

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

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

**COMMENTS OF  
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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The National Cable & Telecommunications Association (“NCTA”) hereby submits its comments on the Notice of Inquiry in the above-captioned proceeding. NCTA is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90% of the nation’s cable television subscribers, as well as more than 200 cable programming networks and services. NCTA’s members also include suppliers of equipment and services to the cable industry. The cable industry is also the nation’s largest broadband provider of high-speed Internet access after investing more than \$145 billion since 1996 to build out a two-way interactive network with fiber optic technology.

**INTRODUCTION AND SUMMARY**

Seventeen years ago, in the Cable Consumer Protection and Competition Act of 1992, Congress took a number of steps aimed at remedying what it viewed as insufficient competition in the provision of multichannel video programming services. In particular, Congress was concerned that in most communities, cable operators faced no effective competition from alternative multichannel video programming distributors (“MVPDs”). Moreover, because a significant number of the most popular cable programming networks were owned in whole or part by the largest cable operators, Congress feared that the operators would refuse to make those

vertically-integrated networks available to would-be competitors such as the nascent Direct Broadcast Satellite (“DBS”) services that were about to be launched.

Accordingly, the 1992 Act contained provisions that, among other things, regulated the rates of cable operators until they faced “effective competition” (47 U.S.C. § 543), required vertically-integrated satellite-delivered program networks to make their services available to competitive MVPDs (47 U.S.C. § 548), and prohibited cable operators from unreasonably harming the ability of unaffiliated program networks to compete fairly by discriminating in program carriage on the basis of whether a network is affiliated with the operator (47 U.S.C. § 536). The Act also directed the Commission to report to Congress annually on “the status of competition in the market for the delivery of video programming” (47 U.S.C. § 548(g)).

For 13 years, beginning in the fall of 1993, the Commission issued such annual reports, creating, in effect, a documentary history of the steady and irreversible growth of competition in the video marketplace. The reports tracked the increasing market share of the two national DBS services, from no presence in 1993 to 29.2% in 2006, as well as the delayed introduction and then rapid growth of competitive cable service provided by telephone companies, whose share of the national MVPD marketplace grew from no presence to 3% between September, 2005 and year end 2008. It described the continuing presence of other competing MVPDs, such as private cable operators (“PCOs”) (previously known as Satellite Master Antenna Television Systems or “SMATVs”). And it identified the steady decline in the market share of traditional cable operators, from 96.6% in 1993 to 68.2% in 2006.

The annual reports also documented a steady and steep reduction in the number and significance of program networks vertically-integrated with cable operators. As the channel capacity of cable systems increased, more and more channels were occupied by networks owned

by affiliated programmers – or by broadcasters. Moreover, several of the companies that owned a significant number of the popular vertically-integrated program networks in 1992 – including TCI/Liberty and Viacom – divested themselves of their program networks and/or their cable systems and were no longer vertically-integrated.

Thus, in the last several annual reports up to the Twelfth Annual Report issued in 2006, the picture had become clear. Even while the telephone companies were just beginning to provide cable service, and even while video on the Internet was more a concept than a reality, the competition that Congress had sought to encourage in 1992 had firmly taken hold in the video marketplace.<sup>1</sup>

After the issuance of the Twelfth Report in February 2006, no further reports appeared for almost three years. The Commission initiated a Notice of Inquiry for the Thirteenth Report in October 2006, but it did not adopt the report until its open meeting on November 27, 2007. And it did not release the report until more than a year later – on January 16, 2009. The findings in that report were, therefore, based on three-year-old data. That data reinforced the trend lines

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<sup>1</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Thirteenth Annual Report (2009) at ¶ 4 (reconfirming that “the MVPD marketplace has continued to grow,” where “almost all consumers are able to obtain programming through over-the-air broadcast television, a cable service, and at least two DBS providers.” And increasingly, the Commission recognized, “consumers also may have access to video programming delivered by emerging technologies, such as digital broadcast spectrum, fiber-to-the-home facilities, or web-based Internet video. In addition, through the use of advanced set-top boxes and digital video recorders, and the introduction of new mobile video services consumers are now able to exercise more control over what, when, and how they receive information.”) *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255 Twelfth Annual Report (2006) at ¶ 5 (finding that “Competition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation. In particular, the effect of DBS competition has resulted in the addition of networks to cable operators’ channel line ups.”) *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-227, Eleventh Annual Report (2005) at ¶ 4 (the Commission reported “almost all U.S. consumers have the choice between over-the-air broadcast television, a cable service, and at least two direct broadcast satellite (DBS) providers.” And in some areas, the FCC found, “consumers also can choose to receive service via one or more emerging technologies, including digital broadcast spectrum, fiber, and video over the Internet.”) *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 03-172, Tenth Annual Report (2004) at ¶ 4 (the Commission reported “the vast majority of Americans enjoy more choice more programming and more services than any time in history.”).

of previous reports, confirming the growth and entrenchment of competition in the video marketplace, the decline of vertical integration between cable operators and program networks, and the emergence of new video competition from programming distributed on the Internet.

But in the three years since the Commission last initiated a Video Competition inquiry, new developments have brought additional competitive benefits to consumers in ways that overshadow the steady competitive growth of the preceding 13 years. While DBS continues to flourish (the two national DBS companies continue to rank second and third in customers among all MVPDs), the telephone companies are vigorously deploying competitive cable service and capturing customers. The convergence of digital video, voice and Internet service over the facilities of cable operators and telephone companies has led to the ubiquitous offering of bundled offerings – with discounts that result in bundled prices that are lower than what consumers paid for all three services a decade ago.

Video service offerings have expanded, as analog services have been gradually migrated to digital format (and, most recently, to switched video), freeing more bandwidth for high-definition, on demand, digital video recording and other new video services, as well as more capacity for broadband Internet and telephone services. Meanwhile, the amount of programming on cable systems that is owned by cable operators has dramatically decreased to a minuscule percentage, since Time Warner Cable (the cable operator) is no longer owned by or affiliated with Time Warner Inc. (the company that owns cable program networks).

Finally, the increasingly robust high-speed Internet service provided by cable operators and their competitors have provided platforms for the delivery to consumers of an enormous amount and variety of video content. When the Commission last collected data on the video marketplace in 2006, most Internet video was watchable only in a small box in the corner of a

computer screen. Today, streamed movies can be viewed with sharpness and clarity in full-screen mode on 22-inch wide-screen computer monitors – and even in high-definition on wall-mounted flat screen television sets.

There is now an incredible variety of video programming available on the Internet, and applications and websites such as Hulu, Boxee and iTunes make it easy for consumers to find and access such programming on demand. And YouTube, which was less than a year old in 2006, is now ubiquitously used for posting and viewing Internet content of all sorts. More than 6 *billion* videos were viewed on YouTube in January 2009.<sup>2</sup>

Were these developments even imaginable when Congress enacted the 1992 Act? The explosive growth of competition among MVPDs, the virtual disappearance of vertical integration between cable operators and cable program networks, and the emergence of the Internet as a viable and ubiquitous source of video programming would have been beyond Congress's wildest dreams when it mandated rate regulation, program access, program carriage, leased access, PEG access, cable ownership restrictions and other provisions to prevent anticompetitive abuse by what it viewed as the sole significant outlet for multichannel video programming. Yet during the three-year virtual blackout on annual video competition reports, the Commission's attention was inordinately diverted to many of these very issues by parties seeking to gain a regulatory boost from the stale perception that competition was lacking in the video marketplace.

The data gathered in this catch-up inquiry will make clear that these anticompetitive concerns have been overtaken by events, and that these issues are now relics of a bygone era. Consumers now have more programming channels, more services and more choices of video providers than ever before. The Commission has recently initiated a proceeding, as mandated by

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<sup>2</sup> "YouTube Surpasses 100 Million U.S. Viewers for the First Time," comScore Press Release, March 4, 2009, <http://www.comscore.com/press/release.asp?press=2741>.

Congress, to fulfill the important 21<sup>st</sup> Century task of establishing a national broadband plan.

Now is the right time to look back and confirm that the 20<sup>th</sup> Century desire for vibrant competition in the video marketplace has unquestionably and irreversibly been achieved.

**I. CONSUMERS ENJOY MORE CHOICE THAN EVER BEFORE AS COMPETITION HAS FLOURISHED IN THE VIDEO MARKETPLACE**

Between 1993 and 2006, the Commission's annual reports tracked a steady, accelerating growth of competition in the marketplace for the provision of video programming. During that period, there were two prominent developing stories in the multichannel video marketplace. The first involved the growth of DBS service from its infancy in 1993 to its status as a full-fledged competitor in the MVPD marketplace.

In its first several reports, the Commission, while noting the steady growth of DBS, also identified the various characteristics of DBS service that it believed impeded the ability of DBS to compete effectively with cable operators. It cited, for example, the substantial up-front equipment costs typically incurred by DBS customers and the inability of DBS providers to retransmit local broadcast stations. But by 1999, these factors had been eliminated, and DBS's share of MVPD customers nationwide grew rapidly while cable's share got correspondingly smaller.<sup>3</sup> And by 2006, when the Commission last gathered data for the 13<sup>th</sup> Annual Report, the two national DBS companies had become the second and third largest MVPDs in the nation. The DBS companies by 2006 served 29.2% of the nation's MVPD customers, and cable's share – which in 1992 was close to 100% – was only 68.17%.<sup>4</sup>

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<sup>3</sup> The Federal Communications Commission, "The FCC's Satellite Home Viewer Improvement Act Page," <http://www.fcc.gov/mb/shva/>.

<sup>4</sup> 13<sup>th</sup> Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Appendix B.

