5).

any case, however, it is vitally important that all provisions of section 628 are vigorously enforced by the FCC.

DIFFICULTY IN ACCESSING LOCAL RIGHTS-OF-WAY ON FAIR AND REASONABLE TERMS.

Competitive cable providers must have access to local rights-of-way to deploy their networks to consumers, whether by attaching to existing utility poles or using underground conduit. Sections 253 and 621[41] of the Communications Act leave control over local franchising and local rights-of-way to municipal or other local authorities subject to broad principles of federal law. It is extremely common for local cable regulators to use the need to secure local authority as an occasion to extract substantial revenue or valuable concessions such as free municipal service from new competitors during franchise negotiations. Numerous FCC and court cases have addressed the scope of local rights to impose such charges or obligations under federal and state law. RCN has suggested to the Commission that it establish federally-mandated standards governing access to such public rights-of-way and require local authorities to adhere to reasonable standards of timeliness and equitable treatment in granting such access. The Commission has not yet acted on this proposal. At the moment there are few clear rules which are uniformly interpreted and applied in all areas.

ADVERSE ADMINISTRATIVE AND JUDICIAL ACTION.

Numerous recent decisions of the Cable Services Bureau are anticompetitive and inhibit, rather than encourage, the development of broadband competition. Congress should encourage the FCC to enforce the pro-competitive provisions of existing law. Some of these are described above. In a broader context, RCN has been urging the Commission to take a more dynamic and interventionist approach to the preservation and encouragement of cable overbuilding by construing its rules in a more pro-competitive fashion, and by considering the adoption of rules or policies to facilitate the transition to meaningful competition. Although the Commission frequently acknowledges that problems may exist in the implementation of broadband competition, it has often declined to address them in a meaningful way and frequently requires far too long to resolve individual matters.[42]

The Federal Courts have also issued a number of decisions which have inhibited the development of broadband competition. As described above, section 653 of the Communications Act created a new form of cable provider, the OVS which was intended to expedite broadband competition. The FCC developed rules implementing section 653 and provided that, consistent with Congressional intent to encourage new competition, OVS operators could secure an FCC certification within 10 days and need not be franchised by local communities. This streamlining of regulatory hurdles promised to significantly accelerate the development of cable competition.

However, at the urging of local governments and the cable industry, the 5th Circuit Court of Appeals struck down the rule eliminating the need for a local franchise.[43] By doing so it severely diminished one of the principal advantages of the OVS mode of operation, and in fact OVS has not been widely exploited by new competitors. There are other federal district and appellate court decisions which have interpreted various provisions of the Communications Act in a fashion which inhibits the development of MVPD competition. Among these are *Gulf Power* v. *FCC (Gulf Power II)*,[44] which denies to cable or telecom companies providing internet access a federally-mandated right to attach their wires to such utility poles or conduits and the benefits of regulated rates for such use of utility poles or conduit for the distribution of their signals. We believe both these decisions seriously misconstrue federal law and have the effect of eviscerating Congress' procompetitive purposes.[45]

In sum, we are seeing competitive entry into the MVPD market, primarily from DBS operators and RCN, with a few other cable overbuilders. However the market remains highly concentrated and indeed the 80% of the market still served by traditional cable entities is becoming more and more concentrated as time goes by. Looking back over the five years since passage of the pro-competitive Telecommunications Act of 1996, we can see in retrospect that significant barriers to full competitive entry persist, and that the competition which has emerged is in response to the

[41] 47 U.S.C. §§ 253, 541.

[42] In one instance, involving RCN's September 1998 request for an interpretive ruling concerning access to MDUs, the Cable Services Bureau has not yet acted.

[43] *City of Dallas* v. *FCC*, 165 F.3d 341 (5th Cir. 1999).

[44] 208 F. 3d 1263 (11th Cir. 2000), *reh. den.* 226 F.3d 1220, *cert. granted sub nom. FCC* v. *Gulf Power Co.*, 121 S.Ct. 879 (Jan. 22, 2001) (No. 00-843).

[45] Many other federal court decisions have construed Communications Act provisions in mutually inconsistent ways, thereby creating uncertainty about their practical meaning.

opportunities created by, and fostered by, forward-looking legislation and regulation. The bottom line issue here, of course, is not the fate of RCN; we will continue to deploy our financial and human resources to compete with the entrenched monopolists. The bottom line is the consumer, and it is clear from these five years of experience that the consumer benefits tremendously from the emergence of competitors. We hope this Subcommittee, and others in the Congress, will continue to assure that the competitive opportunity remains alive and well.

Thank you very much.

Chairman DEWINE. Mr. Currey, thank you very much.

Mr. Kimmelman?

STATEMENT OF GENE KIMMELMAN, CO-DIRECTOR, WASHINGTON OFFICE, CONSUMERS UNION, WASHINGTON, D.C.

Mr. KIMMELMAN. Thank you, Mr. Chairman, Senator Kohl, for once again inviting me to represent consumers' point of view on these important issues.

My colleagues on this panel present some very, very impressive statistics about what their companies are doing, and I certainly don't doubt that they are doing very important things for our economy. However, I would like to highlight what consumers are facing and echo what you both said in your opening statements. This is not what was promised with the 1996 Act.

It is not unheard of in an industry where rates have gone up 33 percent since passage of deregulation law, almost three times the rate of inflation, and there are new players in the marketplace—it is not unheard of for competition to involve rate increases. But I would like to suggest to you that it does not fit with the market economics in this instance, and therefore truly indicates that there is something more complex, maybe even something very fishy going on here.

If you look at adjacent communities in certain parts of the country, they have very different attributes, but we have looked at a number and they are all over the country and in these adjacent communities cable companies are upgrading, just like Mr. Kent's company. And just like Mr. Sachs indicates, they are moving to digital service and high-speed Internet, and investing billions and billions of dollars. But there are some differences, also.

In one set of communities right next to each other, the average local basic cable rate is about $11 a month; in the adjacent communities it is $17.67. For the whole package of expanded basic, in the first set of communities the price on average is $27, compared to $31 in the other communities. Why the difference? They are the same cable companies in many of these adjacent communities with the same upgrades.

In both sets of communities, satellite TV is available. In both sets of communities, you get that high-cost, very popular TV programming—Fox, NBC, CBS, ABC. You get that really expensive sports programming—ESPN. As a matter of fact, in the communities that I indicate where the prices are cheaper, you get more than 10 percent more channels, 71 versus 63.

There is only one meaningful difference we can find in these communities, and we find this throughout the country. In the communities where the prices are lower, there are two wires competing head to head. That is the only meaningful difference.

Now, if you look carefully at some of the cable industry's explanations for why their rates go up, I would suggest they are not presenting the whole picture. Programming costs, as reported to the Federal Communications Commission, have increased more than $2 billion since 1997. When you add their increased advertising revenue and you add their new pay-per-view services, that virtually covers all those costs.

And if you look at all of their operating cost increases, all of them, and compare it to just their new revenue, not any of their basic rate increases, not any of their expanded basic rate increases, you find that the new digital services, the new high-speed Internet services, the advertising revenue, and the others that I mentioned cover 90 percent of all those new operating costs.

So then you find that for basic and expanded basic, since 1997, consumers are paying more than $4 billion a year more. A billion dollars of that would cover the other operating expenses. What about the other $3 billion? It looks like it is going to the bottom line.

All the data suggest that there is clear price gouging going on in this industry, despite the fact that there are more players, not nearly as many as we had hoped for after passage of the 1996 Act, but more players. Something is wrong when, where there is competition, you get 14- to 30-percent price reductions compared to where there is only one company.

So we urge you to step back and truly declare war on the persistent monopoly elements of these industries. We would certainly concur with Senator Kohl's suggestions of what needs to be done, extending access to programming, urging the FCC to more aggressively go after discriminatory practices, making sure that the loophole that applies to terrestrial transmission of cable programming is closed.

It is time both to pressure the agency to do more to promote competition and for Congress to step in and fill the gaps. This should not be an ideological issue. As I think about electricity prices going up almost 50 percent in California with deregulation and I think about your own committee's oversight of the airline industry and what is going on, and then add the 30-plus-percent cable rate increases, what is obvious here is that deregulation, whether you are for it or against it, just doesn't work automatically to translate the benefits that many of its proponents argue are there.

We know in the political process passing legislation often involves compromises. It is not an ideological question to go back in and make mid-course corrections and make sure that we truly deliver a marketplace with more choices and lower prices for consumers. I urge you to do that.

Thank you.

[The prepared statement of Mr. Kimmelman follows:]

STATEMENT OF GENE KIMMELMAN, CO-DIRECTOR, WASHINGTON OFFICE CONSUMERS UNION ON BEHALF OF CONSUMERS UNION AND CONSUMER FEDERATION OF AMERICA

There is something rotten in the state of "cable television competition." Very rotten. Cable rates are up about 33 percent nearly 3 times the rate of inflation since Congress passed the Telecommunications Act of 1996.[1] There is no sign of meaning-

[1] Bureau of Labor Statistics, consumer price indexes, March 2001.

ful price competition in sight. Consumers Union[2] and Consumer Federation of America[3] believe the need for policymakers to curtail the abusive practices of cable monopolies is long overdue.

Let's put this problem in context. At the time the Telecommunications Act became law, consumers were given the clear impression that cable prices would go down, not up Consumers Union were led to believe competition would expand sooner rather than later. President Clinton promised that "consumers will receive the benefits of lower prices, better quality and greater choices in their telephone and cable services."[4] The bill's co-sponsor, Rep. Thomas Bliley, predicted that that the Act would break up "two of the biggest government monopolies left—the monopolies in local telephone service and in cable television. Beside lower rates and better service, the result will be innovative new products and services."[5] Based on these optimistic predictions, the Act phased out cable rate regulation and assumed that the elimination of legal barriers to entering the catme business would unleash a torrent of competition from local telephone companies, electric utilities and others.

Unfortunately, the local telephone companies have virtually abandoned efforts to compete with cable.[6] Electric utilities have had difficulty breaking into the market. Even the quickly expanding satellite television companies have been unable to discipline cable prices. So without the benefit of regulations that prevent cable price gouging, only consumers in the few communities where two wire-line companies engage in head-tohead competition for cable services are receiving the benefits promised in the 1996 Act. Federal Communications Commission (FCC) data show that head-to-head competition saves consumers 14 percent compared to prices charged by cable monopolies (where satellite service is also available), and independent research indicates that competition can save consumers as much as 32 percent on their cable bills.[7] Indeed, Dr. Thomas Hazlett of the American Enterprise Institute points out that "even using a conservative estimate, the prompt establishment of competition for [video services] could save consumers over $1 billion annually.[8]

A recent Los Angeles Times article compared rates charged by the same cable companies in communities with and without competition. The article vividly illustrates how much consumers are being shortchanged by the persistence of monopoly. In Southern California cities where there were two cable companies competing head-tohead, basic cable subscribers paid 37.5% less ($11.06/monthly) than basic subscribers in cities where there was not a wire-line competitor ($17.69 monthly).[9] Subscribers to enhanced cable in cities with competition paid an average of $26.92/month for 71 channels compare that to the $30.93 for 63 channels that subscribers paid in cities without wire-line competition. In addition to price competition in cities where there were two cable companies, consumers also received better service quality and more channels than in communities where only satellite competes against a single cable company.

Unfortunately, two-wire towns are the exception to the rule in today's marketplace. The cable industry is increasingly dominated by large companies that are well positioned to block competition. Currently two companies (AT&T and AOL Time Warner) together own cable systems serving more than 50% of the nation's cable

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[2] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports with more than 4 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[3] The Consumer Federation of America is the nation's largest consumer advocacy group, composed of over two hundred and forty state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power an cooperative organizations, with more than fifty million individual members.

[4] Aversa, Jeannine. "Promises, Promises—Two Years after Big Telecom Bill: Promises Unfulfilled." Associated Press, January 20, 1998.

[5] *Id.*

[6] FCC Seventh Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (CS Docket No. 00–132), January 8, 2001.

[7] Declaration of Thomas Hazlett, PhD (Resident Scholar, American Enterprise Institute for Public Policy Research). In the Matter of Applications of Northpoint USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. To Provide a Fixed Service in the 12.2–12.7 GHz Band. (ET Docket No. 98–206.

[8] Hazlett Declaration at 2.

[9] Talev, Margaret. "Consumers Have Little Recourse on Cable Rates,"Los Angeles Times, Feb. 4, 2001.

subscribers. A recent court decision may strengthen the largest cable companies' hands. AT&T, which had exceeded legal limits for cable ownership when it merged with Media One, was under an obligation to divest its holdings in Time Warner's cable systems as a result of the FCC's cable horizontal ownership rules and the conditions the Commission imposed during review of the merger. However, in the wake of a federal court of appeals decision on cable ownership limits,[10] the FCC recently suspended the deadline for AT&T to come into compliance with the Commission's ownership limits in the merger order,[11] setting the stage for further consolidation.

In order to defend their rate hikes, cable companies often cite increases in programming costs as a primary reason for the increases. However, upon closer inspection of cable industry data, we find that a substantial portion of the increase in programming costs should be offset by corresponding increases in advertising revenue. As programming gets more expensive, cable companies are receiving greater revenue from advertisers who run commercials during the programming. For example, FCC data show that during the years cable programming costs rose 18–21 %, advertising revenue increased 16%.[12] Furthermore, considerable revenue increases in advanced services such as high-speed Internet[13] and pay-per view services[14] are offsetting any additional expenditures that the cable companies are making in either programming or infrastructure investment.

Complaints from cable companies that programming costs and capital outlays are rising and account for the increase in monthly rates for basic and expanded basic monthly service simply do not withstand scrutiny.

First, the largest cable system operators have a significant financial interest in about one-third of all national and regional programming services. Complaining about rising costs is simply an excuse for the right pocket to charge the left pocket more, and to put the excess profits in the bank. The substantial vertical integration into programming and the market power that the largest cable operators enjoy blunts any incentive cable companies have to resist price increases.

In addition, even at the local level, the complaint about rising programming costs does not hold water. Since the passage of the 1996 Act, cable revenues have increased much faster than costs. Since 1996, total revenues are up 50 percent, and operating revenues are up 43 percent.[15] Average operating revenues (total revenues minus operating costs) are up 32 percent.[16] Most notably, the revenues that are associated with the expansion of systems—advertising, pay-per view and shopping services, advanced services and equipment are up 123 percent.[17]

The dollar value of revenue increases for new and expanded services since 1997 alone swamps the increase in programming costs. It would cover over 90 percent of cable's increase in total (programming and non-programming) operating costs. Viewed in this way, virtually all of the increase in basic and expanded basic service revenues have been carried to cable's bottom line in the form of increases in operating profits.

While there are certainly capital costs that must be covered with this increasing flow of operating revenues, cable companies have exhibited an irrational exuberance for acquisitions that dramatically diluted the assets of the industry's dominant firm. AT&T's bidding war to become the dominant cable firm tripled the price of cable systems and helped reduce its stock price by almost three-quarters. Driven by these outrageous acquisition costs and unchecked by price competition or regulation, basic service ratepayers have been socked with abusive price increases. (See Attachment A).

While Direct Broadcast Satellite television (DBS) continues to grow, for most consumers it remains more expensive and less attractive than cable. In addition to problems (often in urban areas) obtaining satellite reception, or failure to receive

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[10] *Time Warner Entertainment Co.,* v. *Federal Communications Commission*, No. 94–1035 (D.C. Cir).

[11] AT&T Receives a Reprieve on a Deadline to Shed Some Holdings," *New York Times*, Mar. 19, 2001.

[12] FCC, Fifth Annual Assessment of the States of Competition in Markets for Delivery of Video Programming (CS Dkt. No. 98–102). Dec. 17, 1998.

[13] Cable industry total revenues for advanced services have increased from $91 million in 1996 to an estimated $4.2 billion at year-end 2000. FCC Seventh Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (CS Docket No. 00–132), Jan. 2, 2001.

[14] Cable industry pay-per-view revenues have increased from $647 million in 1996 to an estimated $1.5 billion in 2000.

[15] FCC Seventh Video Competition Report at 102, Table B–6. is Id.

[16] *Id.*

[17] *Id.*

local broadcast channels with satellite TV, the high cost of installation and multiple TV hookups still makes DBS significantly more expensive than cable.

The FCC's recent finding that "DBS is a substitute for cable and exerts a small (as shown by the small magnitude of the DBS coefficient) but statistically significant influence on the demand for cable services," should not be interpreted to suggest that DBS disciplines the abusive pricing practices of cable systems. Leaving aside the fact that the FCC data are self-reported, self-selected, unaudited data in which forty percent of the respondents left out the key variable (DBS penetration), the data show that satellite exerts no significant effect on cable prices.[18]

This is exactly the point we have demonstrated time and again in our analysis of cable price increases. It makes more sense for cable to raise prices and lose a small market share to DBS than it does to exercise price restraint.[19]

And technological developments may strengthen the hand of cable and reinforce its ability to abuse market power. The roll out of digital cable and the bundling of high speed internet access erode the ability of DBS to compete even in high capacity niche markets. By allowing the cable companies to leverage their market power base in cable into the high speed Internet access market, the FCC has all but ensured that the abuse of consumers will continue. Three years after consumers asked the FCC to begin requiring cable companies to open their systems to multiple high-speed Internet service providers, virtually all cable companies still sell high speed service on an exclusive basis and bundle it with video services. The best chance for a technological development to weaken the market power of the cable operators-streaming videohas been destroyed by the FCC's failure to require open access.

Today's "hands off' legal and regulatory climate does not bode well for consumers. Prohibitions on exclusive deals in cable television programming could expire this year if the FCC fails to extend its "access to programming" rules,[20] which will give the largest cable companies (which own vast programming in addition to their cable networks) even more sway over potential competitors. Not only must this programming remain accessible to cable's potential competitors, but Congress should consider expanding this requirement to include cable-owned regional sports channels or other popular programming that cable companies directly or indirectly prevent from being made available to others. And the nondiscrimination obligations should apply regardless of whether cable distributes its programming terrestrially or by satellite.[21]

In addition, the Federal Court of Appeal's recent ruling regarding cable ownership limits in *Time Warner Entertainment, Co.* v. *Federal Communications Commission*[22] has created an even greater risk of increased marketplace domination by just a small handful of large companies. The court reversed and remanded the FCC's horizontal ownership limit (which limited any one company to a maximum of 30% of the nation's cable and satellite subscribers), holding that the FCC had not adequately justified its limits on purely competitive grounds, and was not allowed to justify its limits with "diversity" concems. Although FCC Chairman Powell has indicated that he thinks the court's decisiorv, was incorrect in its exclusion of diversity concerns from a properly' formulated cable ownership limit,[23] he so far shows no interest in seeking a rehearing or appeal of the court's decision. We believe it is essential that the FCC challenge this court decision as an inappropriate reading of the statute, its legislative history, and the Commission's appropriate authority to make legitimate regulatory judgments in establishing ownership limits.

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[18] As a strict economic proposition, a statistically significant cross price elasticity is a much better demonstration of the substitutability of DBS for cable services. DBS continues to be a niche market technology that may substitute for cable in the high capacity, high cost market segment and in rural areas. It does not compete head-to-head with cable in any broad sense.

[19] After two decades of relentless price increases (except for a short period of regulated price restraint), it should come as no surprise that cable is beginning to approach the limit price set by satellite in an increasing segment of the market, hence the fact that the FCC's competition report finally shows a small responsiveness of cable to DBS penetration. What this means is that the monopoly abuse of cable operators has become embedded and institutionalized in the market. The rip off of consumers is permanent, although its rate of escalation may slow in the years ahead. It will remain until policymakers gain the courage to relieve the public of this cable monopoly tax, or some new technology with cost characteristics that can compete with cable comes along to break its iron grip on the multichannel video programming market.

[20] 1992 Cable Act, Public Law 102–385, 47USC548.

[21] The FCC has interpreted the 1992 Cable Act's access to programming provisions to apply only to satellite distribution channels.

[22] *Time Warner Entertainment Co.* v. *Federal Communications Commission*, No. 94–1035 (U.S. App., DC Cir.) Mar. 2, 2001.

[23] Testimony of FCC:Chairman Michael Powell before the House Telecommunications Subcommittee, March 29, 2001.

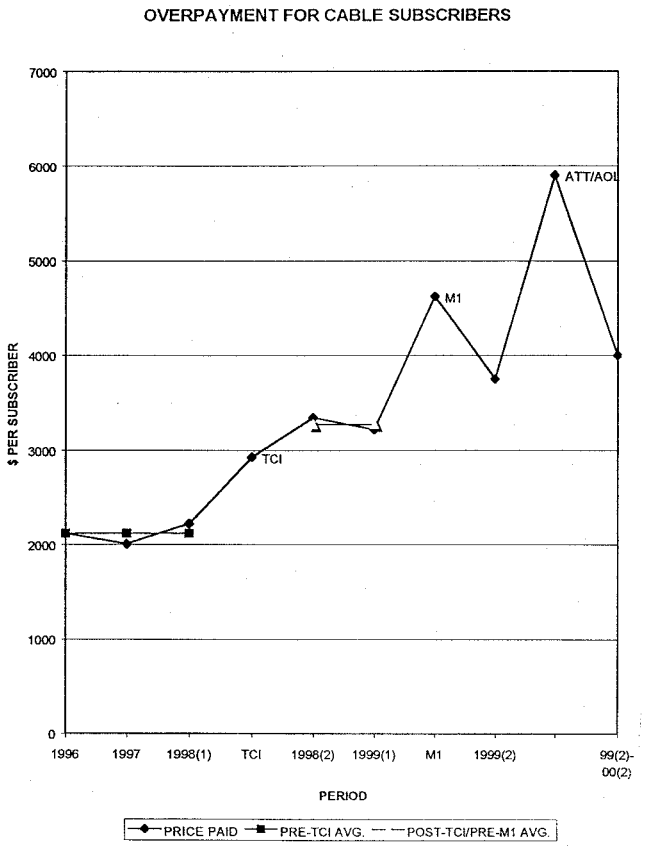
Finally, a proceeding currently before the FCC showcases the high barriers to entry faced byA would-be cable competitors. North poi nt/Broadwave is a promising potential compEittor to cable and satellite TV that is trying to secure a license for its service, but is oaught in a regulatory morass at the FCC. After having invested large sums to bring ali patented technology to market-a technology which offers a practical and ingenious solution to our country's spectrum shortage and lack of competition for video services—the FCC appears inclined to delay or thwart cable and satellite competition by denying Northpoint a license and instead begin proceedings to auction this spectrum.[24]

With cable prices continue to rise at an alarming rate, and no sign of meaningful price competition, consumers believe measures designed to jump-start market entry and prevent—monopoly abuse are needed. Potential competitors like North point/Broadwave should be allowed to enter the market and begin earnest, pricedisciplining competition. Most importantly, Congress must renew and expand nondiscrimination requirements where cable retains monopoly power over content and distribution of video programming and high-speed Internet services.

Finally, we urge you to ensure that the FCC does everything in its power to prevent further cable consolidation or unfair distributional arrangements that thwart the expansion of more choices and lower prices for consumers.

[24] FCC ET Docket No. 98–206, RM 9147, RM 9245. While there are numerous instances where we believe spectrum auctions offer enormous consumer benefits, this is not one of them. If there were ever an instance where consumers deserve immediate access to more choices and lower prices, it is in the cable and satellite markets. We believe that the failure of cable deregulation to deliver lower prices and better service requires the most aggressive regulatory efforts to let potential competitors like Northpoint enter the market as soon as possible.

ATTACHMENT A



Chairman DEWINE. Thank you very much.

Let me welcome William Johnson and Marsha Globerman from the FCC's Cable Services Bureau. They are here with us today and we appreciate that very much. They have submitted a statement for the record, and without objection we will make it a part of the record at this point.

Chairman DEWINE. Mr. Kimmelman, what do you think of Mr. Sachs' argument about these extra channels, that really I ought to be happy because I am getting well over 100 channels now on my cable system?

Mr. KIMMELMAN. Well, I think people probably like more rather than less, but the fact of the matter is that using Mr. Sachs' own measurement, in the communities where you have two wires the price per channel is approximately 45 cents and where there is only one cable company the price is more than 60 cents a channel.

The FCC has consistently shown a 30-percent differential between wire-to-wire competition in one cable company. So while

cable companies are adding more channels, I don't believe they are doing it at a fair price to consumers.

By the way, Mr. Chairman, I would just be interested to have a poll of everyone in every one of these communities who faced a couple-buck cable rate increase last year to identify the three new channels they got for it. I bet you they are not very highly watched, popular channels.

Chairman DEWINE. Mr. Sachs, do you want to respond to that? Just jump right in.

Mr. SACHS. I will be happy to. There is continued consumer demand for services that aren't offered on cable systems, and whether it is Arts and Entertainment's new History Channel or Odyssey, a new women's channel, or the newly launched National Geographic Channel, we are hearing from customers that they want new programming. Programming has costs associated with it.

In Mr. Kimmelman's analysis, he spoke of electric rates in California. Well, when electric prices go up, the consumer is not receiving more kilowatts for that. When cable prices are adjusted, consumers are receiving more product and service for it. If we look at the period since cable—and we are really talking about cable program service tiers, not the underlying basic rates, but since those were deregulated, which is as of the end of March 1999, we are talking about a 2-year period.

There have been two cycles of cable rate increases. Those increases have been each year about 2 percent above inflation, and at the same time consumers have received more programming. So I believe what I said in my opening statement is correct that—and this is consistent with what the FCC found—on a per-channel basis, the cable rates essentially have been flat.

I think the one other thing that is probably fair to say is when you are looking at cable prices, you really have to look community by community. You also have to say, compared to what in terms of entertainment and information value.

I was at the movies with my wife Saturday night—$8.75 for a ticket for a 2-hour movie. There were just the two of us. If it were a family of four, you are looking at $35.

Chairman DEWINE. You go in the afternoon if you are a family of four.

[Laughter.]

Mr. SACHS. You could, and maybe you should.

Chairman DEWINE. That is what the DeWine family does.

Mr. SACHS. The newsstand price of the Wall Street Journal this week went from $.75 to $1.00. Well, you know, if you happen to buy it everyday at the newsstand, that is $5.00 a week.

You look at cable where the average customer is taking your basic and expanded service and is paying something in the neighborhood of $35 a month. The average household is watching television 7 hours a day, 30 days a month. Compared to other entertainment and information options, cable remains a very good value.

Chairman DEWINE. Mr. Hartenstein, assume for me that there is no change in the law, that we do not change the law, as you have suggested should take place. You have testified, I believe I wrote down correctly here, 61 percent of the households—you now have

the ability to offer them local TV as part of the package. Is that where you are, 61 percent?

Mr. HARTENSTEIN. That is correct.

Chairman DEWINE. Assuming no change in the law, when do the other 39 percent get theirs?

Mr. HARTENSTEIN. With no change in the law—

Chairman DEWINE. No change in the law. Assume that for me. You have already made your point about you need a change in the law.

Mr. HARTENSTEIN. With no change, we can do no more markets than we have up today because the new satellite that we are putting up would then only serve to fill up all of the channels, the "must carry" that we have for the markets that we already have up.

If we have that same spectrum and the satellite that we are putting up, we could expand to perhaps as many as 80 markets and get closer to about 79, 80 percent of the households of the entire country coverage, and that is what we would propose to do.

Chairman DEWINE. You might get to Dayton, Ohio, sometime?

Mr. HARTENSTEIN. I picked those cities specifically because they are the next ones that we would go to if we don't have to do the—

Chairman DEWINE. I get the argument. We all understand that argument.

My time is about up. I am going to go ahead and vote. We are now about 5 minutes into a vote. I am going to turn it over to Senator Kohl. He is going to go as long as he wants to go and when he is done, I suggest, Herb, that you stop at that point and we will take a break until we come back.

Senator KOHL. That is fine.

Chairman DEWINE. Senator Kohl?

Senator KOHL. Thank you, Mr. Chairman.

Gentlemen, we believe that cable rates are increasing and we have heard the explanations for these price hikes, but be it the cost of upgrading or expensive programming, Congress has reacted in the past to an unchecked trend of rising prices. But I would like to see competition, not the Government, discipline rates.

Mr. Sachs, I have two questions. Can we expect cable rates to level off any time soon, and how would you describe the state of price competition? Is it vigorous?

Mr. SACHS. I think the answer to your first question depends on our costs. Not to avoid your question, but our rates are a function of our costs. What is happening and will happen more as we introduce new services like movies on demand that Mr. Kent spoke of and high-speed data and cable telephony is that there will be reduced pressure on basic and expanded cable rates.

Insight Communications, for instance, another NCTA member company, has been very aggressively marketing video on demand. Their increases last year were in the 4- to 5-percent neighborhood because 20 percent of their subscribers in the first year had signed up for new digital services. So those digital services are actually subsidizing the basic-only and basic and expanded subscribers.

So as we have more sources of revenue, I would expect to see the pressure on basic rates reduced. But when we are seeing double-digit increases in programming costs year to year, and sports in-

creases in the mid-teens, it is difficult to keep your rates at inflation.

Mr. Kimmelman suggested that because of advertising revenue and pay-per-view revenue, all the programming cost increases on basic ought to be absorbed. The vast majority of the advertising revenue does not flow to the local cable operator; it flows to the program networks. And as to pay-per-view, there are programming costs associated with that as well.

Mr. KIMMELMAN. If I could just clarify, Senator Kohl, I am not counting the $8 billion that flows to the programming networks, only the $1 billion-plus increase since 1997 that has flowed to actual cable operators, according to your submissions to the FCC.

Senator Kohl [presiding.] Mr. Kent, what would you tell the subscribers in Wisconsin about the future of their rates?

Mr. KENT. Senator Kohl, our research has shown that in this competitive environment our consumers are much concerned about quality of service, about the channel lineup, and about the advanced offerings that we can provide our customers.

The situation we have been in over the past several years is that, frankly, up until we launched our digital product in this industry, which is only about a year-and-a-half to 2 years ago, we had an inferior product to direct broadcast satellite. They had enhanced channel capacity and were able to offer a superior product with more channels. We are just now catching up, and we now have a level playing field where we have spent the dollars, added our channel capacity, particularly in Wisconsin, and we now have pretty much the same number of channels as DIRECTV and EchoStar for similar offering.

What we have seen is this year—and I can document it. I have to tell Mr. Kimmelman that prior to being a cable operator, I was a CPA and I can assure him that pay-per-view revenues and ad sales don't come close to earning an adequate rate of return on our investment on upgrading our plant.

The situation is such that this year alone, Charter Communications has experienced a 24-percent increase in our programming costs, half of which is adding of channels to try to provide a level playing field with our satellite competitors. The other half is just sheer inflation increases, particularly sports inflation.

Where Charter is today is our margins, the gross revenues less programming costs, are absolutely decreasing. We cannot raise our rates to recoup the full amount of programming costs that we are absorbing, so we are trying to remain competitive. Where we are competing significantly on price is in the advanced services, in our pay channels.

Just last year in Wisconsin, and frankly nationwide, for 2 and 1/2 months we had what we called a Summer Sizzle. For $49.95 a month, you could get every single digital and analog offering, including all the pay channels that we offered, which was about a $35 discount from our normal cost and frankly about a $27 discount to DIRECTV.

Today, those same consumers have the ability to take that service for $10 less than DIRECTV. So there is significant price competition going on across all of our offerings. I think the problem with basic and expanded is until we get sports inflation under con-

trol, it is going to be hard for us to decrease our rates. In fact, DIRECTV and EchoStar have the same problem and have also recently increased their rates.

Senator KOHL. Thank you, gentlemen. We will have to stand in recess until the votes are completed.

[The Subcommittee stood in recess from 11:04 a.m. to 12:02 p.m.]

Senator DEWINE [presiding.] Well, let me apologize to our panel and to our audience. The first vote in the Senate took 50 minutes. The second one only took a few minutes, but it is one of the interesting things about having a divided Senate. We have a lot of close votes and we have the Vice President who is even closer, so it is going to be an interesting week.

Let me start again with you, Mr. Hartenstein. You have stated in your testimony that you don't believe the FCC should permit competitors to use the spectrum that your company uses to provide its services. Northpoint is one company that would like to do so, and we certainly appreciate your concerns and understand that you want to ensure that your business can deliver its service without interference from other services.