Meanwhile, when last the Commission reported on video competition, a second story line was developing in the multichannel video marketplace. Specifically, local telephone companies – in particular, Verizon and AT&T – were beginning to deploy competitive multichannel video services at a rapid rate. The telephone companies were alleging that franchising requirements, exclusive access agreements between cable operators and multiple dwelling unit buildings, [and lack of access to certain cable program networks] were impeding their entry into the video marketplace. But there was no indication that the telcos’ own timetables for deploying facilities and services were in any way being stymied. In 2006, Verizon already had franchises to serve 2.4 million households, was already providing service to 207,000 customers in multiple states, and had announced plans to deploy service around the country.<sup>5</sup>

Three years later, as the Commission resumes its annual reporting, the telephone companies have established themselves as vigorous competitors in the video marketplace. During this same period, the growth of DBS not only has not waned but has spiked. All of this is still playing out as consumers increasingly access video content from a host of other sources – from home video, such as DVDs and Blu-Ray discs, to on-line video programming and services. The point is that consumers are enjoying a multitude of benefits from the *competition* that flourishes among MVPDs and other sources of video programming.

#### **A. Competitors to Cable**

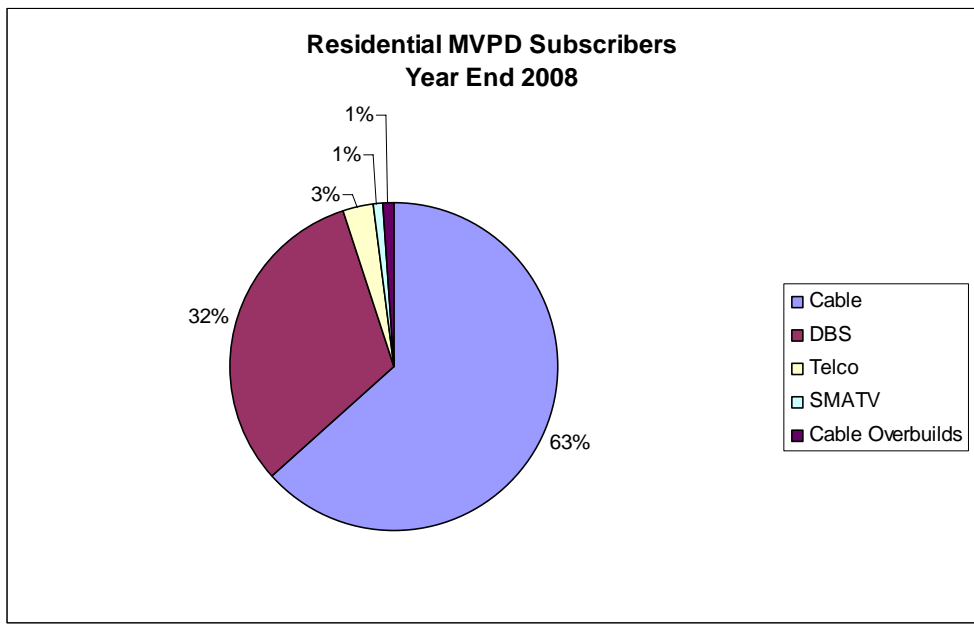
The steady, unrelenting rise of facilities-based multichannel video programming competitors to cable is more evident now than ever before. In 1996, one out of *ten* multichannel video customers purchased their service from a competitor to their incumbent cable operator. Today 36 million customers subscribe to MVPDs that compete with incumbent cable – direct

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<sup>5</sup> Verizon Communications Reports Revenue, Earnings and Cash Flow Growth in 1Q 2009; April 27, 2009; <http://investor.verizon.com/news/view.aspx?NewsID=983>.

broadcast satellite, telephone and alternative broadband providers. This amounts to *one out of three* multichannel video customers.

Year after year the share of MVPD customers served by cable operators declines and the share of customers served by cable’s competitors increases. Cable’s share of the multichannel video marketplace has dropped from 68.17% in June 2006 to 63.5%, and in some regions its share is below 50 percent.



The changes in cable competitors’ market share are a testament to the vibrancy and dynamism of the video marketplace. As one analyst described 2008, “If nothing else the past year has proven that for communications companies the old industry silos” are irrelevant; “everyone these days is in everyone else’s business as voice, video and data continue to meld into a media-cum-communications-cum-whatever stew of constantly changing consistency.”<sup>6</sup> And as new Internet-based services continue to proliferate MVPDs must stay on their toes to compete.

<sup>6</sup> Evie Haskell, “The Inside-Out Year, Winners, Losers & Changing Tides,” *The Bridge*, April 2009, p. 3.

In the midst of the worst recession in decades and a still-worsening economy in many corners, the American public still places a high value on entertainment and information services. The pressure to hold on to, bring back and bring in new customers is enormous for all MVPDs – cable, satellite, telco and alternative broadband providers – in this highly competitive marketplace.<sup>7</sup>

The advertising and promotional campaigns that have escalated in recent years are indicative of intense competition, as MVPDs jockey for increased share of the multichannel video marketplace. Each provider – satellite, cable, telco and other broadband service providers – tout their leadership in cutting-edge technology and services, such as high-definition programming and broadband bundles and products.

For example, throughout 2007 and 2008, DirecTV ran an aggressive marketing campaign highlighting its superiority as the leading provider of high definition programming. The message was aimed squarely at cable customers, which at the time offered fewer all-HD channels. More recently, DISH has launched its own TurboHD promotions offering more and more HD channels. Meanwhile, Verizon too trumpeted its HD offerings to lure new customers from cable and satellite. In response, cable companies – in the midst of network upgrades and channel reconfigurations in the transition from analog to digital – moved quickly to free up space and boost their HD lineups to compete with DirecTV, DISH, and Verizon.

At the same time, cable operators and their competitors began to compete even more aggressively on service bundles. For example, Verizon initiated a promotion offering six months

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<sup>7</sup> Research Notes: 1Q 2009, Leichtman Research Group, Inc., March 2009, [http://www.leichtmanresearch.com/research/notes03\\_2009.pdf](http://www.leichtmanresearch.com/research/notes03_2009.pdf). “The top multi-channel video providers in the US combined to add 1.7 million net new video subscribers in 2008 – about 250,000 fewer than in 2007.”

free of its FiOS video service to customers who also subscribe to its voice service.<sup>8</sup> And, AT&T matched cable rivals by adding voice to its U-Verse video service: customers who signed up for U-Verse got a voice package with unlimited long distance calling, and other benefits. The DBS providers also jumped into the bundling fray by partnering with broadband providers to offer a bundle of multichannel video and broadband Internet service.

## **B. Direct Broadcast Satellite**

The direct broadcast satellite industry, with two well-established nationwide providers, DirecTV and DISH, has continued to grow its share of the multichannel video programming marketplace. As described by Bernstein Research, “the core U.S. satellite business remains a picture of health,” with revenues up 8.3% from [2007].<sup>9</sup> DirecTV, in particular, is experiencing strong net subscriber growth. According to CEO Chase Carey, DirecTV’s “promotional offerings, its re-seller agreement with AT&T and a boost from the digital transition helped propel DirecTV to its largest quarter of net new subscriber additions in four years.”<sup>10</sup> DirecTV added 460,000 net new subs in the first quarter of 2009 and closed out 2008 with 301,000 net new subs in the fourth quarter. DirecTV had a total of 17.621 million subscribers by year-end 2008.<sup>11</sup> And, although DISH Network lost subscribers in the first quarter of 2009, “at the same time the DBS distributor boosted its bottom line, growing net income nearly 21%.”<sup>12</sup>

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<sup>8</sup> Todd Spangler, “Verizon Looks To Grow DSL By Giving It Away,” Multichannel News, August 28, 2008, [http://www.multichannelnews.com/article/134503-Verizon\\_Looks\\_To\\_Grow\\_DSL\\_By\\_Giving\\_It\\_All\\_Away.php?q=verizon+looks+to+grow+DSL](http://www.multichannelnews.com/article/134503-Verizon_Looks_To_Grow_DSL_By_Giving_It_All_Away.php?q=verizon+looks+to+grow+DSL).

<sup>9</sup> “Quick Take – DirecTV: 22K Miles Above the Recession,” Bernstein Research, February 10, 2009.

<sup>10</sup> “DirecTV Sub Growth Soars,” Multichannel News, May 7, 2009, [http://www.multichannel.com/article/231734-DirecTV\\_Sub\\_Growth\\_Soars.php](http://www.multichannel.com/article/231734-DirecTV_Sub_Growth_Soars.php).

<sup>11</sup> The DIRECTV Group Announces First Quarter 2009 Results, The DIRECTV Group Press Release, May 7, 2009, <http://dtv.client.shareholder.com/releasedetail.cfm?ReleaseID=382409>.

<sup>12</sup> “Dish Drops 94,000 Subs, Boosts Income, Multichannel News,” May 11, 2009. [http://www.multichannel.com/article/231940-Dish\\_Drops\\_94\\_000\\_Subs\\_Boosts\\_Income.php](http://www.multichannel.com/article/231940-Dish_Drops_94_000_Subs_Boosts_Income.php). The company

Overall DBS market share continues to climb and DirecTV's and DISH's customer bases each far exceed that of most cable operators.<sup>13</sup> With more than 17 million subscribers, DirecTV retains its status as the second largest MVPD.<sup>14</sup> And DISH, with more than 13 million subscribers, is still the third largest MVPD.<sup>15</sup> Together, they serve more than 30 million customers, or 37% of the MVPD marketplace.

### C. Telephone Companies

In the last two years, the traditional telephone companies emerged as strong competing MVPDs, ratcheting up their deployment of video services and expanding their footprint to cover a significant portion of the nation's population. Verizon has made significant headway with its \$18 billion investment in television and high-speed Internet service. Just launched three and a half years ago, Verizon's FiOS video service has signed up a total of 2.2 million.<sup>16</sup> Verizon expects its FiOS network to pass 17 million homes by the end of 2010, and will eventually reach

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attributes its losses to a variety of "company-specific" issues, including the loss of its partnership with AT&T, promotional pricing by competitors, and the failure to meet certain service standards.