However, I understand that there have been several tests performed that have shown minimal interference. Why have these tests failed to alleviate your concerns?

Mr. HARTENSTEIN. Without getting into some of the technical—

Chairman DEWINE. Don't do that. Thank you.

[Laughter.]

Mr. HARTENSTEIN. I won't. Thank you.

Chairman DEWINE. Just give me the summary.

Mr. HARTENSTEIN. The tests have been problematic, I think, to say the least. We did, we feel, have a positive step forward when a few months ago the FCC agreed to bring in an outside firm, a third party, to conduct the tests.

Chairman DEWINE. Excuse me. You are going to have to be a little more specific than "problematic." What do you mean? You don't trust them, you don't like them, they are no good? What is the deal?

Mr. HARTENSTEIN. Up to before the FCC brought in a third party, it was, if you will, EchoStar's and DIRECTV's tests and analysis versus Northpoint's, and I think the FCC saw the wisdom in bringing in a neutral third party to conduct the tests.

As we stand today, those tests have commenced. There is an issue, however, because the DBS providers and the trade association for DBS have not been allowed to review the test procedures and the actual test setup to verify that it would actually replicate a real-life situation.

We in the DBS industry—and DIRECTV and EchoStar I think can speak together on this—are not at all afraid of competition. For gosh sakes, we are up against cable which has the market power and the size, and we are not afraid of that. What we are very concerned about, as I think anybody who uses a portion of the spectrum, is that when a new application would get planted on top of you in the same spectrum with the potential to cause interference and cause interruptions and outage. That is what we are concerned about. If the tests are done above board and if the procedures in

doing the tests are shared and made available to all parties, then we will stand by the results of those tests.

Chairman DEWINE. Mr. Currey, I wonder if you could elaborate a little bit on your comments about both the Philadelphia and the New York markets as far as sports. It has been my experience in talking to people both in the business and also as consumers that, maybe to state the obvious, sports is just an unbelievable draw.

One of the things I would tell Mr. Hartenstein is when I was trying to decide in Cedarville, Ohio, whether I was going to get DIRECTV or not was what sports we could get and whether I could see the Cincinnati Reds. I don't know that I am unique to anybody else, but I think sports is just huge.

I am kind of intrigued by your written testimony and the summarization you made of it, and I wonder if you could maybe describe the market in New York and Philadelphia in regard to sports and the withholding of that from basically your ability to function or others to function and offer consumers what they want, which is sports. You mentioned in New York, I guess, 7 of 9—well, you tell me; go ahead. You said 7 of the 9 sports are—

Mr. CURREY. Controlled by Comcast, and the venue.

Chairman DEWINE. Yes. Tell me about that.

Mr. CURREY. Well, maybe just a preliminary comment about this whole programming issue. We talked about the cost of it. Yet, if you look behind that cost, too, and who owns a lot of that programming, that is also highly concentrated among the largest cable operators in the country. So a lot of that profit is going right back into that company.

Chairman DEWINE. They own the product?

Mr. CURREY. Yes, they do; in many instances they do.

To your point, though, cost is one thing. More important is the withholding or the threat of withholding of that program. So while in New York we can get sports from Comcast, our customers don't know what sports they are going to get because they allow us certain sports, but they won't tell us which sports we are going to get.

So you may want the Cincinnati Reds, and that day you are going to get the Cleveland Indians and the Chicago Cubs. It would have to be a local one, but in New York they control 7 of the 9. The only two they don't control are professional football, so they have got hockey, basketball, and baseball.

Chairman DEWINE. So they have got everything but football?

Mr. CURREY. Yes, sir. The more problematic one for us is also Philadelphia, though, where Comcast has the same control over the sports as I described. What they do to us there is not only threaten us with denial of that programming, but then sign a 3-month contract with us so that it is commercially available for 3 months. We don't know when they are going to not re-up it for the 3 months. Then, worse, they will tell their salespeople to go out; don't switch to RCN because you don't know how long they are going to have sports programming.

To your point, our market research shows that about 50 percent of the consumers will not even consider switching unless they can be guaranteed that they are going to have the sports programming of the incumbent provider. So it is a critical issue, not only getting

it and getting it at a reasonable rate, but more so just the guarantee that you can get it.

We are not asking for subsidies, we are not asking for it to be free. We are willing to pay a competitive price for it, but we have to have it and we have to be able to tell our potential customers that—

Chairman DEWINE. So your point is that at least in the Philadelphia market they just jerk you around, is what you are saying.

Mr. CURREY. That is exactly right.

Chairman DEWINE. And getting back to the New York market, where are you with that?

Mr. CURREY. Well, again, that is Comcast.

Chairman DEWINE. You are in there?

Mr. CURREY. We are in.

Chairman DEWINE. It is your market?

Mr. CURREY. Yes. In the Philadelphia market, we are not just in the city; we are going to build in the Philadelphia suburbs. We are not just going to the city. We are going to spend the money, but we finally just gave up after 2 and 1/2 years. We have enough other cities that want us to come to town that recognize the benefits of competition, recognize that the incumbent starts to behave to withhold prices and add channels.

The mayor of Detroit's office called us after Philadelphia and said Comcast is a competitor here, but they are not located here; come to Detroit; we would love to have a competitor. And there are multiple examples of that right now, that the cities recognize the benefits to their consumers and they would love to have us come to town. So why stay in a city that really doesn't want you? We don't have to do that anymore.

Mr. HARTENSTEIN. DIRECTV and EchoStar, Mr. Chairman, didn't even get the 3-month rolling option from Comcast. We have been denied access all along.

Chairman DEWINE. In what markets, then?

Mr. HARTENSTEIN. In Philadelphia, if you are a DIRECTV customer, we do not deliver the local, regional sports channel there. So you don't get the Sixers' games, you don't get the Flyers' games.

Chairman DEWINE. So they have totally denied you?

Mr. HARTENSTEIN. Yes, yes.

Chairman DEWINE. It is not a price issue?

Mr. HARTENSTEIN. We said the name the price and there is no price.

Chairman DEWINE. If you can't have that product, I don't know how you compete. We all have our own example, but when I checked you all out, I wouldn't have gotten you if I couldn't have gotten the Cincinnati Reds. I just wouldn't have done it, and so if someone could deny you that, you are at horrible disadvantage, it would seem to me.

Mr. CURREY. I just wanted to correct the record. I made a mistake. I commented on Comcast in New York, and it is Cablevision. It is Comcast in Philadelphia and Washington, D.C., just to correct the record.

Chairman DEWINE. Thank you very much.

Mr. SACHS. Mr. Chairman, may I be heard on that topic?

Chairman DEWINE. Yes.

Mr. SACHS. The vast majority of cable programming networks, satellite networks, are not owned by cable operators. Going back to the time of the 1992 Act, there was about 50-percent vertical integration. That is down to about 35 percent, and when AT&T broadband completes its spin-off of Liberty Media, that percentage will go down further.

There is a very limited amount of exclusive programming today, and it is not limited just to cable. DIRECTV has the NFL all-you-can-eat package on Sunday afternoons.

Chairman DEWINE. All you can eat?

Mr. SACHS. All you can eat, all you can consume, any city, any game, which has been advertised quite heavily and it is a very good competitive tool that DIRECTV has. So I think to complete the picture, you have to—

Chairman DEWINE. Your point is that is exclusive. Is that right?

Mr. SACHS. It is not available to any cable companies.

Mr. KENT. Nor any other satellite provider.

Mr. CURREY. But I would add, look at his penetration in Philadelphia or other urban areas. It is not the 15 percent or 17 percent that he has nationwide. It is much less; it is probably a third of that, and part of that is attributable to the lack of local sports programming.

Mr. KIMMELMAN. Mr. Chairman, if I could just add, as we know, programming is not all equal. As you just pointed out, you wouldn't have gotten the service if you didn't have your favorite teams. Of the channels that are owned by cable companies, it turns out that among the top most viewed cable channels about half are owned by cable companies; among the top 20, about half; among the top 30, about half.

So while, when you go down to 200 channels, a whole bunch of the small ones are independent, a lot of the most popular ones are owned by the cable companies themselves. Obviously, these are the marquis-draw channels that, like yourself, are the reasons why consumers would want a particular service.

Mr. HARTENSTEIN. Mr. Chairman, if I may just clear the air on it, DIRECTV currently is the exclusive DBS provider for the NFL Sunday Ticket service, the so-called all-you-can-eat. That doesn't preclude the consumer's access to probably five to six games every week of NFL between CBS, the Fox feeds on Sunday, the ESPN, and then the ABC feeds.

Chairman DEWINE. Right, right, but if I want that package, the only place I can get it is from you?

Mr. HARTENSTEIN. From me or from C-BAN satellite, the larger dish. Whether the product is available to cable is an issue frankly between cable and the NFL. There is no mention of that in our agreement.

Chairman DEWINE. Your agreement is a non-exclusive agreement?

Mr. HARTENSTEIN. Yes. What I said is we are the exclusive DBS distributor for that. We negotiated with the NFL, which is an independent third party. There is no cross-ownership between DIRECTV and the NFL.

Chairman DEWINE. So there is nothing in your contract that says they can't sell that to cable. Is that what you are saying?

Mr. HARTENSTEIN. That is correct.

Chairman DEWINE. OK, so they have decided to market it differently for cable?

Mr. HARTENSTEIN. Yes, and the NFL is an independent third party which has no reason to favor, no incentive to favor one distributor over another. On the other hand, Comcast in this case—and I don't disagree with you, Mr. Sachs. You are right. The amount of vertical integration has gone down. By the way, we never had a problem with Liberty on any of the content.

But I think there is an incentive to favor in the case of Comcast, namely themselves, to what is their only competitor in the Philadelphia market, which is DBS, and presumptively here Mr. Currey's company to come in and overbuild. So those are the reasons that I think we both feel strongly about cleaning up that loophole in the program access provision and continuing it beyond the sunset of next year.

Chairman DEWINE. Let me ask this question to any members of the panel who would like to respond. Section 304 of the 1996 Telecom Act required the FCC to open up the set-top box market to competition. Why do you think we haven't seen competition in this area and what more needs to be done to foster competition?

Does anyone want to jump on that one?

Mr. SACHS. I would be happy to speak to that. In 1992, when Congress reregulated cable rates, that included set-top boxes. With the 1996 Act and deregulation in 1999 of the cable program service tiers, regulation of set-top boxes continued. So the cable operator today—its equipment is price-capped at 11.25 percent over cost. Consumer electronics retailers are accustomed to much higher margins than an 11-percent markup over cost. So there has been little economic incentive for them to compete with us on that basis.

The other factor there is that with DIRECTV and with EchoStar, they are functioning as the local distributor and they are working out arrangements which involve some commission and perhaps some continued revenue stream from that subscriber. With cable being a local business, 30,000 separate franchises in local offices, we are for the most part our own local distributor. So there is no economic benefit to the cable operator to be paying out to Circuit City or Radio Shack or Best Buy a continuing revenue stream on set-top boxes. So there is not an economic proposition that is particularly attractive to the consumer electronics retailers.

Chairman DEWINE. Anybody else?

Mr. KENT. Mr. Chairman, if I may, at Charter Communications—and I think I can speak for the rest of the cable industry—we have invested in point of deployment security devices that we have available at each of our systems to ensure that if a consumer does buy a set-top box at a retail outlet that we can serve that customer.

Frankly, Mr. Chairman, it is in our best interest. Right now, we are spending hundreds of dollars per box and we can only, under law, mark that up 11.25 percent over cost to charge back to that customer. To the extent I can move those boxes to the retail market, I don't have to expend those capital dollars, so it is in my interest.

In fact, we have recently entered into deals with CompUSA and others to get a retail presence in the store. So I think we have done as much as we can to help promote the retail outlet.

Chairman DEWINE. Mr. Kimmelman, in the past you have said that the cable industry needs to be reregulated to get rates under control. Some have expressed concern that this will slow the cable companies' efforts to roll out new services, such as broadband and telephony. Do you want to comment on that criticism of your criticism?

Mr. KIMMELMAN. Well, you asked me to come up today and speak to competition, so I didn't raise rate regulation, but Senator Specter did.

Chairman DEWINE. We are going to give you a chance.

Mr. KIMMELMAN. I agree with Senator Specter. I think we traditionally put a lid on what monopolists can charge, and we still believe that would be necessary until we get to competition.

I think that there is no question about the fact that you can have a dampening effect on innovation, but what we are seeing is blatant price gouging, and you have to balance the interests of consumers who don't have meaningful choice and meaningful price competition versus the interests of the industry. Some of the industry's behavior is being questioned as to whether it is blatantly anticompetitive as well.

I think at this juncture the logical course to follow, Mr. Chairman, is to really try to break open this market more forcefully to competition. I recognize there is not a lot of sentiment to reregulate in the Congress today. I disagree with Mr. Hartenstein. I can't speak to the technical issue, but we will file today urging the FCC to go forward and license Northpoint broadwave as a competitor to both satellite and cable to give consumers another choice.

They are proposing a $20 price point for, I think, 70 to 90 channels that we think could be extremely attractive to consumers, and we certainly hope the FCC can move this way without any interference problems, certainly extending access to programming, expanding it to make sure that marquis programming like sports programming cannot be used to circumvent the non-discriminatory access provisions.

So I think that we are at a point now, practically speaking, where a few surgical endeavors here, both regulatorily at the FCC and with Congress' help to ensure non-discrimination, hopefully will get us to a point where we are going to start seeing some price competition.

Chairman DEWINE. Let me thank you all very much for your patience today. Again, I apologize for the major break that we had that lasted over an hour. We do appreciate your testimony. It has been very helpful.

Senator Specter has indicated, as you have heard, that he has an interest in holding hearings in Philadelphia. We are certainly going to accommodate him on that. So I would anticipate that we would be holding hearings in Philadelphia, or at least one hearing.

There is also the possibility that this Subcommittee will, within a short time, have another hearing on this same topic. If we do not do that, however, this Subcommittee obviously is going to continue periodically to hold oversight hearings to see how we are doing and

to get the update and to see what, if any, additional legislation is needed by Congress.

So, again, we thank you all very much.

[Whereupon, at 12:22 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow:]

QUESTIONS AND ANSWERS

Responses of Shawn Bentley, Motion Picture Association of America, to questions submitted by Senator Hatch

Question 1: For all panelists (especially Mr. Parsons, Mr. Ken Berry, Mr. Murphy, and Mr. Richards, and Mr. Henley and Ms. Morissette): One argument we have heard in favor of a compulsory license is that music has so many nieces to license and there have been substantial disputes between the record labels, the publishers and technology companies like MP3.com about how to get the publishing rights cleared in the volume demanded by online offerings. Some have suggested that a stumbling block to getting the labels to license sound recordings is that they tray not have the rights from their artists to want those rights I understand there may even be problems with the MusicNet offering to some degree because of these impediments. Would any of you be interested in commenting on this particular problem and suggest ways to remedy it?

Answer: As I said in response to some questions in the hearing, I speak only for the movie industry. I will defer to my colleagues on the panel to address questions concerning the music industry. In our haste to bring legitimate digital content to online consumers, we must not abandon the market-based principles that are the bedrock of the nation's economy. As Congress has noted in the past, compulsory licensing is an intrusion by the government into the marketplace. That intrusion artificially shrinks and devalues the exclusive rights of authors and creators. Government price fixing just never works. Never has. Never will. It is a flimsy substitute for the marketplace. Compulsory licensing is always a drastic measure of last resort. At this moment the online world is still very much in its infancy, as dot-com failures and almost-daily retooling of business models has made clear. In this environment we must take care that our impatience in building the online marketplace does not lead us to abandon essentials of our economy. The marketplace is the arena where competition thrives. It is the marketplace that drives growth in the national economy. Therefore, a leap by Congress into a "compulsory licensing" mode for the digital environment would not only be unnecessary, it would be wrong.

That is not to say that rights clearance is easy. Movie studios deal with difficult rights clearance issues every single day, ranging from synchronization rights for music to portrayals of visual arts in motion pictures to publicity rights. None of this is easy, but we do it. The vast majority of programs on every cable system are freely negotiated between rights holder and cable system. The same with satellite delivery, the same with over-the-air television. Online marketplace distribution of digital will work in the same way.

Question 2: For all panelists: Mr. Hank Barry argues that we have created compulsory licenses in the past, for publishing rights in music and in rebroadcast of television programming because it was difficult to clear the rights to the myriad creative interests involved in making up a broadcast day. Would anyone like to explain why that analogy does or dues not obtain in the online music and entertainment world?

Answer: The Register of Copyrights addressed a similar question when studying whether it was appropriate to extend the cable and satellite compulsory licenses to Internet retransmissions of broadcast programming. She concluded that it would be inappropriate to "bestow [] the benefits of compulsory licensing on an industry so vastly different from other retransmission industries now eligible fur compulsory licensing under the Copyright Act."

The Copyright Act's existing compulsory licenses are totally different in scope and applicability than the type of compulsory license proposed by Mr. Barry. To begin with, there is no compulsory license for digital downloads via cable or satellite—only for retransmission of broadcast signals. Perhaps even more importantly, the impact of the cable and satellite licenses on copyright owners is tempered by regulatory and technical limitations that restrict the reach of those media and their potential to foster serial copying and retransmission. Cable and satellite operators have to deal not only with the fact that they can only transmit within limited viewing areas, but also with regulatory requirements like syndicated exclusivity, network non-duplication, sports blackout, retransmission consent, etc. The Internet, on the other hand, is

global and unrestricted in its reach. It allows perfect serial copies and distribution of copyrighted works that is both infinite and instant. As I am wont to say from time to time, the Internet is to cable/satellite environments as lightning is to the lightning bug.

The existing compulsory license for musical compositions—the so-called mechanical license—is similarly inapposite. That license enables a person to make and distribute recordings of a particular musical composition (i.e., the sheet music) that has been previously recorded and distributed to the public under authority of the copyright owner. In other words, it allows someone to record a song that has been previously recorded, using their own performers and as their own rendition of the song, upon payment of the prescribed royalty to the copyright owner in the underlying musical composition (i.e., the composer and songwriter). It is not a license to reproduce and distribute the underlying sheet music in copies, and it does not convey a right to make copies of the resulting sound recording. That is the right, with respect to sound recordings, that Mr. Barry proposes to usurp by way of a compulsory license. There is simply no precedent for such a proposal in the Copyright Act.

The justifications suggested in this question for the existing cable and satellite compulsory licenses might very well not even hold true were Congress revisiting the need for those licenses today. As I already mentioned, the majority of programming offered on cable and satellite is not subject to compulsory licensing. Cable networks like HBO, Showtime, USA, Lifetime, Discovery Channel, ESPN, Nickelodeon, and hundreds of others are not subject to any compulsory license, yet cable and satellite operators have no problem acquiring retransmission rights for these networks. The reason? In the absence of a compulsory license, these networks have emerged as rights aggregators for all the programs on those channels. For example, HBO secures both the right to exhibit the show and the right to sublicense the retransmission by satellite and cable providers. There is no reason to believe that similar market-based solutions would not emerge with respect to online digital content delivery, provided that the market is allowed to work.

Finally, four quick points why it is that a compulsory license simply will not work for movies. First, as I mentioned already, the Internet is global in nature and provides the means for perfect serial copying. This means that the 100' copy of a digitized movie is as pure as the original. Not so in the analog format, where each copy is degraded in quality. More ominously, transmission of a movie on the Internet is instantaneous to every corner of the globe. The potential for harm to copyright owners is immense. The effect is particularly alarming in the film industry, where the average major studio motion picture costs $82 million to produce, distribute, and advertise, and where only 1 in 10 films ever makes its money back from domestic theatrical exhibition. Here is the question that the Congress must answer: If films are unable to return their investment through ancillary markets like home-video, pay-per-view, and international territories because perfect digital copies are floating around the Internet for anyone to take down, who will put up huge amounts of private risk capital to produce films if they can be so easily and so swiftly pilfered?

Second, a compulsory license would devastate small and independent film producers. These producers cannot finance films out-of-pocket. Rather, they finance their films by pre-selling distribution rights in markets around the world. An Internet compulsory license would do away with this entire market. The small independents would be doomed.

Third, to repeat, government price-fixing does not work. As 1 said in the hearing, today a cable system with $9 to $10 million in revenue pays less than one percent of that revenue in royalties to the copyright owners. A satellite provider pays 19 cents per subscriber for ALL the programming of a SINGLE broadcasting station for ONE month. Everyone knows that an Internet compulsory license would similarly undervalue content, but that degradation of worth would have far greater an impact on copyright owners given the Internet's global reach. Risk capital would dry up. Not a happy augury for the future.

Fourth, an Internet compulsory license would force American consumers to subsidize foreign consumption of American copyrighted works. American movies are the most popular on all the continents. Our movies dominate the world for one simple reason: Most citizens of just about every country find our creative movies the most entertaining. The U.S. movie industry is a big reason why the Copyright Industries have a surplus balance of trade with every single nation in the world. No other U.S. business industry can make that statement. A compulsory license would change all of that in a most desolating way. Keep in mind that a compulsory license would have to take into account the global reach of any distribution system, as well as the increased potential for unauthorized copies and distribution. Because copyright law is national, American consumers—not foreign consumers—would have to bear the

costs of foreign uses. Rather than bringing more foreign revenues to the U.S., a compulsory license for movies would give foreign consumers a free-ride on the back of American consumers.

Question 3: I have heard a number of entertainment companies say that acceptable protection for online content simply does not exist yet, that existing Digital Rights Management and watermarks. wrappers. or encryption, is simply not good enough to protect valuable content. Yet we have a number of technology companies here today who believe that they have such a solution, and now we, have announcements of online initiatives from all five major labels, which suggests the technological protections have developed recently. Would any of you care to comment on the state of technological protection for content?

Answer: Companies with content protection products to sell are motivated to declare that the answer to this question is a clear yes (and that each, in fact, has the specific "yes" that is needed!). Yet as the clip from "Gladiator" viscerally demonstrated, the current marketplace is filled with illegitimately obtained copyrighted works, strongly suggesting a diametric answer as the correct one.

Technology development is an iterative process and the core issue at the heart of the question is "where are we in this iterative process?" Are we near the start, middle, or the end of the process of the development and deployment of effective content protection technologies?

As is pointed out in the question, there are numerous vendors offering content protection technologies that, as witnessed by recent announcements, are now entering the marketplace for initial tests with real products and real consumers. Some of these technologies will be fully flawed while others will show more promise.

The fact that we are seeing the start of deployment clearly indicates that the answer to the question posed is that we are at the beginning, not the middle or the end, of the deployment of content protection technologies in the marketplace. Extrapolating when we will arrive at the middle—a robust and active market—is impossible to judge as the pace of adoption and acceptance of these first-to-be-deployed technologies will depend on the unknown answers to questions such as how consumers will respond as they test and trial the products wrapped in these protection technologies and how effective the vendors of these products will be at repelling the legions of hackers that are sure to arrive on the scene.

Question 4: The premise of this hearing is that digital content is coming soon to digital devices to he enjoyed by consumers soon. Bared on our discussion today. how soon is soon, and when will the promise become a reality?

Answer: Legitimate, technologically protected digital content is already reaching millions of consumers in many ways such as via DVDs, digital satellite, digital cable, and other methods. These consumer-friendly technologies did not appear overnight. They required years of dedicated effort by hundreds of companies and they continue to be refined to this day not only in the area of content protection but, equally important, in ways that heighten the entertainment. experience and usability for the consumer. Innovation will continue and we expect both product types and variations to multiply every year as far as we can see into the future. Competitive products such as those noted, which provide great consumer experiences and also protect content, take real work, innovation and dedication to produce—and those that would look to Congress to diminish their efforts to the detriment of the rights of others should not be encouraged.

Responses of Shawn Bentley, Motion Picture Association of America, to questions submitted by Senator Leahy

Question 2: Jack Valenti testified that within four to six months, several movie studios plan to use the Internet to transmit to American homes in encrypted form, but that more protection may be needed. "some of which might require congressional legislation. " In the Digital Millennium Copyright Act (DMCA). the Congress has provided protection for technological measures that effectively control access to copyrighted works and barred the manufacture, import. or sale of products or services primarily designed to circumvent such technological measures. 17 U.S.C. § 1201 (a)(1) & (2). Please describe the circumstances where additional protection may he warranted and the areas not already covered by the DMCA where additional legislation may be requested.

Answer: The DMCA provides a critically important remedy against those who would circumvent technical measures used to protect against unauthorized access to and reproduction of copyrighted content. This remedy already had been success-

fully applied to protect the integrity of DVD technical protection measures, without which there would be no DVD marketplace—a marketplace that has benefited consumers enormously.

However, the DMCA measures, although critically important, are quite limited in their application. In particular, the DMCA does not require devices to affirmatively respond to access and copy protection technology. This is a hugely significant limitation. In the case of DVDs, responsiveness to technical protection measures has been required by technology licensing terms. However, such terms require privity of contract, which substantially narrows, and complicate,, the ability of content owners to require device manufactures to respond to technical protection measures.

A statutory mandate that requires devices to recognize technological protection measures would provide a much broader and more reliable safety net for content owners and could make it easier for our industry to distribute more high quality, high value ;films to consumers. So I believe that Congress should give serious thought to this possibility, but 1 am not at this time prepared to recommend specific legislative measures. Of course, if a statutory mandate were enacted, it would have to be accompanied by measures that would preserve the balance among the various interests that were struck in the DMCA.

Question 3: Concerns have been expressed that "copyright management" measures being developed by copyright owners to control the distribution of their digital works may erode the first sale doctrine. If a customer pays for the personal use of a copyrighted work, the right holder may use technological means to ensure that the work is not posted on a website for my by others. Do you believe that the marketplace will sort out the scope of copyright management measures since customers who believe they are not getting what they pay for will simply stop buying?

Answer: We strongly believe that "copyright management" measures will in no way undermine the sanctity of the "First Sale" doctrine and that such concerns are sorely misplaced. The First Sale doctrine does not prohibit the use of either technical or contractual measures to restrict the dissemination of copyrighted material. However, the marketplace has placed practical limitations on the use of such measures. For instance, the use of contractual restrictions to prevent the rental of videos by purchasers proved unworkable in the marketplace. We do believe that the marketplace will sort out the scope of copyright management measures on-line, as it has off-line. If imbalances occur, they should be addressed. But at this time there are no problems that need to be "fixed"-only speculation about what could or might happen sometime in the future. There is certainly no basis for even considering "prospective" amendments to the First Sale doctrine, which is operating as intended.

Question 4: Retailers of music, movies, video games, and other copyrighted works have expressed concern about whether copyright management measures and end user licensing agreements will erode the ability of retailers and distributors to distinguish themselves from one another in meaningful ways with the potential of stifling competition among retailers, since those measures may yet uniform price policies. and terms for the online distribution of digital works

Answer: Motion Picture companies are in the very earliest stages of marketing their films to consumers on-line. It remains to be seen whether copyright management measures and user licensing agreements will be uniform or whether they will have an adverse impact on competition. If so, however, existing laws should be more than adequate to protect retailers and the public against any anticompetitive practices that might develop. Indeed, the likelihood is that distribution of films through the Internet will have strong procompetitive effects and provide significant benefits to consumers.

Response of Shawn Bentley, Motion Picture Association of America, to a question submitted by Senator Kohl

Question 1: While all of the panelists are primarily concerned with access to the online entertainment marketplace, they must also understand chat they have a responsibility to parents. The Internet makes it even more difficult or parents to police the songs that their children hear, the images that they see and the games that they play. I'd like the panelists to discuss what their company or industry plans to do to help parents as online entertainment becomes more readily accessible to all consumers, especially children.

Answer: Your question, "what our industry plans to do to help parents as online entertainment becomes more readily accessible to all consumers, especially chil-

dren," is quite relevant, in part because it highlights the importance of facilitating a legitimate marketplace for the distribution of digital entertainment.

The movie industry is now implementing a 12-point set of Initiatives to help parents determine what films they want their children to watch or not to watch in theaters. Included in those Initiatives is a pledge to give reasons fur the ratings of a movie in advertising and on web sites so that parents can easily assess that films' suitability for their children.

The voluntary movie rating system, established November 1, 1968, has won high marks of parental endorsement. I attach a summary of national surveys over the past 30 years which confirm that statement; the latest Opinion Research Corporation of Princeton, New Jersey poll reveals *81% of parents with children under 13 find the rating system Very Useful/Fairly Useful. An independent poll taken by the Federal Trade Commission in 2000 found that 80% of parents were "Satisfied" wit the rating system*.

The Motion Picture Association is also a founding participant in the voluntary television program rating system. All TV shows visually display a rating; most newspapers also carry the ratings. This aids parents in guiding their children's TV viewing.

As you know, Congress passed the V-Chip legislation (supported by the MPA), which allows parents to block TV programming they choose for their children not to watch.

MPAA and its member companies are committed to fulfilling our pledge to parents in the online world as we do in the offline world. To date, the Internet has largely been a promotional tool for MPAA member companies. As such, the MPAA has adopted a policy that requires Internet advertising for all rated films to be prescreened by the MPAA's Advertising Administration just like any other ad. That means that before it can be put on the Internet, every trailer, every official web page, and associated banner ads must be approved by the Advertising Administration and must meet the same standards as offline advertisements to ensure that Internet ads are likely to be judged appropriate for even the youngest audience.

As I said in the hearing last week, we are now on the eve of an important shift in the way movie studios use the Internet to market their films. Within four to six months, several movie studios will be online offering downloads of full-length feature films. Each film offered to the public will have to pass the scrutiny of parents before it can be downloaded for a fee. The computer format will demand a credit card and a password for that credit card so that youngsters will be unable to download movies on their own, unless their parents approve. Every movie offered to families will have a rating, and the reasons for the rating. Through the use of technology, the MPAA and its member companies are committed to giving effect to the MPAA ratings system in the online environment.

Keep in mind that web sites which illegitimately offer copyrighted works for download, without permission of the owner (such as Napster, Gnutella, Freenet, Aimster, and others) have no information about ratings and make no effort to assist parents in discerning what is appropriate for their children. These web sites and software applications that offer films, illegally, are easily accessible by children, and most am riddled with obscenity and child pornography. We are now in the process of determining technological procedures which are needed to protect valuable creative works on the Internet, and many of those same technologies may also enable parents to exercise greater control over their children's viewing choices. If some part of that technology requires congressional legislation, we will return to you and your colleagues to help preserve the worth of America's most valuable trade export and a huge part of the national economy. One thing, however, is perfectly clear: Only in a legitimate marketplace will parents be given meaningful choices and information necessary to enable them to influence their children's viewing habits. The "near perfect anarchy" envisioned by Ian Clark, the creator of Freenet, is as bad for parents as it is for copyright owners.

To graphically illustrate the difference between legitimate on-line movie sites, and pirate sites, I have attached two screen shots taken from the Web. One is the opening screen for a legitimate movie site called Sightsound.com, which offers movies (including rating information), music, sports events, children's programs and other material. The other is an illegitimate site, Gnutella, which offers pirate movies, music, video games and the most tawdry pornography imaginable—all on one page, easily accessible to children.

Responses of National Music Publishers' Association to questions submitted by Senators Hatch, Leahy and Kohl

QUESTIONS FROM SENATOR HATCH

Question: One argument we have heard in favor of a compulsory license is that music has so many pieces to license and there have been substantial disputes between the record labels, the publishers and technology companies like MP3.com about how to get the publishing rights cleared in the volume demanded by online offerings. . .. Would any of you be interested in commenting on this particular problem and suggest ways to remedy it?

Answer: As you are aware, songwriters and music publishers already operate pursuant to the statutory compulsory license in section 115 of the Copyright Act. MP3.com has mischaracterized its experience in clearing publishing rights with the Harry Fox Agency ("HFA"), and in fact substantial progress has been made recently between MP3 and HFA, which we describe in detail below. There has been no increase in the number of licenses necessary to distribute music since the emergence of online digital music services, and music has been successfully distributed for decades under the current legal regime. As we demonstrate in detail in the answers that follow, no new compulsory license is necessary—nor would it be beneficial.

Question: Mr. Hank Barry argues that we have created compulsory licenses in the past for publishing rights in music and in rebroadcast of television programming because it was difficult to clear the rights to the myriad creative interests involved in making up a broadcast day. Would anyone like to explain why that analogy does or does not obtain in the online music and entertainment world?