<sup>13</sup> Cable TV Investor: Deals & Finance, SNL Kagan, March 31, 2009, p. 6.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* DBS providers operate under a different regulatory regime than cable operators. They are not subject, for example, to the Commission's rate regulations and therefore they have more flexibility than cable operators with respect to packaging their retail services. DBS providers also are not generally subject to the program access obligations of Section 628 of the Communications Act, although DirecTV continues to be subject to program-access like conditions resulting from its merger with Liberty. *See In the Matter of News Corporation and The DirecTV Group, Inc. and Liberty Media Corporation for Authority to Transfer Control*, 23 FCC Rcd 3265, 3340-41 (2008). In addition, the Commission's decisions prohibiting the use of exclusive access agreements in multiple dwelling units ("MDUs") and establishing a horizontal ownership cap apply only to cable operators. *Exclusive Contracts for the Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-189 (rel. Nov. 13, 2007) (*MDU Order*). News Release, *FCC Adopts Rules to Promote Video Programming Diversity by Ensuring New Video Providers Can Enter and Compete in Video Market*, MB Docket No. 92-264 (rel. Dec. 18, 2007).

<sup>16</sup> AT&T's First-Quarter Results Highlighted by Wireless Gains, U-verse TV Growth, Double-Digit Increase; April 22, 2009; <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26752>. Verizon Communications Reports Revenue, Earnings and Cash Flow Growth in 1Q 2009; April 27, 2009; <http://investor.verizon.com/news/view.aspx?NewsID=983>. Telcos Continue to Increase Video Market Share, Multichannel Market Trends, SNL Kagan, March 9, 2009.

18 million homes.<sup>17</sup> It is now in 14 states, including parts of California, Delaware, Florida, Indiana, Maryland, Oregon, Pennsylvania, Massachusetts, New Jersey, New York, Rhode Island, Texas, Virginia and Washington State.<sup>18</sup> Verizon recently reported that it gained 299,000 subscribers in the first quarter of 2009.<sup>19</sup>

AT&T's U-Verse, an IP-based cable service, attracted 284,000 new subscribers in the first quarter of 2009.<sup>20</sup> To expand and enhance this service, AT&T is laying fiber in the 93 markets across 19 states that offer U-Verse, in some cases extending it out to the home.<sup>21</sup> One company's gain is often another company's loss. AT&T claimed, for example, that more than 60% of the customers it signed up for U-Verse services switched from cable.<sup>22</sup> In April 2009, AT&T reported a total of 1.3 million U-Verse video customers.<sup>23</sup>

As cable has increasingly taken a significant number of the Regional Bell Operating Company phone customers, "the number of homes with U-Verse and FiOS TV availability more than quadrupled in 2008."<sup>24</sup> AT&T expanded its footprint from 5.5 million homes in September 2007 to 17 million in 2008, while FiOS TV's footprint increased from 8.5 million in September

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<sup>17</sup> "Verizon: With Frontier Deal, FiOS Footprint Could Reach 80% Coverage," Telephony Online, May 13, 2009, <http://telephonyonline.com/independent/news/verizon-frontier-communications-deal-0513/>. Verizon's deal to sell lines to Frontier Communications is expected to result in 9 to 10 million homes that will not be part of its FiOS deployment. *Id.*

<sup>18</sup> "FiOS Builds Pennsylvania Merger," Multichannel News, March 3, 2009.

<sup>19</sup> Verizon Communications Reports Revenue, Earnings and Cash Flow Growth in 1Q 2009; April 27, 2009; <http://investor.verizon.com/news/view.aspx?NewsID=983>.

<sup>20</sup> "AT&T: We've Been Stealing Cable Subs," Multichannel News, April 27, 2009, [http://www.multichannel.com/article/209999-AT\\_T\\_We\\_ve\\_Been\\_Stealing\\_Cable\\_Subs.php?rssid=20059&q=AT%26T%3A+stealing+cable](http://www.multichannel.com/article/209999-AT_T_We_ve_Been_Stealing_Cable_Subs.php?rssid=20059&q=AT%26T%3A+stealing+cable).

<sup>21</sup> AT&T's First-Quarter Results Highlighted by Wireless Gains, U-verse TV Growth, Double-Digit Increase; April 22, 2009; <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=26752>

<sup>22</sup> "AT&T: We've Been Stealing Cable Subs," Multichannel News, April 27, 2009, [http://www.multichannel.com/article/209999-AT\\_T\\_We\\_ve\\_Been\\_Stealing\\_Cable\\_Subs.php?rssid=20059&q=AT%26T%3A+stealing+cable](http://www.multichannel.com/article/209999-AT_T_We_ve_Been_Stealing_Cable_Subs.php?rssid=20059&q=AT%26T%3A+stealing+cable).

<sup>23</sup> *Id.*

<sup>24</sup> Telcos Continue to Increase Video Market Share, Multichannel Market Trends, SNL Kagan, March 9, 2009.

2007 to 13.2 million.<sup>25</sup> The presence of AT&T and Verizon in the video marketplace, with combined revenue of over \$220 billion – more the two times the cable industry – ensures that the competitive trends affecting cable’s share of MVPD customers are likely to continue.<sup>26</sup>

#### **D. Alternative Broadband Service Providers**

As DBS and telco competitors have grown, alternative broadband service providers (also known as overbuilders) have not been sitting back. They continue to compete and experience modest growth in some markets. RCN Corporation’s residential and small business division posted year-over-year results that include 4% revenue growth.<sup>27</sup> RCN announced that the conversion of its platform to all-digital would be completed in major markets by January 2009 in order to provide new and enhanced services.<sup>28</sup> The markets include New York, Washington D.C., Boston, Chicago, and the Philadelphia suburbs. Knology introduced its iPlex product, which utilizes IP voice technology, to attract small communications firms and businesses.<sup>29</sup> Both companies plan to roll out DOCSIS 3.0 technology across their footprint by the end of 2010. As noted by one analyst, “the deployment [of DOCSIS 3.0] is crucial to RCN to remain

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<sup>25</sup> *Id.*

<sup>26</sup> In carrying out those plans, AT&T and Verizon will benefit from the extremely favorable regulatory regime that the Commission has established for new cable entrants. In recent years, the Commission has issued orders that provide new cable entrants with regulatory assistance in their dealings with local franchise authorities, building owners, and programmers. *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2006); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007) at ¶ 1; *Program Access Order and NPRM* at ¶¶ 1-2 (extending exclusivity prohibition and adopting new complaint procedures).

<sup>27</sup> “Commercial services help overbuilders continue margin gains in Q4,” SNL Kagan Multichannel Market Trends, March 24, 2009.

<sup>28</sup> “RCN: All-Digital By Month’s End,” XChange, January 21, 2009; <http://www.xchangemag.com/hotnews/rcn-all-digital-by-months-end.html>.

<sup>29</sup> “Commercial services help overbuilders continue margin gains in Q4,” SNL Kagan Multichannel Market Trends, March 24, 2009.

competitive [with cable and FiOS] and keep its advantage in the multiple dwelling unit market.”<sup>30</sup>

### **E. Home Video Rentals and Sales**

Meanwhile, the home video entertainment market remains a stable competitor. Video rental sales totaled \$9.3 billion in 2008, slightly up from the previous year, with traditional in-store rentals accounting for \$5.5 billion (approximately 68% share of the total).<sup>31</sup> U.S. consumers also spent \$22.4 billion on DVDs and Blu-ray discs in 2008.”<sup>32</sup> Despite recent drops in DVD sales,<sup>33</sup> DVDs are currently the primary means of viewing movies and TV shows at home. They retain their dominance in part by increasing sales of Blu-ray discs, a relatively new high-definition disc format, launched by Sony in 2006. According to the Digital Entertainment Group, a DVD trade association, 250 percent more Blu-ray discs shipped to retail in 2008 versus the previous year, for a year-end total of approximately 63.2 billion discs shipped in the U.S. and Canada.<sup>34</sup>

Blu-ray discs are significant not only for their high quality picture and sound, but also for their interactive capability. A new generation of Blu-ray discs in development by the Hollywood studios uses a technology called BD Live to allow users to interact via the DVD and the Internet with games and a platform specifically tailored to the film itself.<sup>35</sup> While the technology is still

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<sup>30</sup> *Id.*

<sup>31</sup> “Rental to stay popular through 2013,” Video Business, March 13, 2009, <http://www.videobusiness.com/article/CA6644141.html>.

<sup>32</sup> “DEG Year-End 2008 Home Entertainment Sales Figures,” Digital Entertainment Group Press Release, January 8, 2009, <http://www.dvdinformation.com/News/press/CES2009yearEnd.htm>.

<sup>33</sup> According to Adams Media Research, consumers spent an estimated 11.4% less on DVDs in 2008, a trend expected to continue throughout 2009. <http://www.latimes.com/business/la-fi-ct-netflix24-2009apr24,0,2597303.story>.

<sup>34</sup> “DEG Year-End 2008 Home Entertainment Sales Figures,” Digital Entertainment Group Press Release, January 8, 2009, <http://www.dvdinformation.com/News/press/CES2009yearEnd.htm>.

<sup>35</sup> “The Way We’ll Watch,” WALL STREET JOURNAL, December 8, 2008.

young and not yet fully developed, it has the potential to revolutionize the way movie viewers make use of their home entertainment media.

Netflix, the largest provider of movie rentals via mail – and now also via the Internet – recently reported revenues of \$394.1 million from the first quarter of 2009, a 70 percent gain from the first quarter of last year. The DVD rental company also set a record for subscriber growth, reporting 10.3 million subscribers for the first quarter 2009, a 25% increase from the same time last year.<sup>36</sup> Netflix expects strong profit growth throughout the rest of the year.

Kiosk services, such as Redbox have also enjoyed a surge in business. Coinstar operates a series of interactive DVD rental kiosks, located in 12,000 different retail locations such as McDonald's and local grocery stores and pharmacies. It is currently the fifth largest DVD retail company in the United States and operates in more U.S. locations than Blockbuster. Each kiosk holds more than 600 DVDs with 70-200 titles, updated weekly. DVDs are rented for \$1.00 per day and can be returned to any of the company's kiosks.<sup>37</sup> By 2008, Redbox had become so successful that even Blockbuster now plans to roll out 10,000 kiosks by the end of 2009 through its partnership with NCR.<sup>38</sup>

## **F. Broadcasters**

Over-the-air broadcasting has been a competitor to cable television for decades. Now broadcasters are using free spectrum from the government to deliver not only their primary signal, but also a number of multicast channels. Many broadcasters are planning to use these multicast channels to offer additional programming options, and already a new “network” has

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<sup>36</sup> “Netflix sees record subscriber growth and 70% surge in profit,” LA TIMES, April 24, 2009, <http://www.latimes.com/business/la-fi-ct-netflix24-2009apr24,0,2597303.story>.

<sup>37</sup> “Basic Biittner: The Redbox is Coming! The Redbox is Coming!” CHRONICAL TIMES, April 23, 2009, <http://www.chronicletimes.com/story/1533426.html>.

<sup>38</sup> “Reed Hastings Opens the Red Envelope” The Motley Fool, April 24, 2009, <http://www.fool.com/investing/general/2009/04/24/reed-hastings-opens-the-red-envelope.aspx>.

been formed that will offer programming to broadcasters to fill these multicast channels.<sup>39</sup> This free, over-the-air HDTV and multicast programming offerings will continue to compete with MVPD offerings. Although the broadcasters' transition from analog to digital in June 2009 may result in new customers for MVPDs, further fueling their fierce competition particularly in those areas where consumers have difficulty getting digital signals. A certain segment of the population will continue to rely solely on broadcast television for its entertainment and information needs.

#### **G. Internet Video**

As discussed in section IV below, there has been a proliferation of Internet-delivered video content since the last video competition report. Most American households already watch at least some video programming over the Internet, and that number is expected to grow over time. The growth in broadband Internet access services has spurred the creation of new programming services, and presented a new outlet for existing programmers to distribute their content. In some cases these services offer television programming that is available on cable systems, *e.g.*, streaming of old and new shows from popular series, and in some cases these services offer completely original programming not available anywhere else. Increasingly, this programming will be available not just on computers or televisions in the home, but also on mobile devices.

## **II. CONSUMERS BENEFIT AS THE CABLE INDUSTRY CONTINUES TO INVEST IN INFRASTRUCTURE AND PROGRAMMING AND TO INNOVATE WITH BURGEONING NEW SERVICES**

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As in the past, cable companies have redefined the video experience for their customers through investments in their networks and the roll out of new services – including mini-tiers,

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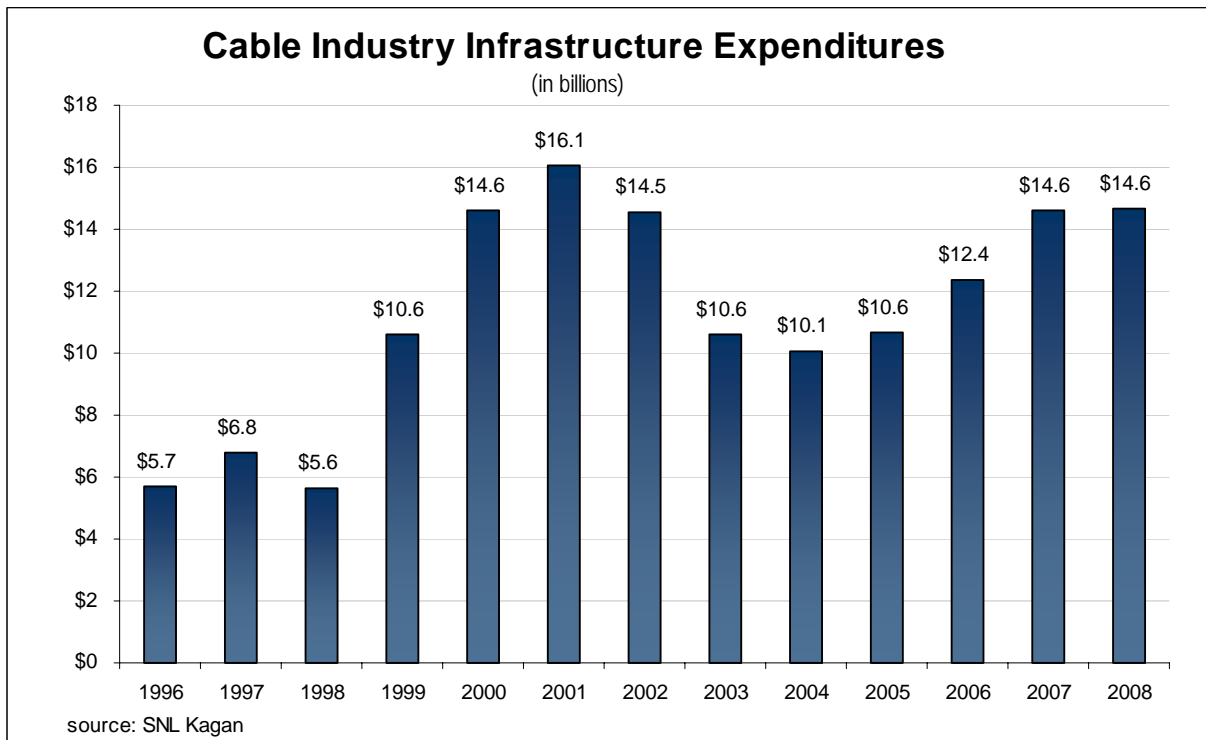
<sup>39</sup> *New .2 Network Inks Sony Deal*, Jon Hemingway, Broadcasting & Cable, Nov. 2, 2007, available at <http://www.broadcastingcable.com/article/CA6496983.html>.

more HD channels, more on-demand options, and digital video recorder (DVR) technology – all to provide greater value to consumers. They have revolutionized their platforms for the delivery of new innovations in the video and on-line digital world and are continuing to do so.

Meanwhile, although rate-card prices have risen on a total-cost basis, retail prices generally have not risen on a per-channel basis or amount-of-viewership basis, and bundling and other daily discounting have led to cost savings for most cable customers.

### A. Effects of Competition on Services

Since 1996, cable companies have invested over \$145 billion in infrastructure and facility rebuilds for full-scale broadband video, Internet and digital phone service. This year alone, cable operators will invest \$14 billion in network upgrades and expansion, and this has provided them with a digital broadband platform to compete in providing an ever-increasing array of services to their customers. And they have also invested in more and better programming.



## 1. Digital Services and Options

In the face of competitive forces, the cable industry rebuilt its plant to provide new digital services but continued to provide an analog service to meet the needs of millions of customers who were not ready to go full digital. DBS and the telcos came into the marketplace as all-digital services, requiring their customers with analog television sets to obtain and pay for digital set-top boxes to receive any programming. Unlike their competitors, cable operators offered an array of digital services on an *optional* basis, ranging from digital tiers, high definition programming, video-on-demand, and DVRs, while still retaining a tier for those customers who do not have digital TVs or still want service without a set-top box.

Most recently, however, cable operators have embarked on a multi-year transition to gradually migrate analog customers to digital in order to take advantage of bandwidth efficiencies and innovations afforded by such technology and to meet increasing demand for digital services and higher speed broadband. As this migration occurs, operators are gradually changing and enhancing the mix of service offerings to ensure as smooth a transition as possible. When it is complete, it will enable cable companies to use their bandwidth more efficiently in ways that serve consumers' interest and maximize the appeal of cable services in a highly competitive marketplace.

The value of cable's digital services is evidenced by the continually growing number of customers who opt to purchase the services. Today, more than 60 percent of all cable homes subscribe to digital services, whether tiers or stand-alone programming, such as HD or video-on-demand, or DVRs, or bundles of television, telephone and Internet services.

The growth of high definition program offerings provides a compelling example of the cable industry's response to an intensely competitive multichannel video marketplace. With the growth in sales of high definition television sets, HDTV has been a key marketing strategy for all

MVPDs. Cable programming networks have developed HD networks in order to meet consumer demand. As of May 2009, 129 cable networks offered HD programming. DirecTV sought a competitive advantage by aggressively rolling out HD service, spending over \$1 billion for new satellites and upgraded ground facilities to offer up to 100 HD channels, including regional sports networks and other new HD offerings.

Cable responded with not only more linear HD channels but an array of video-on-demand HD programming. Comcast, for example, offers over 1,000 HD choices, and most of them are available on VOD.<sup>40</sup> DirecTV also introduced a VOD-like service, DirecTV On Demand. Meanwhile DISH offers 140 HD channels, as well as Slingbox service and improvements in its satellite broadband service.

Competition for customers is also evident in the growing penetration of DVR services. According to SNL Kagan, more than 39% of households taking digital video services purchased at least one DVR-enabled box by the end of 2008. SNL Kagan also reports DVR subscribers across all platforms – cable, DBS and telco video and stand-alone services – reached 31 million by December 2008. The time-shifting DVR services vary among these providers, with cable offering multiple DVRs per household and satellite and telcos offering multi-room DVRs that enable this functionality to multiple televisions in the household. As cable's competitors push multi-room DVRs as a differentiator in service, some cable companies are beginning to deploy similar offerings in response. DirecTV and AT&T offer iPhone users, for example, the ability to use their phone to program the DVR remotely. Cable companies are looking to provide this

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<sup>40</sup> "HD's Mixed Bag for the Holidays; Sales May Feel A Pinch, But Spirits Are High," Multichannel News, December 8, 2008, [http://www.multichannel.com/article/160420-HD\\_s\\_Mixed\\_Bag\\_for\\_the\\_Holidays.php?q=HD%27s+mixed+bag](http://www.multichannel.com/article/160420-HD_s_Mixed_Bag_for_the_Holidays.php?q=HD%27s+mixed+bag).

functionality and other advanced features this year as well.<sup>41</sup> Comcast, Cox and other operators have also struck deals with TiVo, a pioneer in DVR technology, to expand its service in various markets.