Answer: NMPA does not believe that any new compulsory license is warranted to promote the availability of music over the Internet. What is necessary for a vibrant online music market to take root is for "services" such as Napster to cease their promotion and facilitation of online infringement. At both the Committee's initial hearing on music and the Internet, held July 11, 2000, and the April 3, 2001 hearing, witnesses representing companies and interests offering appropriately licensed music services acknowledged the virtual impossibility of competing with rogue entities that make other people's music available to anyone for nothing. Until Napster and its imitators follow the law by seeking necessary licenses and making the necessary payments to creators and rights holders, law-abiding companies will remain at a serious, if not fatal, commercial disadvantage.

As Mr. Barry knows, at the time Napster launched its service, the company was eligible—like any other Internet music service—for compulsory licenses under the terms and conditions of section 115 of the Copyright Act for the making of "digital phonorecord deliveries" ("DPDs") of musical compositions. It chose not to use the compulsory licensing system available to it. Napster has therefore forfeited eligibility for compulsory licensing through its continued infringement. The company now urges Congress to establish a new compulsory license regime that would reward it with access to all musical compositions (and all sound recordings), presumably at a rate it finds acceptable and with few if any administrative responsibilities for Napster. NMPA believes that the existing section 115 compulsory license provides an adequate framework for Napster and other Internet distributors of music to secure licenses at a reasonable rate.

Question: I have heard a number of entertainment companies say that acceptable protection for online content simply does not exist yet, that existing Digital Rights Management and watermarks, wrappers, or encryption, is simply not good enough to protect valuable content. Yet we have a number of technology companies here today who believe that they have such a solution, and now we have announcements of online initiatives from all five major labels, which suggests the technological protections have developed recently. Would any of you care to comment on the state of technological protection for content?

Answer: The technology for protection of digitally distributed content is still in its infancy. The field is extremely complex and combines disparate academic fields of study including computer science, encryption mathematics, digital signal processing and acoustics. Our experience with reviewing the different technologies offered by various vendors (large and small) is that a technology is "tamper-proof" or "hacker proof" only as a matter of degree. Today, there is no single copy protection technology that meets the requirement of consumer convenience, strong protection, practicality and reasonable cost.

In addition to copy protection technology, use tracking mechanisms are equally important to ensure a vibrant digital music business where all of the participants, including songwriters and publishers, get properly paid for the uses of their creations. While "fingerprinting" technology is useful to identify unauthorized music files on computer servers, such a function is distinct from managing legitimate delivery to consumers of copy protected music. For example, The Harry Fox Agency has proposed for several years, most recently in the "SDMI" process, that the license number corresponding to the mechanical license (and any other relevant license number) authorizing a digital distribution be included in the header of each downloaded or streamed file. Inclusion of the mechanical license number would permit automated spot checking of websites and allow automated auditing of a licensed website. It is a given that different website operators may secure the authority to distribute a song from their website from different parties. In order for a songwriter, publisher or their agent (HFA, for example) to check that a website has such authority, it is essential that a license number corresponding to the license granting the operator the authority to execute such distribution appear in the header of the digital music files being distributed from their website.

Although digital rights management technology vendors profess to have the solution to this problem, they and the record labels have resisted attaching license numbers to digital music files. While we have been given a number of reasons for this resistance (including the "header" can only accommodate so much data), all can be technologically surmounted. By continuing to resist inclusion of this license information in the "header," the record companies make it much more difficult for music publishers to audit record company compliance with our licensing agreements. Furthermore, because the primary clients of digital rights management vendors are the record labels (because the record labels control the distribution of sound recordings), the technology they have developed and adopted so far has been responsive to the interests of record labels, not those of music publishers. An important principle arises from our experience with digital rights management: technology alone is not the only challenge facing an effective digital rights management regime. The economic tensions that have been a part of the music business for decades are also a significant factor in whether the right technology is made available. We remain hopeful that on-going discussions between the music publishing community and the RIAA will resolve this issue.

There is an important additional factor to consider: the "consumerfriendliness" of the protection and management technologies. A near-perfect copy protection technology is of little help to the music industry if it frustrates consumers. It is our experience that the easier and more versatile the technology is for consumers, then the easier they are to "hack" or bypass. Conversely, the more tamper-resistant the technology is, the more difficult it becomes for legitimate consumers to access their purchased content and for the music licensing community to implement the technology. Currently, the Achilles heel of all of these technologies is a product called "Total Recorder." This packaged software product, generally available, pretends to the computer operating system that it is the sound card hardware that produces the musical sound. This means that after legitimate content is legitimately decrypted by the copy protection and rights management software, the Total Recorder software can copy the decrypted digital sound data constituting the song into a separate file, typically in MP3 format, that would be "clear" of encryption. In other words, truly piracy-proof digital music delivery technology must protect the entire chain of delivery, from the website to the speaker. This last state of affairs will only occur if the entire industry agrees on a copy protection and rights management model that meets everyone's needs and is implemented across all platforms at each point in the chain of digital music delivery. So far, as mentioned above, that has not occurred.

In summary, copy protection technology is still developing. "Perfect" systems from a technological perspective are not yet perfect from a business market perspective. Digital rights management technologies are improving but so far, music publishers are at the mercy of the record companies regarding which digital rights management technology is used and what information is included in the identifying "headers." Industry-wide resolution of this issue remains elusive. We are confident that these problems can be resolved, but as this answer indicates, there are some significant issues remaining.

Question: For all panelists: The premise of this hearing is that digital content is coming soon to digital devices to be enjoyed by consumers soon. Based on our discussion today, how soon is soon, and when will the promise become reality?

Answer: Mr. Chairman, for music, the question is not when the content is coming digital delivery of music is here. NMPA members have licensed more than thirty enterprises, most of them fledgling businesses less than five years old, to distribute recordings of music over the Internet. EMusic and MP3.com are among the licens-

ees. These companies have chosen to respect the rules laid down by Congress by obtaining licenses and paying compensation to the copyright owners. Our licensing arrangements demonstrate that music publishers are fully prepared to license any Internet music service if that service is prepared to follow the law.

Furthermore, NMPA has every incentive to license its works in the digital environment. Some digital music services imply that music copyright owners are deliberately impeding the issuance of licenses for online music services. This suggestion is both inaccurate and illogical. Music publishers only get paid when their work is used; if it is not used, no revenue is generated. NMPA members are eager (and economically motivated) to license their works in the new digital environment.

Question: For all panelists: Is there any point you feel should be raised or that you would like to further respond to for the completeness of our record?

Answer: We would like to respond to the suggestion of some that a new "blanket" statutory license be created for digital music distribution.

Music website operators (including MP3.com in its written testimony) often propose that digital music distribution be governed by a "blanket licensing" scheme without further elaborating on the complexities of current blanket licensing. NMPA believes that blanket licensing is inappropriate to the licensing of digital phonorecord deliveries, for the following reasons.

Blanket licensing is a process that the performing rights societies (e.g. ASCAP, BMI and SESAC) use to license and collect performance royalties from radio and television stations for performances of songs on radio and television. Created during the World War I era to address the practicalities of keeping track of the public performance of musical works on radio and in live performances, the blanket license is premised on the impracticality of reviewing every radio or television station's play log or programming for every minute the station is on the air or every location where the music is played. Instead, statistical sampling of a smaller number of radio and television stations is employed to estimate how many times a particular work is performed.

Sections 111 and 119 of the Copyright Act establish limited compulsory licenses for the retransmission of certain broadcast signals under modified blanket licensing. Royalties deposited pursuant to the terms of these compulsory licenses are subject to a complex, two-phase distribution proceeding. In phase one, groups of eligible rights holders demonstrate how much of the overall royalty pool should be allocated to each group. In phase two, disputes regarding the allocation of royalties among claimants within each group are resolved. Such a system may be appropriate in the context of the transmission of copyrighted material employing technologies that, at least for now, do not provide a ready means for identifying individual rights holders. It is not appropriate, however, to impose by law a licensing regime developed for the specific facts of the cable or satellite industries where (as in the case of certain Internet music services) the transmitter is the originator of the transmission and has control over the material being made available to subscribers, and where technology is available to facilitate accurate licensing on behalf of the affected rights owners.

It is inaccurate for music website operators to state that blanket licensing resolves technical licensing problems in the digital era. First, the compulsory license of section 115 is available to any entity wishing to distribute music over the Internet. Second, website operators routinely collect information on millions of visits to their websites which they use in marketing their products and attracting advertising revenue. It is disingenuous for the same website operators to claim that it is impractical for them to account for each use of the works that they are licensing (as a justification for blanket licensing) when they already have that detailed information in digital form in their databases. In other words, website operators are ideally equipped for this kind of accounting task.

The principal reason for advocacy of a blanket license by web-based music services is that it transfers the royalty distribution burden from users to copyright owners in a manner that costs the creators of the work significantly more than per-use accounting. Digital technologies are particularly well suited, however, to performing the accounting tasks associated with licensing uses of works in a networked environment and ensuring accurate payments to the appropriate rights owners and creators. Congress recognized this fact when it enacted section 1202 of the Copyright Act to protect copyright management information from intentional interference.

Question: Mr. Murphy: Could you comment on the publishing issues and how you believe your members will be able to meet the demands of licensing hundreds of thousands of songs where you have in the past licensed ten to twelve at a time?

Answer: The assertion that HFA can only license ten to twelve songs at a time is inaccurate. In recent years, HFA has routinely issued licenses for approximately

250,000 titles annually. Everyone at HFA is aware, however, that the digital economy is changing the licensing paradigm from individual licenses to bulk licenses, and we are adapting to this new reality promptly—along with the rest of the music industry. Our transformation is not complete, and the process has not been error free, but we are confident .that HFA has made rapid progress and is performing as well as or better than any other digital music licensing entity. HFA anticipates it will have a smoothly functioning digital licensing mechanism in the very near future.

Here are some examples from the HFA-MP3 relationship to prove our point. Presently, HFA and MP3 are working under the terms of an interim license under which the MyMP3 service may operate while permanent licenses are issued. This is a critical fact that MP3 omitted entirely from its testimony. With respect to permanent licenses, MP3 has submitted a database of 914,914 titles for licensing, and HFA has completed a file matching and validation search on each one. As of April 5, 2001 HFA had issued permanent licenses for 32,885 songs. Between April 5 and April 20, 2001, HFA issued permanent licenses for an additional 131,072 songs. In conducting our analysis of the MP3 database, HFA determined that 64,482 were duplicate requests. In other words, HFA has reviewed the entire file and has resolved (by permanent licensure or by confirmation that a request was a duplicate) 228,439 of the records. The "10 to 12 licenses at a time" criticism is simply misplaced.

There is no question that a substantial number of requests are pending. A significant portion of the unresolved requests, however, are due to incomplete information submitted by MP3. We continue to work with MP3 to perfect the songclearance mechanism so that we can issue licenses for whatever number of songs that MP3 submits to us. It should be noted, however, that users of the copyrighted material have responsibilities as well. A company cannot simply "rip" CDs with impunity (that is, disassemble lawfully purchased CDs which contain the necessary licensing information), disregard data retention and quality requirements in this process, and then blame the licensing entity for a failure to respond promptly. A substantial portion of the 686,000 titles that are pending are due to MP3's incomplete database. HFA is committed to resolving the pending MP3 license requests; but we ask that the necessary minimum identifying data be submitted to us so that we can ensure proper compensation of the lawful copyright owners.

Question: Mr. Murphy: You have testified that the Harry Fox Agency has provided MP3. com with an electronic copy of its licensing database and I understand you will not support litigation against MP3.com while you mutually attempt to address problems faced in issuing licenses for these songs.

Answer: The Chairman's understanding on this point is correct. The President of HFA (Gary Churgin) confirmed this fact in a letter to MP3.com dated March 29, 2001.

Question: I have some questions about how this is working practically, and must how the clearance process will work. First, how many song titles are on that database and does the Harry Fox Agency represent all of the publishers for each of those songs? If not, with respect to how many of these songs does the Harry Fox Agency represent 100 percent of the publishers?

Answer: MP3 has advanced the notion that HFA must represent all of the owners of each work in order to issue a license—which betrays a fundamental misconception of the copyright law on this point. 17 U.S.C.§ 201(a) states: "Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work." The leading treatise notes that "one joint owner" has the right "to license the work without the consent of the other joint owners" and "an authorization to [a user] from one joint owner will be an effective defense to an infringement action brought by another joint owner." NIMMER ON COPYRIGHT § 6.10. A long series of cases encompassing most of the major federal circuits is cited in support of these propositions, which we will not repeat here. Id. The result of this well-settled aspect of copyright law is that HFA need not represent "all of the publishers for each of the songs" in order to issue a license upon which MP3 may rely; if HFA represents one co-owner of a musical work, that is sufficient to issue a license.[1]

With respect to the second part of the question, the number of songs for which HFA represents at least one owner is constantly changing (and growing). The now over 27,000 music publisher principals represented by HFA have historically owned or administered approximately 90% of the compositions in the American repertoire.

[1] In the event HFA licenses through one joint owner, that owner owes an accounting for profits to the other co-owners. See Nimmer § 6.12[B].

HFA's publisher principals collectively own more than 2.5 million copyrighted musical works. We are continually acquiring more titles and publishers.

Question: Second, online music services such as MP3.com have testified that they want to offer consumers access to a vast library of music, exceeding 900, 000 titles. For those songs whose publishers are not represented by Harry Fox, could you help us understand how an online music provider would go about identifying the publishers and obtaining licenses from them?

Answer: Some background information on the 914,914 titles in the MP3 database is necessary. First, 64,482 of the titles are confirmed duplicates. Second, an unspecified portion of the 914,914 were placed there by MP3 through their music hosting service for independent artists (without record label affiliation and in most cases not containing copyrighted musical work). It is obvious that HFA would not have these MP3-facilitated songs in its database.

In the relatively rare instances where MP3 presents sufficient licensing information[2] to HFA, and HFA represents none of the copyright owners of the underlying musical work, MP3 (or any other online music provider) could do the following to identify the publisher and obtain a license: (1) directly contact the publisher, which would be listed in the sound recording license that the music provider must obtain from the record labels (most of the artists are affiliated with such labels); or (2) use the compulsory license provisions of section 115(b) of the Copyright Act and either determine the copyright owner from the Copyright Ofce records or, in the case no such owner is listed, file notice with the Office pursuant to that section (and its implementing regulations at 37 CFR § 201.18[3]) and distribute the work pursuant to the statutory compulsory license.

Question: Third, given that there are many songs whose publishers are not represented by the Harry Fox Agency and that even where you represent a publisher claiming an interest in a song there may be other publishers in that same song that you don't represent, do you have any practical suggestions for businesses like MP3.com who have paid the major rights holders in most of their music library to avoid infringement suits from the myriad smaller, independent publishers and other rights holders who might have some interest in one or more of the many songs they offer?

Answer: There is no "given" that "many songs" are published by entities not represented by HFA. As noted above, the over 27,000 publisher principals represented by HFA have historically owned or administered approximately 90% of the compositions in the American repertoire, and the recent growth in the number of publishers whom HFA represents is substantial. Furthermore, also as noted above, when HFA represents one owner of a musical work, it may license a third party to use the work, and that party is insulated against an infringement action by any other co-owners.

In the relatively rare circumstance when HFA represents none of the publishers of a work that MP3 seeks to use, as mentioned before, we suggest: (1) contacting the publisher directly, after identifying the publisher through either Copyright Office records or through the information contained on the sound recording license; or (2) invoking the compulsory license in section 115 and filing "notice of intention" to use the work with the Copyright Office.

QUESTIONS FROM SENATOR LEAHY

Question 3: Concerns have been expressed that "copyright management" measures being developed by copyright owners to control the distribution of their digital works may erode the first sale doctrine. If a customer pays for the personal use of a copyrighted work, the rights holder may use technological means to ensure that the work is not posted on a web site for use by others. Do you believe that the marketplace will sort out the scope of copyright management measures since customers who believe they are not getting what they pay for will simply stop buying?

Answer: The question raises several issues. First, is there a need for an expanded "digital first sale doctrine" as some have suggested? NMPA believes the answer is no. The first sale doctrine, in section 109 of the Copyright Act, provides, in pertinent part,

> Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such

[2] In the case of a previously issued CD, a licensable match requires the song title and two of the following: (1) artist, (2) album, or (3) catalogue number or UPC code.