## **2. Programming**

Investment in network upgrades for new services is not the only guidepost in this intensely competitive marketplace. Investments in programming by cable operators and their competitors is another strong indicator in the battle for customers who may choose one bundle of services from one provider or turn to ad hoc TV viewing on-line.

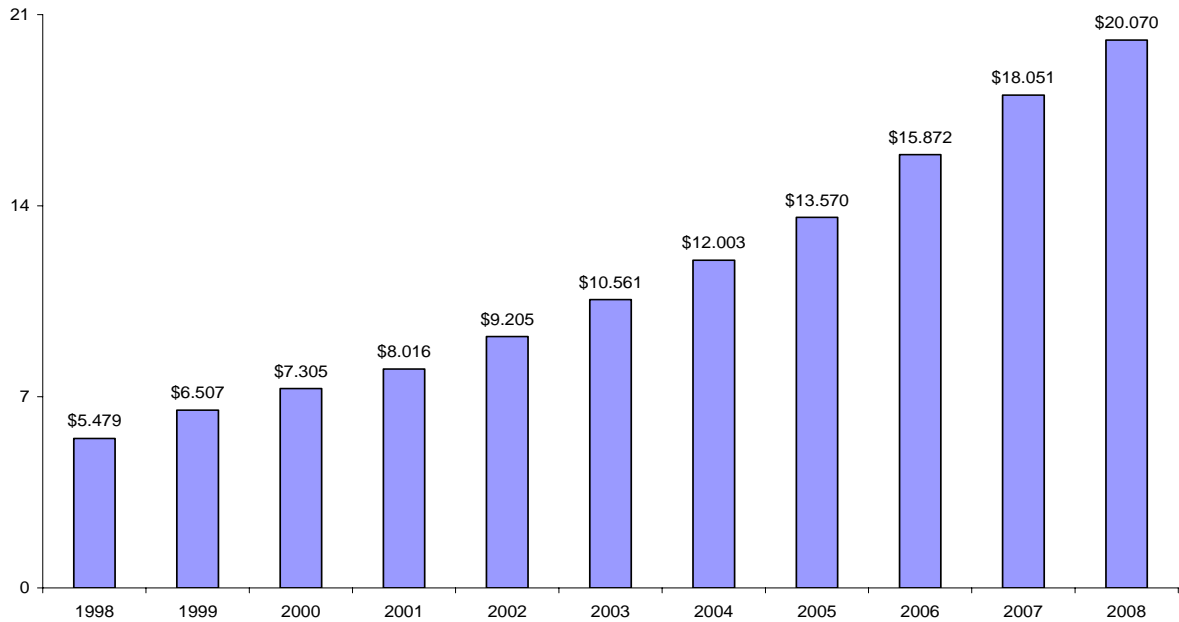
Basic and HD cable program networks, in competing among themselves for viewers and carriage, were projected to invest over \$20 billion in programming in 2008 and are projected to spend nearly \$22 billion in 2009.<sup>42</sup> The following chart shows the steady growth in expenditures by multichannel video programming networks:

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<sup>41</sup> “Cable Trails on Remote DVR; Satellite and Telco TV Operators Are Touting Feature,” Multichannel News, April 27, 2009, [http://www.multichannel.com/article/210002-Cable\\_Trails\\_On\\_Remote\\_DVR.php?rssid=20077&q=cable+trails+remote](http://www.multichannel.com/article/210002-Cable_Trails_On_Remote_DVR.php?rssid=20077&q=cable+trails+remote).

<sup>42</sup> SNL Kagan, Economics of Basic Cable Networks, 2008 Edition.

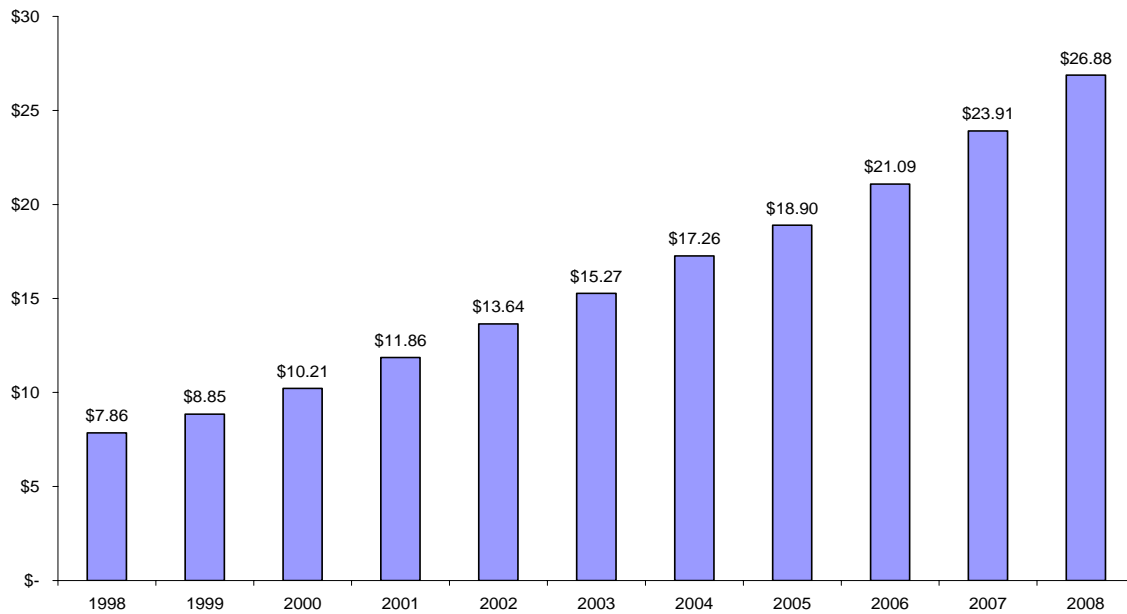
**Basic and HD Cable Network Programming Expenditures  
1998 - 2008  
(in \$ billion)**



Source: SNL Kagan, Economics of Basic Cable Networks, 2008 Edition.

The programmers' investment has resulted in a wide variety of diverse, high quality programming from original series and entertainment programming to more extensive news and information programming – which cable operators and their competitors purchase and provide in order to compete effectively for customers.

**Cable Operator Programming Expenditures  
1998 -2008  
(in \$ billion)**



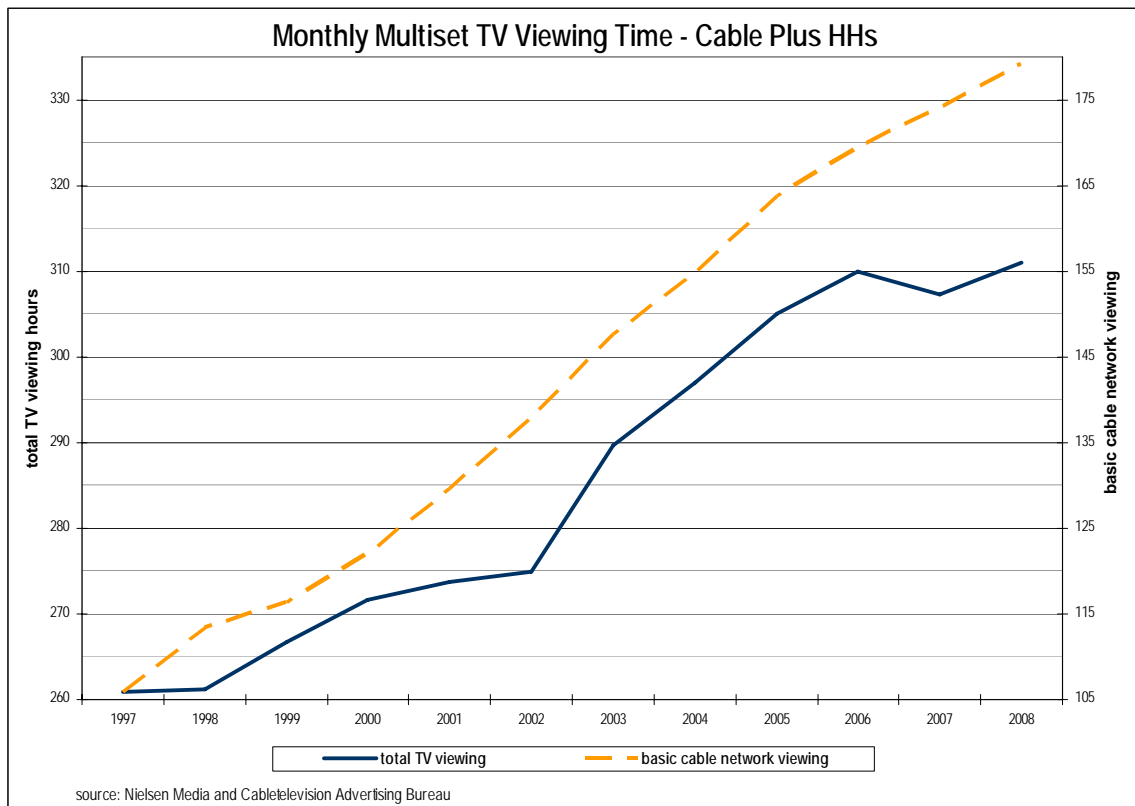
Source: NCTA Research based on SNL Kagan and Copyright Office data.

Whether a customer's interest revolves around news, public affairs, children, health, science, arts, history, sports, food, lifestyle, original movies and entertainment, and more – it can be found on cable. As discussed below, most of these networks have no affiliation with a cable operator and many of them are serving segments of the marketplace that previously may have been underserved.<sup>43</sup> Indeed, a growing area of competition between MVPDs is in ethnic program offerings, particularly aimed at Hispanic and Asian communities. Regional and local programming is another area that is receiving increased dollars and support from cable operators and programmers. Today, cable MSOs operate and offer dozens of local and regional news and programming networks, such as Time Warner Cable's ("TWC") New York 1, Comcast's CN8-The Comcast Network and Cox's Rhode Island News Channel.

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<sup>43</sup> *Id.* at ¶ 32.

Investment in programming has paid off in terms of increased recognition and awards, including Emmys and Golden Globe awards. Indeed, cable is recognized as the premier outlet for cutting edge programming by television critics and viewers. But even more importantly it has paid off in terms of customers voting with their eyeballs for cable programming. A recent report by Craig Moffett, the leading telecom analyst from Sanford Bernstein noted that “between 1997 and 2007, ad-supported cable's share of total television viewing steadily increased from 32.7% to 51.4% which, when combined with the increase in the number of total hours of television watched daily, has resulted in *a nearly 80% increase in the number of cable hours viewed daily per household over the last 10 years.*”

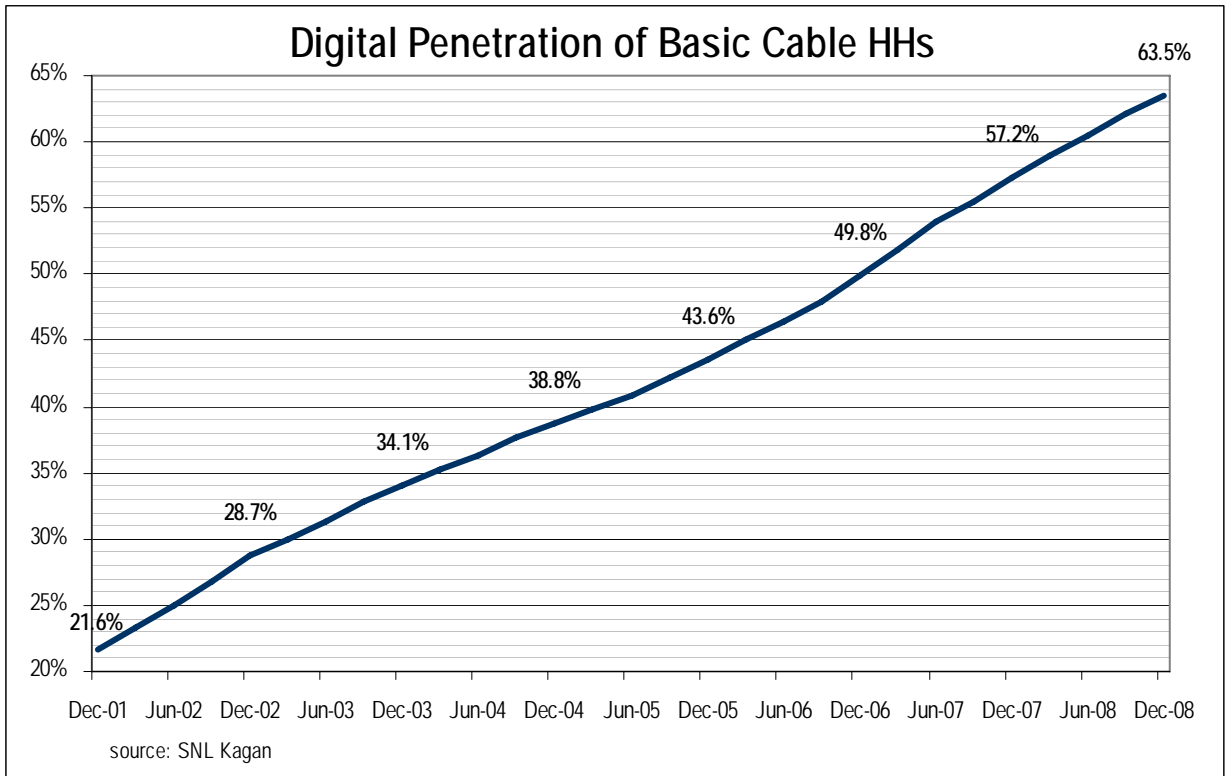


## **B. Effects of Competition on Prices**

While the initial and ongoing response of cable operators to strong head-to-head competition from DBS and telephone companies has been to enhance the quality and value of cable service by giving customers many more choices, digital-quality pictures and sound, and new services, this competitive response has had a beneficial effect on prices as well. Given the extraordinary investments that cable operators have made to increase the quantity and quality of available services, it is not surprising that, in some cases, the prices for the services – in particular, the rate-card prices of services, as opposed to increasingly prevalent promotional discounted prices and “bundled” prices – have increased as well. Prices generally are a function of costs, and if increases in expenditures far exceed the rate of inflation, prices are sure to do the same.

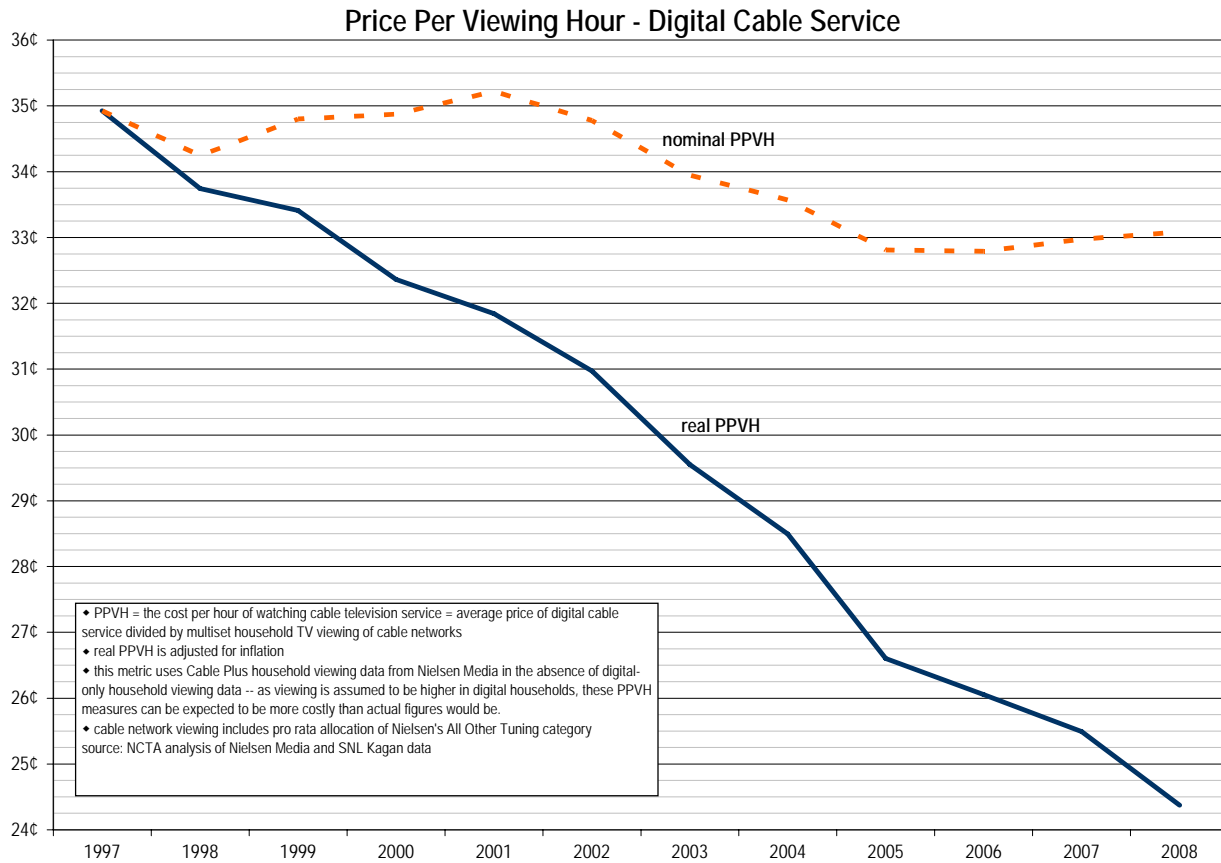
But these price increases hardly reflect a lack of competition. To the contrary, they reflect expenditures made because of increased competition. When a monopolist raises its prices to exploit a lack of competition, consumers buy *less* of the product – although the seller makes greater profits by selling fewer products at a higher price. That is the vice of monopoly: Output is reduced and consumers consume less of a product at the monopoly price than they would prefer to buy at the lower competitive price.

As programming efforts and expenditures by operators and program networks have increased, precisely the opposite has occurred. Competition has led to a huge increase in output in terms of the number of channels, the quality and quantity of programming, etc. First, more and more consumers are purchasing the optional digital tiers of service offered by cable operators:



Second, as previously noted, consumers are *watching* much more of cable’s product. This means, as Sanford Bernstein’s Craig Moffet explained, that “taking account the increased amount of time U.S. households spend watching television, and the fact that cable’s share of total television viewing has increased, the real price of an hour of cable TV has actually declined by an inflation-adjusted 26% over the past 10 years.”<sup>44</sup>