[3] A good summary of the compulsory licensing mechanism for music is found in Copyright Office Circular 73, available at the Office's website: http://www.loc.gov/copyright/circs/circ73.pdf

owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

The Digital Media Association ("DiMA") and other advocates of expansion of the first sale doctrine argue that a consumer who purchases a digital download should be able to forward that download to someone else, provided the consumer deletes her original copy. A similar proposal was offered during consideration of the Digital Millennium Copyright Act and rejected by Congress because Members recognized that: (1) unlike in the physical world, in the digital context the owner of a copyrighted work did not relinquish the original copy, and (2) relying on the "honor system" to ensure that the "original" copy would be deleted or otherwise rendered inaccessible in the digital environment would open the door to widespread abuses and encourage disrespect for the law. The advent of Internet-based peer-to-peer file propagation software has demonstrated that Congress's concerns were warranted. In addition, it is inconsistent for DiMA to advocate a philosophy that copyright is an anachronism in the digital age but then ask Congress to apply an inapplicable copyright concept to restrict the right of songwriters and publishers to apply digital rights management technology to protect their creations.

Forced to acknowledge that the "honor system" would not work, in law or in practice, DiMA now asserts that technologies are available to enforce the limits of a digital first sale doctrine. But there is no evidence that consumers desire or would benefit from a change in the law that would result in the deployment of "forward and delete" technologies. As the Senator's question implies, the pertinent inquiry is not whether technology can be deployed to police a first sale privilege, but whether controls can be employed to serve the legitimate interests of copyright owners in curbing unauthorized uses of their works and the desire of consumers to enjoy works in new ways. NMPA believes that the marketplace is the only venue flexible enough to respond to this challenge effectively in the many contexts and business models in which it is likely to arise.

Finally, it is important to recall that Congress has examined the first sale doctrine as it relates to works in digital form in at least three instances and, each time, has found that the special vulnerability of such works warranted an exception to—rather than an expansion of—the first sale privilege. In responding to the introduction of compact disc technology by enacting the prohibition against the unauthorized rental of phonorecords, in making that prohibition permanent, and in enacting a similar provision prohibiting the unauthorized rental of copies of computer programs, Congress has recognized that allowing exercise of first sale privileges in copies of works in digital form would lead to unacceptable levels of copying that would prejudice the legitimate interests of copyright owners. Certainly the concerns underlying these legislative reforms apply with equal magnitude with regard to the reproduction and distribution of copies over the Internet.

Question 5: The Copyright ice issued a Notice of Inquiry on March 9, in response to a petition by the RIAA, stating that: "there is considerable uncertainty as to the interpretation and application of the copyright laws to certain kinds of digital transmissions of prerecorded musical works. It is also apparent that the impasse presented by these legal questions may impede the ability of copyright owners and users to agree upon royalty rates under section 115. . .. " 66 Fed. Reg. 14099, 14101 (2001).

Question (A): Do you agree with this statement and, if so, please explain how the uncertainty over the legal questions presented in the petition is affecting voluntary licensing agreements for new online music services?

Answer: NMPA filed comments in response to the Notice of Inquiry on April 23. Those comments made clear that NMPA does not agree with the statements and explained the reasons why it believes the existing legal framework is adequate to allow marketplace to address licensing issues that have arisen as well as those that might arise in the future. A copy of those comments is attached to this response.

NMPA does not believe that there is "considerable uncertainty as to the interpretation and application of the copyright laws to certain kinds of digital transmissions of prerecorded musical works." In enacting the Digital Performance Rights in Sound Recordings Act in 1995, Congress extended the existing compulsory license in section 115, which covers the making and distribution of phonorecords of protected musical compositions, to certain Internet uses.

In enacting these important changes into law, Congress did not attempt to anticipate every possible business model for making music available to Internet users. Nor, as we discuss below, did Congress assign that burden to the Copyright Office. Rather, it provided general definitions establishing the principle that songwriters and music copyright owners—like record companies—should be compensated fairly

and in a manner that reflects the economic significance of those business models for current as well as new sources of publisher and writer income.

We believe the model Congress has adopted is working, and can continue to work for the benefit of songwriters, music publishers, record companies and companies seeking to offer innovative music services. Music publishers, through HFA, have already issued licenses to more than 30 music service providers covering downloads as well as interactive streaming services, and we are prepared to license others.

There is no question that some have constructed specious arguments to evade the obligation to pay reasonable royalties for covered services. Napster, for example, has argued that its "service," which provides the means for the distribution of billions of unauthorized downloads of protected music, is exempt from infringement liability and royalty payment obligations under a parade of theories, including the assertion of a defense under the Audio Home Recording Act, a "staple article of commerce" defense, and claimed eligibility for a "safe harbor" under the service provider liability provisions of the Digital Millennium Copyright Act. We are gratified that, as to each of these purported defenses and privileges, both the Ninth Circuit Court of Appeals and Judge Patel's court have found that music publishers and record companies are likely to prevail on the merits.

What is needed now, in NMPA's view, is for entrants into the digital music services market to cease efforts to evade their responsibilities under the law and to engage in good faith efforts to obtain the required licenses. Voluntary negotiations, under the regime established by Congress, in NMPA's view will yield the fairest result for music creators and copyright owners, for commercial users of their works, and for consumers. In the event voluntary negotiations fail, Congress has provided for an arbitration mechanism that will resolve disputes and allow the music to be used.

Question (B): In 1995, the Digital Performance Right in Sound Recordings Act expanded the scope of the mechanical license, under 17 U.S. C. sec. 115, to include the right to distribute, or authorize the distribution of, by digital transmission both hard copy phonorecords and "digital phonorecord deliveries" or "DPDs. " DPDs are defined in the Act but a subset of DPDs, called "incidental DPDs " which are also subject to the mechanical licensing process, are not defined. One of the issues before the Copyright Office is to determine what is and what is not an "incidental DPD. " Is this a question that the Copyright Ofce for the Congress should determine in the first instance?

Answer: Congress has already spoken to this question, and it has expressed a strong preference for the resolution of these issues through voluntary, private negotiations. As the Senator observes, Congress expressly defined the term "digital phonorecord delivery" ("DPD") in its 1995 amendments to section 115. It did not, however, create a statutory classification known as "incidental digital phonorecord delivery." In fact, Congress did not even use the term "incidental digital phonorecord delivery" in section 115. Instead, it merely directed that any "rates and terms" for DPDs established through voluntary negotiations or arbitration proceedings distinguish between (1) digital phonorecord deliveries where the reproduction or distribution of a phonorecord is incidental to the transmission which constitutes the digital phonorecord delivery, and (2) digital phonorecord deliveries in general." 17 U.S.C. sec. 115(c)(3)(C).

Had Congress wished to create pre-defined, static categories known as "incidental DPDs" and "general DPDs," it certainly could have done so. It did not. Nor did Congress choose to assign responsibility for creating such static definitions to the Copyright Office, which it certainly could have done. Instead, it wisely recognized that the distinction of "incidental" versus "general" could only be made in the fact-specific context of a voluntary rate-setting negotiation or a Copyright Arbitration Royalty Panel ("CARP") proceeding and with respect to the particular business models and technologies known at the time.

The legislative history of section 115 supplies a number of illustrative examples of DPDs that might be considered "incidental" to the making of transmissions constituting DPDs, but does not suggest that an exhaustive list would be possible or at all necessary to create. Congress's approach clearly demonstrates that it sought to leave the "incidental" and "general" DPD concepts flexible and subject to definition through voluntary negotiations or arbitration based upon the specific activities and technologies at issue at the time. NMPA urges that the approach adopted by Congress be given the opportunity to work.

Question (C): The Copyright Office is currently considering the applicability of the section 115 mechanical license to two new services for the delivery of music: "On-demand streaming" (which permits users to listen to real-time streamed music they want when they want it) and "Limited Downloads" (which permits users to

download music for listening for only a limited time). According to the Notice of Inquiry, these types of services were not "anticipated" when the Congress expanded the scope of section 115 to cover digital transmissions. Is legal uncertainty over the applicability of section 115 to these new services having any effect on the deployment of such services and, if so, please explain what that effect is?

Answer: As we have discussed, Congress did not create static categories in section 115 and provided, in the legislative history, only a non-exhaustive list of examples of what might constitute an incidental digital phonorecord delivery, based upon the technologies known at the time. No effort was made to anticipate or prospectively deal with any new technology.

But saying that certain services were not anticipated in section 115 will not lead one to the conclusion that section 115 does not provide the mechanism for dealing with the new services discussed in the Notice or Inquiry or any others that might arise in the future. Congress established its clear preference for issues related to the licensing of new, interactive music services to be dealt with in private, voluntary negotiations and, if those negotiations fail, by arbitration before a Copyright Royalty Arbitration Panel. This decision by Congress was the appropriate one in 1995 and remains so. To have chosen otherwise—or to choose otherwise now—would invite every new entrant into the online music market to bring what should remain private business matters to Congress or to the Copyright Office. Others might simply be tempted to use Congressional or regulatory pressure on rights owners and creators in an attempt to exact a more favorable deal. This is hardly a prescription for rapid introduction of legitimate services for the distribution of music or any other form of creative content.

As noted above, voluntary negotiations have resulted in the issuance of licenses for rights in musical compositions to more than 30 companies. NMPA is pleased to report that it is involved in negotiations with affected users over potential rates for the very services outlined in the Copyright Office Notice of Inquiry. Progress in these voluntary negotiations is being made. It is apparent to us, however, that any progress toward voluntary resolution of licensing issues would be undermined by injecting these business decisions back into the policy arena before the regime set out by Congress in 1995 has been given an opportunity to work.

Question (D): Various music publishers filed suit in December 2000 against UMG for copyright infringement alleging that UMG was copying sound recordings on servers for its new online music subscription service, Farmclub.com, and stating that: "UMG recently obtained a judgment from this court that the operator of another Internet music service, MP3.com, Inc., had willfully infringed UMG's sound recording copyrights by placing copies of those sound recordings on its public servers—precisely what UMG has done here without plaints permission. " Would clarifying the scope of the mechanical license under section 115 of the Copyright Act in the context of such new online music services help avoid the undue delay and undue distraction from litigation?

Answer: No, clarification of section 115 would not have avoided the need for the litigation against UMG.

UMG has admitted in the litigation that it made computer server copies of copyrighted musical works and that these constitute phonorecords. Instead of seeking a license for these actions, it attempted to rely on licenses previously obtained from HFA that were expressly limited to CD's, audiocassettes, and LP's. No clarification of the statute would help avoid a dispute such as this. UMG has alternatively argued that there was no need for a license because the server copy was not distributed. If this were the case, then only the reproduction right in section 1060) was violated, the compulsory license under section 115 was not available, but UMG is liable nonetheless for infringing the exclusive reproduction right of the plaintiffs. Even under this alternative argument, no statutory clarification would have helped avoid the litigation. HFA and UMG are sophisticated members of the music industry with ample access to legal counsel: there is no possibility that one of the parties to the litigation "misunderstood" the law such that a statutory clarification is needed.

QUESTION FROM SENATOR KOHL

Question: While all of the panelists are primarily concerned with access to the online entertainment marketplace, they must also understand that they have a responsibility to parents. The Internet makes it even more difficult for parents to police the songs that their children hear, the images they see and the games that they play. I'd like the panelists to discuss what their company or industry plans to do to help parents as online entertainment becomes more readily accessible to all consumers, especially children.

Answer: With the exception of the sheet music market, music publishers do not generally sell a "product" directly to consumers. Rather, they license a separate business entity—usually a record company—to make and distribute recorded versions of that music. Thus, as a general matter, music publishers are not involved in the marketing of recorded music to the public, and have no right or ability to control the advertising, packaging or labeling of sound recordings issued by record companies.

Music publishers believe that government intrusion into decisions about the content of a musical work raises important First Amendment concerns. Indeed, the Federal Trade Commission has stated that First Amendment concerns dictate that industry self-regulation should prevail in determining practices in connection with the marketing and labeling of works for explicit content. NMPA supports that view.

At the same time, however, music publishers understand the concern of parents who wish to know more about the music to which their children listen. NMPA is troubled, therefore, by the findings of the Federal Trade Commission's April 24 followup report on the marketing of violent entertainment to children. The FTC observed that the "recording industry, unlike the motion picture and electronic game industries, has not visibly responded to the Commission's [September 2000] report" urging all three industries to move quickly toward more effective self-regulation both in limiting the advertising of inappropriate material to young audiences and in providing rating information useful to parents.

The follow-up report noted, among other things, that none of the major record company or artists web sites it surveyed provided links to an educational web site that could provide parents and other consumers with information about the record industry's system for labeling explicit content. NMPA would encourage the record industry to develop and implement such as site, and NMPA would be pleased to assist in the education effort by establishing an appropriate link from its own web site and encouraging individual music publishers to do the same. Moreover, we stand ready to explore with the recording industry other ways in which we might assist in promoting the availability of information about parental advisory labels.

Finally, we would note that HFA posts lyrics to some of the titles its publishers own or administer at its "songfile" website and also posts a disclosure at the page where such lyrics may be viewed that some of the lyrics may not be appropriate for children.

SUBMISSIONS FOR THE RECORD

Statement by Comcast Corporation

Comcast Corporation thanks the Antitrust subcommittee for the opportunity to submit this brief statement for the record.

Our experience as a competitor in the multichannel video marketplace demonstrates the great effectiveness of the Telecommunications Act of 1996 in promoting competition and delivering benefits to consumers. Comcast constantly responds to increasing video and broadband competition by expanding investment, improving operations and customer service, and delivering new products. We urge Congress and the FCC to continue the legislative and regulatory stability that has given the financial markets the confidence to support us and our competitors in bringing new products to market; this stability is essential to the continued growth and expansion of competition.

Comcast Corporation is the nation's third largest cable operator serving more than 8.4 million customers in 26 states, as well as providing high-speed Internet service through cable modems available to more than 6.4 million households in over 20 markets. In addition, Comcast holds ownership interests in various programming networks. Comcast subsidiaries also provide wired local exchange telephone service in Florida, Maryland, and Virginia, and long-distance service in 14 states.

EVIDENCE OF COMPETITION

In sharp contrast to the conditions that prevailed when Congress passed legislation in 1992, competition in the video marketplace today is vigorous and accelerating. Almost every customer of Comcast has more than one alternative choice for their television service. Two direct-to-home broadcast satellite (DBS) companies, DirecTV (with 13 million customers, larger than all but the two biggest cable companies) and DishTV (with nearly a million customers, larger than all but the top ten cable companies), sell their products through hundreds of stores like Circuit

City, Radio Shack, and Best Buy, and directly through newspaper and radio advertisements. The passage of the Satellite Home Viewer Improvement Act in November 1999 allows DBS to retransmit local TV stations to most US households. As a result, DBS is adding subscribers at the rate of more than 8,300 a day, a pace three times that of cable's subscriber growth, with the result that 70% of new DBS customers are in areas served by cable.[1] These satellite services are well-funded, formidable competitors with distinctive and attractive programming offerings for customers.

Terrestrial providers are also an increasingly important source of competition. For instance, in Comcast's home of Philadelphia, Popvision, the wireless cable company with over 10,000 local customers, has been serving Philadelphia for years and actively markets its service throughout the region. There are also numerous companies that serve apartment and condominium buildings. Every one of these companies, including Comcast, offers a distinct range of service and price options. Competition among all of them is robust.

Similar competition is growing in other communities served by Comcast. RCN, with $6.56 billion in available capital, is providing service in the Washington, DC market to 352,000 customers. RCN reports cable penetration of 30% and local phone penetration of 20% in its service areas.[2] Knology provides multichannel video service in communities including Charleston, South Carolina, Panama City, Florida, Huntsville, Alabama, Knoxville, Tennessee, and Augusta, Georgia. SBC Communications operates Americast services in 16 Michigan communities, and provides video service in the entire state of Connecticut, while several new overbuilders and OVS providers are seeking to enter the market.[3]

COMCAST RESPONSES TO INCREASING COMPETITION

Comcast is responding to this competition by continuing to invest to upgrade its operations, and delivering new video and broadband services so that its customers enjoy an increasing array of service choices. Comcast Digital Cable offers more than 170 channels of programming with CD quality sound to 95% of its customers, with more than 1.35 million subscribers at year-end 2000, doubling the 1999 level, with stated expectations of over 2 million customers by year-end 2001.[4] Comcast's high speed cable Internet service, *Comcast@Home*, has 400,000 customers, and is available to over 4.4 million households in 20 markets, with 7,400 new modem customers added each week. Other products are on the horizon, as Comcast expects to launch Video-On-Demand in 2001 and Interactive TV by year-end 2002.[5]

For its existing analog cable customers, Comcast continues to provide a variety of options by structuring program service offerings to offer three or more levels of service, including a lowprice basic service for between $9–12 consisting of local broadcast stations plus C–SPAN. The prices for Comcast's cable service offerings remain well below the national average price per channel for comparable services, ac-

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[1] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Seventh Annual Report, CS Docket No. 00–132, FCC 01–1 at ¶8 (rel. Jan. 8, 2001); Alan Breznick, "Cable Operators Aim for Steady Flow of New Digital Services," COMMUNICATIONS DAILY, Sept. 22, 2000, at 3; "Skyfonnn: Smug in the Enemy Camp," CABLEFAX DAILY, Sept. 22, 2000, at 1

[2] RCN has agreements to serve 20 communities around Philadelphia and Union, New Jersey and is currently building or serving in dozens of townships in Delaware County, Pennsylvania. RCN is also currently providing OVS service under the Starpower name in Washington, DC and Gaithersburg, MD. RCN has been awarded cable franchises in Arlington, VA (scheduled to commence service 1Q2002), Prince George's County, MD, and Montgomery County, MD. RCN also is in negotiations in Baltimore County, MD, Alexandria VA, and Reston (Fairfax Co.), VA, as well as several communities in the Philadelphia and New Jersey areas.

[3] BroadbandConnect has obtained OVS franchises in 30 Maryland communities in the Baltimore and Washington, DC areas.

[4] Comcast's Digital Basic Tier offers more than 200 channels of programming with CD quality sound. Digital Plus Tier offers over 280 channels with 45 premium channels available in 40 systems, with an interactive screen guide that allows customers to search for programs by title, time, channel or category.

[5] Comcast is a leader in developing IP telephony, and plans comprehensive entry into phone markets by 2002.

cording to FCC figures,[6] despite continued pressure from rising input costs due to significant upgrades and programming costs.[7]

In order to develop and deploy these services, Comcast has spent $3.2 billion for fiber optics and system upgrades over the past four years. More than 86% of Comcast customers are now served by systems of 550 MHz or greater, and 70% of customers are served by systems of 750 MHz or greater. Every month, Comcast upgrades plant serving nearly 250,000 homes.

Comcast also has made substantial investments in creating local and regional programming networks, including regional sports networks, to provide programming of particular interest to the communities we serve. Comcast SportsNet ("CSN") in Philadelphia is made available to RCN and all other terrestrially based competitors to cable television who carried "PRISM," the predecessor home-team sports network in Philadelphia, but not to'DBS operators, who did not seek to carry PRISM. This approach is not only consistent with the law, but in fact exceeds the legal requirements imposed on CSN by the "program access rules." Congress deliberately and explicitly chose not to apply the "program access rules" to terrestrially distributed programming networks, presumably because Congress wanted to encourage the development of locally-oriented and regionally-oriented programming networks, and did not want to burden those networks with additional regulation. CSN—a terrestrially distributed regional service—is made available to RCN and other competitors to cable television even though there is no legal obligation to do so. In addition, it is important to note that, in the interest of ensuring that no Philadelphia sports fan would be denied the opportunity to see their teams, Comcast returned a substantial number of Philadelphia professional sports games to free over-the-air broadcast television (under a previous owner, one of the teams had been removed completely from over-the-air TV).

CSN's decision to distribute its signal by terrestrial means was not an evasion of the FCC's program access rules or any other law. CSN, like many other local and regional networks, uses terrestrial distribution technology to reach its customers because it is far cheaper and more efficient than satellite delivery. The FCC carefully investigated claims by DirecTV and EchoStar and confirmed these facts; the FCC also found that CSN had not engaged in any conduct designed to "evade" the FCC's program access rules.

Even without CSN, DirecTV and EchoStar are fully capable of competing with their cable operator competitors in the provision of local sports programming. As stated in its own advertising, DirecTV has more sports programming than anyone else, with over 20 sports networks, including full season sports subscription packages. Moreover, both DirecTV and EchoStar already carry most of the games shown on CSN through arrangements with other programmers. DirecTV also has its own exclusive sports programming (including its extremely popular NFL packages) that is not available to Comcast or to any other cable operator—or, for that matter, to EchoStar's Dish TV (which has sued DirecTV for the right to carry NFL programming).

In view of the DBS industry's exclusive sports programming arrangements, its complaint that it cannot compete without CSN seems disingenuous. But the claim is also incorrect. DirecTV has a higher percentage of subscribers in the Philadelphia market than it does in the New York, Boston or Hartford-Springfield markets, where it does carry regional sports networks.

RCN does carry Comcast SportsNet, and has done so since the minute RCN switched on its Philadelphia-area service. RCN's contract with CSN is identical in all key respects to CSN's contracts with its other affiliates. Last year, CSN gave all of its affiliates—including Comcast, Time Warner, Popvision and RCN—short-term agreements, all of which expired on the same day, while CSN reviewed significant business restructuring opportunities. As RCN has been told, once that business restructuring process is completed, CSN will resume offering its affiliates standard multi-year agreements on terms standard in the industry. RCN has not been singled out for differing treatment or required to agree to materially different contract terms than CSN's other affiliates.

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[6] 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 Services, and Equipment, Report on Cable Industry Prices, FCC 01–49, MM Docket No. 92–266,—FCC Rcd—(released February 14, 2001) ("FCC Cable Price Report").

[7] The FCC's recent Report on its annual price survey also acknowledged these trends of rising upgrade and programming input costs as major factors for explaining pricing for multichannel video service. See FCC Cable Price Report.

COMCAST'S COMMITMENT TO ITS COMMUNITIES

Comcast has deep local roots in the communities it serves, and looks to strengthen those roots by showing its community commitment, particularly in the area of education. For example, Comcast has led the cable industry's commitment to provide schools with free highspeed cable Internet service; over 1000 schools and 250 public libraries are now receiving free cable Internet service from Comcast. Comcast will connect an additional 750 schools as part of its entry into the Washington, DC metropolitan area. In addition, the Comcast Foundation's primary focus is to enhance education initiatives in Comcast communities. The Foundation announced a $60,000 grant in 2000 for Cable In The Classroom to support teacher Internet training initiatives in the Washington, D.C. area through the Comcast Technology Academy. More than 1,000 teachers in Montgomery County, Maryland have already taken advantage of the free technology training, and the program will be expanded this year. These are only two examples of creative and significant community involvement by Comcast.

Customers in the multichannel video marketplace enjoy more and more choices from more and more providers of video service, driven by the massive investments in better technology encouraged by the 1996 Telecommunications Act. Comcast believes that its responses to competition have produced many benefits for its customers. We urge Congress to continue the pro-competitive and deregulatory policies that have helped to create this atmosphere.

Comcast respectfully submits and appreciates the Committee's consideration of this statement regarding the state of video competition.

Statement of the Federal Communications Commission, Cable Services Bureau, Washington, DC

INTRODUCTION

Section 628 of the Communications Act of 1934, as amended ("Communications Act"), requires the Federal Communications Commission to report annually to Congress on the status of competition in the market for the delivery of video programming. The Commission submitted its Seventh Annual Report ("2000 Report") to Congress on January 8, 2001.

SUMMARY OF FINDINGS IN THE SEVENTH ANNUAL REPORT

In the 2000 Report, the Commission found that overall competitive alternatives and consumer choices continue to develop. Cable television still is the dominant technology for the delivery of video programming to consumers in the multichannel video programming distribution ("MVPD") marketplace, although its market share continues to decline. As of June 2000, 80 percent of all MVPD subscribers received their video programming from a franchised cable operator, compared to 82 percent a year earlier.

The following presents the status of competition in the market for the delivery of video programming, the general trends that have occurred in the competitive environment between June 1999 and June 2000, and barriers to entry that continue to exist. (See also Attachment.)

MVPD SUBSCRIBER GROWTH

The total number of subscribers to both cable and non-cable MVPDs (e.g., direct broadcast satellites or DBS, multipoint multichannel distribution systems or MMDS, satellite master antenna television systems or SMATV, open video systems or OVS) continues to increase. A total of 84.4 million households subscribe to multichannel video programming services as of June 2000, up 4.4 percent over the 80.9 million households subscribing to MVPDs in June 1999. This subscriber growth accompanied a 2.4 percentage point increase in MVPDs' penetration of television households to 83.8 percent as of June 2000.

- The number of cable subscribers continued to grow, reaching 67.7 million as of June 2000, up about 1.5 percent from the 66.7 million cable subscribers in June 1999.
- The total number of non-cable MVPD subscribers grew from 14.2 million as of June 1999 to 16.7 million as of June 2000, an increase of almost 18 percent.

- The growth of non-cable MVPD subscribers continues to be primarily attributable to the growth of direct broadcast satellite ("DBS") service. Between June 1999 and June 2000, the number of DBS subscribers grew from 10.1 million households to almost 13 million households, which is nearly three times the cable subscriber growth rate. DBS subscribers now represent 15.4 percent of all MVPD subscribers.
- Cable operators reported that DBS service has captured, on average, an estimated 14.7 percent share of television households in their service areas in 2000 (18 percent in rural and 11.8 percent in urban areas) compared to a 10.4 percent DBS share of households reported in the 1999 price survey report. In addition, the Commission found that the demand for cable service is somewhat sensitive to DBS penetration. This finding also suggests that DBS is a substitute for cable service. The difference between cable and DBS prices has declined and recent DBS price increases have been of a similar magnitude as those for cable. According to one study that compared 1999 cable and DBS prices, DBS's average programming price was $29.50 per month while large multiple system owners' ("MSOs") programnung prices averaged $30.56 per month.
- There also have been a number of additional cable overbuilds in the last year.
- While the Commission has certified new open video systems, some open video system ("OVS") operators have converted portions of their systems to franchised cable operations.
- Over the last year, the number of subscribers to larger-than-DBS home satellite dishes ("HSD") and multichannel multipoint distribution system ("MMDS") subscribers continued to decline. However, the number of satellite master antenna system ("SMATV") subscribers has increased slightly between June 1999 and June 2000.

CABLE RATES

During the period under review for the 2000 Report, cable rates rose faster than inflation. According to the Bureau of Labor Statistics, between June 1999 and June 2000, cable prices rose 4.8 percent compared to a 3.2 percent increase in the Consumer Price Index ("CPI"), which measures general price changes.

Pursuant to Section 623 of the Communications Act, the Commission is required to conduct an annual survey of cable rates. As reported in the 2000 Annual Survey of Cable Rates:

- As of July 1, 2000, cable operators facing competition charged, on average, $32.40 per month, an increase of 5.8 percent over 1999, while cable operators not facing competition charged $34.11, also a 5.8 percent increase. [The Consumer Price Index for all goods and services rose by 3.7 percent over the same period.] The differences between the average rates charged by competitive and non-competitive cable systems were $1.71 and $1.62 for 1999 and 2000, respectively.
- On a per channel basis, rates charged by competitive operators remained stable at $0.57 per channel during the year ending July 2000. For the noncompetitive group, per channel rates increased from $0.65 to $0.66, a 1.5 percent increase, over the same period. The average number of channels offered by competitive cable systems was 59.9 in July 2000, an increase of 4 percent over a year earlier. For non-competitive cable systems, the average number of channels offered was 54.8 in July 2000, an increase of 5.4 percent over the previous year. Non-video service offerings also increased in 2000. As of July 1, 2000, the percentage of surveyed cable operators that offered a digital programming tier doubled to 54 percent from 27 percent a year earlier. Of the surveyed cable systems, 47 percent offered Internet services and 7 percent offered telephone services.

Concurrently with these rate increases, capital expenditures for the upgrading of cable facilities increased (from $5.6 billion in 1998 to $10.6 billion in 1999, an increase of 89.3 percent), the number of video and non-video services offered increased, and programming costs increased (license fees increased from $4.9 billion in 1998 to $5.5 billion in 1999, or 12.2 percent, and programming expenses increased from $4.9 billion in 1998 to $5.8 billion in 1999, or 16.2 percent).

The available evidence indicates that when an incumbent cable operator faces "effective competition," as defined by the Communications Act, it responds to such head-to-head competition in a variety of ways, including lowering prices or adding channels without changing the monthly rate, as well as improving customer service and adding new services such as interactive programming.

COMPETITION FROM LECS

The Telecommunications Act of 1996 ("1996 Act") removed barriers to local exchange carrier ("LEC") entry into the video marketplace in order to facilitate competition between incumbent cable operators and telephone companies. At the time of the 1996 Act, it was expected that LECs would compete in the video delivery market and that cable operators would provide local telephone exchange service.

- The 2000 Report found that there had been an increase in the amount of video programming provided to consumers by telephone companies, although the expected technological convergence that would permit use of telephone facilities for video service had not yet occurred.
- In the 2000 Report, the Commission found that the rate of entry by LECs into the MVPD marketplace appears to be slowing, even by the most aggressive telephone companies, and several LECs have reduced or eliminated their MVPD efforts. Many incumbent local telephone exchange carriers appear to have decided to exit the facilities-based video programming business and instead are seeking to market DBS service to their customers.
- While the 1996 Act created the OVS framework as a means of entry into the video marketplace by LECs, few telephone companies have sought certification.
- Alternatively, only a limited number of cable operators have begun to offer telephone service and their strategies for deployment remain varied. Some MSOs continue to deploy traditional circuit-switched telephone service. Others are offering cabledelivered telephony on a limited basis, waiting until Internet Protocol ("IP") technology becomes available before accelerating their rollout of telephone service, or continuing to test such service.

BROADBAND HIGH-SPEED INTERNET SERVICES

The most significant convergence of service offerings continues to be the pairing of Internet service with other service offerings. There is evidence that a wide variety of companies throughout the communications industries are attempting to become providers of multiple services, including data access. Cable operators continue to make large investments to expand the broadband infrastructure that permits them to offer high-speed Internet access.

Currently, the most popular way to access the Internet over cable is through the use of a cable modem and personal computer. Virtually all the major MSOs offer Internet access via cable modems in portions of their nationwide service areas. A small portion of cable Internet access is delivered through a television receiver rather than a personal computer. Many cable operators also are planning to integrate telephony and high-speed data access. There are now approximately 4.6 million subscribers to cable Internet services.

Like cable, the DBS industry is developing ways to bring advanced services to its customers. For example, one DBS operator currently offers a satellite-delivered highspeed Internet access service with a telephone return path. Another DBS company now offers its subscribers an interactive program guide and weather service and recently initiated two-way Internet access service via satellite. There are approximately 40,000 subscribers to DBS high-speed data service.

Many SMATV operators offer local and long distance telephone service and Internet access along with video service. In addition, digital technology makes it possible for MMDS operators, who provide video service in only limited areas, to offer two-way services, such as high-speed Internet service and telephony. Two of the largest long distance companies have acquired most of the larger MMDS operators with the intent to use the acquired frequencies to provide two-way, non-video communications services.

REGULATORY BARRIERS

Non-cable MVPDs continue to report that regulatory and other barriers to entry limit their ability to compete with incumbent cable operators and to thereby provide consumers with additional choices. Non-cable MVPDs also continue to experience some difficulties in obtaining programming from both vertically integrated cable programmers and unaffiliated programmers who continue to make exclusive agreements with cable operators. In multiple dwelling units ("MDUs"), potential entry may be discouraged or limited because an incumbent video programming distributor has a long-term and/or exclusive contract. Other issues also remain, e.g., how, and under what circumstances, existing inside wiring in MDUs may be made available to alternative video service providers, delays in gaining access to local rights-of-way, pole attachment delays, and excessive rates.

Consumers historically reported that their inability to receive local signals from DBS operators negatively affected their decision as to whether to subscribe to DBS. The significant increase in DBS subscribership between June 1999 and June 2000 has been attributed, at least in part, to the authority granted to DBS providers to distribute local broadcast television stations in their local markets by the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") enacted on November 29, 1999.