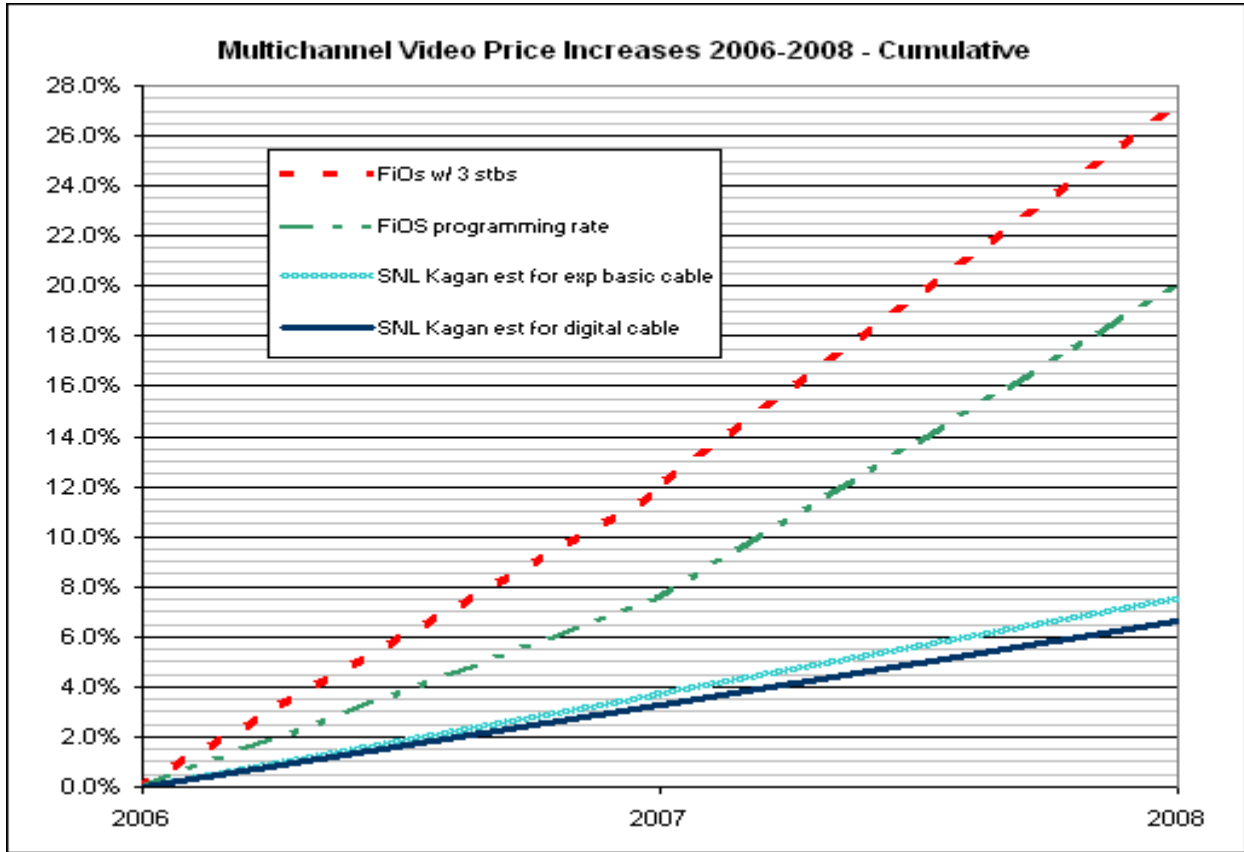
<sup>44</sup> “U.S. Cable & Satellite: How Economically Sensitive Is Pay TV?” Bernstein Research, January 14, 2009.



As the charts above make clear, these competitive trends – the increased expenditures on facilities, programming and new services, the increased purchasing of optional tiers, and the increase in viewership and reduction of price per viewing hour – have all been in steady progress for more than a decade. Competition has spurred cable operators’ efforts to maximize the value of their service offerings to consumers, to be sure. But competition from two sturdy national DBS competitors ensured this result long before the telephone companies finally entered the video marketplace in earnest.

In fact, as telephone companies have entered the marketplace, they, too, have found it necessary to increase prices in order to offer an array of services that can compete effectively with the offerings of cable and DBS. Although Verizon, for example, is aggressively promoting its video service offerings and has been rapidly increasing its share of MVPD customers, its

nominal prices (again as opposed to promotional or bundled rates) have been increasing at a rate that dwarfs the increases in cable operators' rates:



note: a set-top box is required for each TV in a FiOS HH in order to receive any programming other than over-the-air channels, this is contrasted with many cable systems which generally do not require a set-top box to receive analog expanded basic service

	<u>2006</u>	<u>2007</u>	<u>2008</u>	<u>2008</u> <u>v.</u> <u>2006</u>
FiOS w 3 set-top boxes	\$51.80	\$57.96	\$65.96	27.3%
FiOS w 2 set-top boxes	\$47.85	\$52.97	\$59.97	25.3%
FiOS w 1 set-top box	\$43.90	\$47.98	\$53.98	23.0%
FiOS programming	\$39.95	\$42.99	\$47.99	20.1%
FiOS set-top boxes (SD)	\$3.95	\$4.99	\$5.99	51.6%
SNL Kagan est. for expanded basic cable	\$41.17	\$42.72	\$44.28	7.6%
SNL Kagan est. for digital cable	\$55.54	\$57.37	\$59.23	6.6%

### **III. BUNDLING HAS MULTIPLIED THE BENEFICIAL EFFECTS OF COMPETITION ON PRICES AND SERVICES**

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What the previous discussion shows is that even the nominal rate-card prices for non-premium cable programming service tiers, when adjusted for inflation and for increases in program quality, have significantly *decreased* over the last several years. But examining rate-card prices obscures the real story regarding cable prices. Many customers are taking advantage of promotional prices or one- or two-year contracts that guarantee a rate during the period of the contract. Moreover, most importantly, the recent availability of bundled video, telephone and high-speed Internet service at discounted prices far below the total amount that consumers were paying for those three services even a decade ago.

When video, Internet and telephone services are provided over the same broadband facilities into a customer's home, there are significant economies that result in lower prices. The price paid by customers who purchase cable's triple play is substantially less than the total amount paid for cable, Internet and phone service in 1996 – and, in each case, the service is more robust.

In 1996, the average price for unlimited local phone service was \$30 per month. Long distance service was available at a per-minute charge, and the average consumer paid \$26 per month. Consumers paid \$19.95 per month for dial-up Internet service with a download speed of 28 Kbps. And a 46-channel package of non-premium broadcast channels and cable program networks cost the average customer \$26.21. The total for all these services – in 1996 dollars – was \$102.16. Adjusted for inflation, that would be \$144.50 in 2008 dollars.

In 2008, the cable triple play generally included unlimited local and long distance phone service, Internet download speeds between 5 and 15 Mbps, and at least 70 channels of cable service – with most operators including digital tiers with hundreds of channels plus video on

demand. The typical price for such a bundle of services was \$99 – 31% less, on an inflation-adjusted basis, than what consumers paid twelve years ago.

Moreover, while the bundle is by far the best value for consumers, most cable operators offer less robust but lower-priced options to compete for those customers who do not want or cannot afford the full-featured bundled offerings. An entry-level basic cable package is typically available for less than \$20 per month. (Similar entry-level options are also available for telephone and Internet service. In Fairfax, VA, Cox offers a basic telephone service for \$12.90 per month, plus taxes and fees. And some cable systems offer an “economy tier” Internet service with less robust download and upload speeds for less than \$20 per month.)

Telephone companies also offer bundled “triple play” – or, when adding wireless phone service to the mix, “quadruple play” – offerings at prices comparable to cable operators’ bundled packages. DBS companies participate in bundled offerings, as well, often partnering with telephone companies that have not upgraded to digital broadband capability. In those cases, the DBS company’s multichannel video service is bundled with the telephone company’s phone and DSL Internet service at a discounted price.

The significance of this development is not simply that the efficiencies of bundling have resulted in lower prices for video, Internet and telephone services – although they certainly have. Nor is it simply that, by lowering those prices, bundling has driven increased penetration of broadband services, making such services more ubiquitously available to households across the nation – although it certainly has. The significance of bundling is also that it has broadened and intensified the intermodal competition among cable operators, DBS companies and telephone companies, raising the stakes of gaining or losing a customer. When services are bundled,

failing to win a new phone customer also means losing an existing video customer, and vice versa.

More and more customers are opting for bundled packages of communications services. At year-end 2008, SNL Kagan estimates that on average more than 60% of the customers of the largest operators took 2 or more services and more than a quarter of the customers took all three services.<sup>45</sup> As a result, the Commission can confidently conclude that competition is vigorous in the marketplace for multichannel video programming – and for Internet and telephone services – and will only continue to flourish in the years ahead.

#### **IV. INTERNET VIDEO WILL FURTHER ENSURE THAT COMPETITION IN THE VIDEO MARKETPLACE IS PERVASIVE AND IRREVERSIBLE**

While the rapid growth of telephone company competition and the ubiquitous offering of bundled broadband services have markedly changed the competitive landscape since the Commission's last video competition inquiry, another recent development presages even greater transformational effects. Specifically – and, ironically, as a result of the ever-increasing speed and capability of cable operators' and their competitors' broadband Internet facilities – the Internet has begun to fulfill its promise as an alternative platform for the creation and delivery of video programming to consumers.

Even in 2006, when the Commission conducted its most recent inquiry, it was already apparent that the Internet was providing an outlet for alternative providers of video programming. The most popular and prevalent provider of Internet video then, as now, was YouTube, which “offer[ed] mostly user-posted original content and videos or video clips that users have recorded from traditional video media, such as television.”<sup>46</sup> In addition, the

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<sup>45</sup> “Cable RGU growth stalls in Q4,” Cable TV Investor: Deals & Finance, March 31, 2009 at p 6.

<sup>46</sup> Thirteenth Report, ¶ 155.

Commission noted that “[m]ajor Internet portals, such as Google, Yahoo, and AOL, continue to offer user-posted content, but are increasingly entering into licensing agreements to offer pre-existing and original video content from traditional video providers.”<sup>47</sup>

Those trends have greatly accelerated, along with technological developments that have transformed the nature of Internet video. On the one hand, greater download speeds and compression techniques have greatly increased the quality of streamed video and have made it increasingly feasible to download and store full-length movies and television programs. This means that Internet videos can be viewed in high quality – even high definition – on computer monitors, instead of in grainy, poor quality in a small corner of the screen. Moreover, technology now permits both the wired and wireless connection of computers (or cable modems) to large, flat screen high-definition television sets, so that Internet video can be viewed on those sets with quality comparable to broadcast, cable, DVD and Blu-Ray high definition programming.

At the same time as technology is bringing Internet video to large television screens, it is also making such video viewable on the miniature screens of wireless phones. Wireless carriers now provide access to an array of video programming, including broadcast and cable network television programming, as well as other video content. And they also provide access to the Internet, enabling wireless customers to access video programming offered by various web providers and aggregators.

The availability of such video programming on the web, the ease of finding and accessing it, and, correspondingly, the amount of web video viewing has dramatically increased in the last three years. According to the Internet measurement firm comScore, Internet users in the United

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<sup>47</sup> *Id.* at ¶ 156.