Under SHVIA, DBS operators can offer a programming package more comparable to and competitive with the services offered by cable operators. The two DBS companies now offers a package of local ABC, CBS, NBC, and Fox affiliates along with a national PBS feed for $5.99 a month in approximately 40 markets, which cover about one-half of all television households. Moreover, in the last year, as required by SHVIA, the Commission has adopted rules for satellite companies with regard to mandatory carriage of analog broadcast signals, retransmission consent, and program exclusivity that closely parallel the requirements for cable service.

INDUSTRY CONSOLIDATIONS

Consolidations within the cable industry continue as cable operators acquire and trade systems. As a result of acquisitions and trades, cable MSOs have continued to increase the extent to which their systems form regional clusters. By clustering their systems, cable operators may be able to achieve efficiencies that facilitate the provision of cable and other services, such as telephony.

- The ten largest operators now serve close to 90 percent of all U.S. cable subscribers. In terms of one traditional economic measure (the Herfindahl-Hirschman Index or HHI), national concentration among the top MVPDs has increased since last year, although it remains below the levels reported in earlier years.
- DBS operators DirecTV and EchoStar rank among the ten largest MVPDs in terms of nationwide subscribership along with eight cable multiple system operators ("MSOs").
- Currently, 44 million of the nation's cable subscribers are served by systems that are included in regional clusters.

SATELLITE-DELIVERED PROGRAMMING NETWORKS

The number of satellite-delivered programming networks has decreased by two from 283 in 1999 to 281 in 2000. Vertical integration of national programming services between cable operators and programmers, measured in terms of the total number of services in operation, declined from last year's total of 37 percent to 35 percent in 2000, continuing a five year trend.

- In 2000, one or more of the top five cable MSOs held an ownership interest in each of 99 vertically integrated national programming services.
- The 2000 Report identifies 75 regional networks, 27 of which are sports channels, many owned at least in part by MSOs. Sports programming warrants special attention because of its widespread appeal and strategic significance for MVPDs. There are also 30 regional and local news networks that compete with local broadcast stations and national cable networks (e.g., CNN).

The program access rules adopted pursuant to the 1992 Cable Act were designed to ensure that other MVPDs can have access to vertically-integrated satellite delivered programming on non-discriminatory terms. The Commission recognizes that the terrestrial distribution of programming, including, in particular, regional sports programming, could eventually have a substantial impact on the ability of alternative MVPDs to compete in the video marketplace. The prohibition on cable exclusivity in the program access rules sunsets on October 5, 2002, unless the Commission finds that the prohibition continues to be needed to preserve and protect competition and diversity in the distribution of video programming.

ADDITIONAL FINDINGS FOR SPECIFIC SECTORS OF THE MVPD MARKET

In addition, with respect to particular distribution technologies operating in markets for the delivery of video programming, the Commission found the following:

Cable Systems: Since the 1999 Report, the cable television industry has continued to grow in terms of subscribership (up to 67.7 million subscribers as of June 2000, a 1.5 percent increase from June 1999), revenues (an approximate 13 percent increase between year end 1998 and year end 1999), audience ratings (non-premium cable viewership rose from a 42 share at the end of June 1999 to almost a 46 share at the end of June 2000), and expenditures on programming (an approximate 12 percent increase in program license fees paid by cable system operators). However, the number of national satellite-delivered video programming services, which had been increasing steadily in recent years, decreased by two networks, from 283 to

281, between June 1999 and June 2000. The cable industry remains healthy financially, which has enabled it to invest in improved facilities, either through upgrades or rebuilding. As a result, there have been increases in channel capacity, the deployment of digital transmissions that provide better picture quality than can be offered through analog service, and non-video services, such as Internet access. Cable operators also offer telephony, although the use of integrated facilities remains primarily experimental with limited exceptions.

Direct-to-Home ("DTH") Satellite Service (DBS and HSD): Video service is available from high power DBS satellites that transmit signals to small DBS dish antennas installed at subscribers' premises, and from low power satellites requiring larger satellite dish antennas. The 2000 Report found that DBS had approximately 13 million subscribers in June 2000, an increase of approximately 29 percent since the 1999 Report. Currently, there are approximately 15 million DBS subscribers. Between June 1999 and June 2000, the number of HSD subscribers, measured as the number of HSD users that actually purchase programming packages, declined from 1.8 million to 1.5 million, a decrease of 17 percent, that is likely due to subscribers switching to DBS. DirecTV and EchoStar are among the ten largest providers of multichannel video programming service. In June 2000, DBS represented a 15.4 percent share of the national MVPD market and HSD represented another 1.8 percent of that market.

Wireless Cable Systems: Currently, the wireless cable industry ("MMDS") provides competition to the cable industry in only limited areas. MMDS subscribership fell from 821,000 subscribers to 700,000 subscribers between June 1999 and June 2000, a decrease of 14.7 percent. With the advent of digital MMDS and the Commission's authorization of two-way MMDS service, it appears that MMDS spectrum will be used to provide video services in limited areas, and that most MMDS spectrum will eventually be used to provide high-speed data services. Wireless cable represented a 0.8 percent share of the national MVPD market in June 2000.

SMATV Systems: SMATV systems use some of the same technology as cable systems, but do not use public rights-of-way, and focus principally on serving subscribers living in multiple dwelling units ("MDUs"). SMATV subscribership has increased approximately 3.5 percent since the last report, with the industry representing approximately a 1.8 percent share of the national MVPD subscribership as of June 2000.

Broadcast Television: Broadcast networks and stations are competitors to MVPDs in the advertising and program acquisition markets. They supply video programming directly to the approximately 20 percent of television households that are not MVPD subscribers. Additionally, broadcast networks and stations are suppliers of content for distribution by MVPDs. Since the 1999 Report, the broadcast industry has continued to grow in the number of operating stations (from 1599 in 1999 to 1663 in 2000) and in advertising revenues ($36.6 billion in 1999, a 5.7 percent increase over 1998). While audience levels continue to decline, the four major television networks still account for a 50 percent share of prime time viewing for all television households. Broadcast television stations continue to deploy digital television ("DTV") service. There are 173 television stations on the air broadcasting DTV signals, and digital simulcast of analog programming continues to increase.

LEC Entry: The 1996 Act expanded opportunities for LECs to enter the market for the delivery of video programming. In the 1999 Report, the Commission noted that it appeared that the rate of entry into the video marketplace by LECs might be slowing, even by the most aggressive LECs, and that several LECs had reduced or eliminated their MVPD efforts. This trend continued or accelerated in 2000. Most incumbent local exchange carriers are seeking to sell their MVPD facilities, preferring instead to market DBS service to their customers. One notable exception is BellSouth, which continues to pursue a number of methods for providing MVPD service. BellSouth has been the largest LEC investor in MMDS licenses, with its service area covering approximately 3.5 million homes. However, in December 2000, BellSouth announced that it was phasing out this service and transitioning existing subscribers to EchoStar's DBS service. It has acquired 21 cable franchises in its telephone service area with the potential to pass 1.4 millions, provides service in 12 franchise areas, and is negotiating for additional franchises. Previously, Ameritech was the most significant LEC provider of in-region cable service, but recent reports indicate that SBC, its current owner, seeks to sell these cable assets. Verizon, which acquired GTE's 10 competitive and one non-competitive cable franchises, is seeking to sell those cable assets. SNET, now also owned by SBC, currently offers service to 30,000 homes in 29 Connecticut localities, but is exiting the business. Qwest (formerly U S West) continues to offer video, high-speed Internet access, and telephone service over existing copper lines using very high speed digital subscriber line ("VSDL") in Omaha and Phoenix.

Open Video Systems: In the 1996 Act, Congress established a new framework for the delivery of video programming-the open video system ("OVS"). Under these rules, a LEC or other entrant may provide video programming to subscribers, although the OVS operator must provide non-discriminatory access to unaffiliated programmers on a portion of its channel capacity. The Commission has certified 25 OVS operators to serve 50 areas. RCN owns the only operating open video systems and currently serves areas surrounding Boston, New York City, Washington, D.C, and San Francisco. In several areas for which it holds OVS certifications, or portions of these areas, RCN has converted its systems to franchised cable systems. The number of OVS subscribers has remained constant over the last year at approximately 60,000 subscribers. OVS subscribers now represent slightly less than 0.1 percent of all MVPD subscribers.

Internet Video: As of June 2000, 56 percent of the U.S. population has Internet access. Real-time and downloadable video accessible over the Internet continues to become more widely available and the amount of content also is increasing. Despite the evidence of increased interest in Internet video deployment and use, the medium is still not seen as a direct competitor to traditional video services. Television quality Internet video requires a high-speed broadband connection, which most current broadband providers cannot guarantee. Also, deployment of broadband is far from ubiquitous. However, Internet users continue to download and use software for accessing Internet video and Web sites dedicated to streaming video continue to proliferate.

Home Video Sales and Rentals: The home video marketplace includes the sale and rental of video cassettes, DVDs, and laser discs. As in past reports, the Commission considered home video sales and rentals part of the video marketplace because they provide services similar to the premium and pay-per-view offerings of MVPDs. Almost 86 percent of all U.S. households have at least one VCR. The number of homes with DVD players has grown rapidly since their introduction into the market. The number of homes with DVD players was expected to reach between 10 and 12 million by the end of 2000. The newest home video technology, the personal video recorder ("PVR"), was introduced in 1999. A PVR is a device connected to a television set that uses a hard disk drive, software, and other technology to digitally record and access programming. In the last year, TiVo and ReplayTV, the two PVR companies, have joined with MVPDs, equipment manufacturers, advertisers, and programmers to incorporate PVR technology into set-top boxes and develop content specifically for PVRs.

Utilities: Since the 1999 Report, several electric and gas utilities have announced, commenced, or moved forward with ventures involving multichannel video programming distribution. Utilities are not yet major competitors in the telecommunications or cable markets, but they generally possess characteristics, such as ownership of fiber optic networks and access to public rights-of-way, that could potentially help them become competitively significant. Moreover, deregulation of utilities, accompanied by the advent of competition, is prompting more utilities to diversify and find new revenue streams. Starpower, a joint venture between RCN and PEPCO, continues to expand the area where it offers voice, video, and high-speed Internet access in the Washington, D.C., area. Last year, the Commission reported that Seren, a wholly-owned subsidiary of Minneapolisbased Northern States Power, offered cable and high-speed data access as an overbuilder in several Minnesota communities. It also offers service in the San Francisco Bay area and plans to expand its service area. Siegecom, funded by Blackstone Capital and a joint venture of Southern Indiana Gas and Electric and Utilicom, is offering bundled voice, video and data access services in Evansville and Newburg, Indiana, and has approached other communities about obtaining franchises. Digital Union, a subsidiary of the local utility in Austin, Texas, plans to overbuild the incumbent cable operator. Braintree, Massachusetts, granted a franchise to the municipal utility and plans to begin cable service by the end of 2000.

ATTACHMENT

Assessment of Competing Technologies[i]

Technology Used	December 96	June 97	June 98	June 99	June 00
(1) TV Households[ii]	97,000,000	97,000,000	98,000,000	99,400,000	100,801,720
Percent Change	1.15%	0.00%	1.03%	1.43%	1.41%
(2) MVPD Households[iii]	72,370,950	73,646,970	76,634,200	80,882,411	84,423,717
Percent Change	5.67%	1.76%	4.06%	5.54%	4.38%
Percent of Households	74.61%	75.92%	78.20%	81.37%	83.75%
(3) Cable Subscribers	63,500,00	64,150,000	65,400,000	66,690,000	67,700,000
Percent Change	2.25%	1.02%	1.95%	1.97%	1.51%
Percent of MVPD Total	87.74%	87.10%	85.34%	82.45%	80.19%
(4) MMDS Subscribers	1,180,000	1,100,000	1,000,000	821,000	700,000
Percent Change	38.66%	-6.78%	-9.09%	-17.90%	-14.74%
Percent of MVPD Total	1.63%	1.49%	1.30%	1.02%	0.83%
(5) SMATV Subscribers	1,126,000	1,162,500	940,000	1,450,000	1,500,000
Percent Change	17.05%	3.24%	-19.14%	54.26%	3.45%
Percent of MVPD Total	1.56%	1.58%	1.23%	1.79%	1.78%
(6) HSD Subscribers	2,277,760	2,184,470	2,028,200	1,783,411	1,476,717
Percent Change	-3.71%	-4.10%	-7.15%	-12.07%	-17.20%
Percent of MVPD Total	3.15%	2.97%	2.65%	2.20%	1.75%
(7) DBS Subscribers	4,285,000	5,047,000	7,200,000	10,078,000	12,987,000
Percent Change	94.77%	17.78%	42.66%	39.97%	28.86%
Percent of MVPD Total	5.92%	6.85%	9.40%	12.46%	15.38%
(8) OVS Subscribers[iv]	2,190	3,000	66,000	60,000	60,000
Percent Change	0.00%	36.99%	2100.00%	-9.09%	0.0%
Percent of MVPD Total	0.00%	0.00%	0.09%	0.07%	0.07%

Notes:

(i) Some numbers have been rounded.

(ii) The year-end 1996 and June 1997 figures are the same because Nielsen's annual update does not take effect until September, the beginning of the new television season.

(iii) The total number of MVPD households is likely to be somewhat less than the given figure since some households subscribe to the services of more than one MVPD. *See 1994 Report*, 9 FCC Rcd at 7480 ¶ 74. However, the number of households subscribing to more than one MVPD is expected to be low. Hence the given total can be seen as a reasonable estimate of the number of MVPD households.

(iv) The decline in OVS subscribers between 1998 and 1999 reflects the conversion of portions of some OVS systems to franchised cable systems over the last year.

Sources:

(1) Television households: 1996 from Nielsen Media Research as cited in *TV Column*, Washington Post, August 26, 1997, at E4; 1998 from Nielsen Media Research as cited in Broadcasting & Cable, June 29, 1998, at 70; 1999 from Nielsen Media Research as cited in Broadcasting & Cable, June 28, 1999, at 26; and 2000 from *Nielsen Media Research.*

(2) Total MVPD households: The sum of the total number of subscribers listed under each of the categories of the various technologies. See note (ii) above.

(3) Cable subscribers: 1996-97 from Paul Kagan Associates, Inc., *Paul Kagan's 10-Year Cable TV Industry Projections,* Cable TV Investor, May 20, 1997, at 9; 1998 from Paul Kagan Associates, Inc., *Paul Kagan's 10-Year Cable TV Industry Projections,* Cable TV Investor, August 10, 1998, at 4; 1999 from Paul Kagan Associates, Inc., *Cable Industry 10-YearProjections,* Cable TV Investor, June 25, 1999, at 6; and 2000 from Paul Kagan Associates, Inc., *Cable Industry 10-YearProjections,* Cable TV Investor, June 19, 2000, at 6.

(4) MMDS subscribers: 1996 from Paul Kagan Associates, Inc., *Wireless Cable Futures,* Wireless Cable Investor, December 31, 1996, at 10-11; 1997 from WCA Comments for the *1997 Report* at 8. The 1998 and 1999 subscribers estimated by the FCC; 2000 from NCTA Comments at 9.

(5) SMATV subscribers: 1996 from *Private Cable Growth,* Private Cable Investor, July 1997, at 3; 1997 subscribers were estimated by the FCC based on data from Paul Kagan Associates, Inc., *Private Cable Growth,* Private Cable Investor, July 1997, at 3; 1998 subscribers from NCTA 1998 Comments at 6; 1999 subscribers from NCTA 1999 Comments at 5; and 2000 subscribers from NCTA Comments at 9.

(6) HSD subscribers: 1996-1997 from *DTH Subscribers,* SkyREPORT, November 1999, at 10; 1998-2000 from SkyReport.com at http://www.skyreport.com/dth_us.htm.

(7) DBS subscribers: 1995 from *DTH Subscribers,* SkyREPORT, January 1997, at 8; 1996-97 from *DTH Subscribers,* SkyREPORT, November 1997, at 10; 1998 from Minal Damani and Jennifer E. Sharpe, *U.S. DBS Marketplace: 1998,* The Strategis Group, July, 1998 at 6; and 1999-2000 from SkyReport.com at http://www.skyreport.com/dth_us.htm.

(8) OVS subscribers: 1996 from Bell Atlantic Comments for *1996 Report* at 5. OVS subscriber count for 1997 through 2000 estimated by the FCC.

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