States viewed *14.5 billion* online videos in just one recent month – March 2009.<sup>48</sup> While YouTube continues to be the dominant source of online videos (with 5.5 billion streams in April 2009), Hulu, which primarily provides longer form videos such as network television programs, “continued its explosive growth trajectory, increasing 490 percent in total streams year-over-year, from 63.2 million in April 2008 to 373.3 million in April 2009....”<sup>49</sup>

Netflix Inc. and Amazon.com Inc. have launched video streaming services which allow users to watch a large selection of movies and TV shows online. Netflix currently offers 12,000 movies and TV shows for instant streaming online at no additional costs to consumers who pay at least \$9 per month for a DVD rental plan. Amazon’s library of available titles is even larger, offering 40,000 movies and TV shows.<sup>50</sup> The streaming service can be watched on a TV but requires an additional device such as a Microsoft Xbox 360 video game console or recorders made by TiVo Inc. In the first quarter of this year, Netflix announced plans to offer its streaming services, through a partnership with LG Electronics, on high-definition TV sets that will stream the videos directly from the Internet onto the TV without an additional device.<sup>51</sup>

It appears likely that this trend towards full length video programming will continue:

“Historically, short-form, clip-length video has ruled streaming on the Web, as demonstrated by YouTube's top spot month after month,” said Jon Gibs, vice president, media and analytics, Nielsen Online.

He added: “Hulu, along with pure-play providers like Veoh and the TV networks, have spent the past two years trying to convince consumers that the Internet can be a good place to watch full-length programming as well. April's strong

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<sup>48</sup> “Hulu Continues Ascent in U.S. Online Video Market, Breaking Into Top 3 Properties by Videos Viewed for First Time in March,” comScore Press Release, April 28, 2009, [http://www.comscore.com/Press\\_Events/Press\\_Releases/2009/4/Hulu\\_Breaks\\_Into\\_Top\\_3\\_Video\\_Properties](http://www.comscore.com/Press_Events/Press_Releases/2009/4/Hulu_Breaks_Into_Top_3_Video_Properties) .

<sup>49</sup> “Hulu’s Explosive Growth Continues; YouTube Still No. 1 in Streaming Video Arena,” *Adweek*, May 14, 2009, [http://www.adweek.com/aw/content\\_display/news/agency/e3i3e5aa5e0b30aa48e2d7a444b1a9afb0b](http://www.adweek.com/aw/content_display/news/agency/e3i3e5aa5e0b30aa48e2d7a444b1a9afb0b).

<sup>50</sup> “LG High-Def TVs to Stream Netflix Videos Directly,” ABC News, January 5, 2009, <http://abcnews.go.com/Entertainment/WireStory?id=6576465&page=1>.

<sup>51</sup> *Id.*

showings of Hulu, Fox and ABC suggest that consumers are beginning to listen.”<sup>52</sup>

It hardly takes a crystal ball to see the effects that these Internet developments will have on competition in the video marketplace. First of all, they are providing a competitive alternative – actually, a platform for a virtually unlimited array of competitive alternatives – to existing MVPDs for obtaining and viewing video programming. Second, they are ensuring that any programmer can make its programming available to viewers who might want to watch it simply by posting the programming for downloading or streaming on the Internet. Whatever remnants of concern anyone might have had that consumers had an insufficient number of competing providers of video programming or that existing MVPDs had too much power to select the programming to be made available to their customers have been blown away by the present and future state of Internet video.

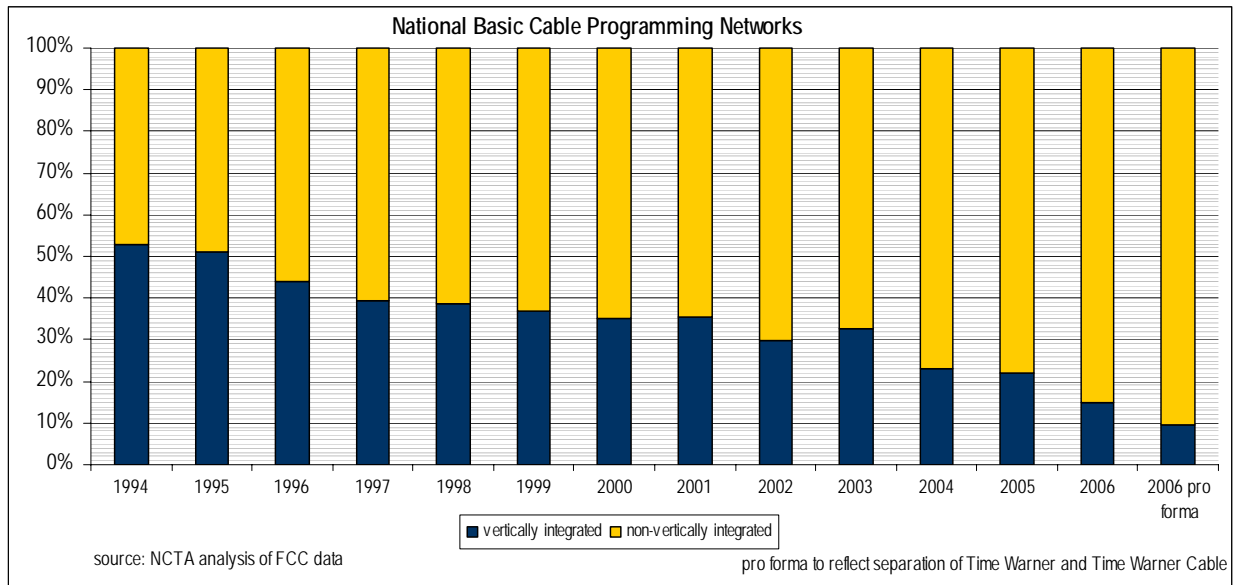
## **V. VERTICAL INTEGRATION IS MINIMAL AND NO LONGER A MEANINGFUL ISSUE IN THE VIDEO MARKETPLACE**

As noted at the outset, horizontal and vertical integration were the structural elements of the video marketplace that underlay many of the regulatory provisions of the 1992 Cable Act. Consumers were viewed as having few if any alternatives to cable television as a source of multichannel video programming, raising concerns that operators would charge supra-competitive prices and would have insufficient incentives to improve the quality of their service. And because so many of the most popular cable program networks were owned by large cable operators, Congress feared that cable operators would have both the incentive and the ability to thwart the development of competing MVPDs by withholding from such potential competitors their vertically-integrated programming.

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<sup>52</sup> *Id.*

The dramatic growth of competition from two large DBS companies and from the telephone companies, and the looming presence of Internet video competition would moot all these concerns even if cable operators continued to own a significant portion of the networks and programming most viewed by MVPD customers. But as the Commission’s previous annual reports showed, the vertical integration that existed in 1992 had by 2006 significantly diminished – indeed, practically disappeared. And the coup de grâce was delivered just a couple of months ago when Time Warner Inc. divested its cable systems while retaining its cable program networks. Applying this change, on a pro forma basis, to the most recent (2006) figures released by the Commission reduces the percentage of all national cable programming networks owned in whole or part by cable operators from 14.9% to only 9.6%. The actual figure may be significantly lower today, given the further proliferation of cable networks in the last three years.



In today’s marketplace, most cable operators provide hundreds of channels to their customers, most operators own hardly any of the networks carried on those channels, no cable operator owns more than one of the 25 most watched cable networks, and only two of the top 25 networks are owned by a cable operator. In these circumstances, any lingering concern that

cable operators might thwart competition in the video marketplace by favoring an affiliated program network or by withholding a vertically-integrated network from a competitor should have disappeared.

Given the diversity and quality of unaffiliated networks that already occupy those hundreds of channels, the notion that it should somehow be presumed, much less deemed, anticompetitive for a cable operator to decide not to carry one more unaffiliated service because the operator may own and already carry a similar service that it *does* own is not a sustainable claim. Nor does it make sense to speculate that, by refusing to make a vertically-integrated program network available, a cable operator could inflict unfair, anticompetitive injury on competitors that already have access to hundreds of other networks, including virtually all of the most viewed networks.

This has not, of course, stopped program networks and competing MVPDs from making such claims. Provisions of the 1992 Act that were meant to address marketplace circumstances that have long since disappeared have been used – especially in the last few years, while the video competition inquiries were in a state of suspended animation – by parties seeking to gain a regulatory boost unwarranted by any marketplace forces. In documenting the remarkable competitive developments of the last three years, the Commission’s Fourteenth Report should put the lid on such regulatory gamesmanship – and on any recurring suggestions that the video marketplace is anything but fully competitive.

## **VI. CABLE HAS INVESTED IN TECHNOLOGY TO COMPETE AS THE LEADING PROVIDER OF HIGH-SPEED BROADBAND SERVICES**

The need to increase bandwidth and speed is driving the next phase of MVPD competition. Beginning in the late 1990s, cable was the first to offer an affordable, high-speed Internet service that is now available in 120 million homes. Cable operators led the way by

successfully rolling out cable modem service, at speeds far exceeding dial up and prices far cheaper than a dedicated high-speed line. As cable gained millions of subscribers to its high-speed Internet service, the Bell companies finally introduced digital subscriber line (DSL) in order to compete. More recently, they have deployed fiber networks with even faster speeds.

In response, cable now is unleashing its DOCSIS 3.0 high-speed data transmission standard. In other words, cable is answering its broadband Internet competitors by deploying the next generation of ultra-fast cable broadband. DOCSIS 3.0 allows cable operators to bond multiple channels together to reach speeds over 100 megabits per second downstream and upstream. The first phase deployment is market speeds of 50 to 101 Mbps, as compared to 3 to 6 Mbps in most high-speed Internet homes today.

TWC is introducing DOCSIS 3.0 services starting in June in New York City and plans to complete the deployment by the end of 2009. TWC has been testing at speeds as high as 138 Mbps downstream and 18 Mbps upstream. FiOS Internet provides up to 50 Mbps downstream and 20 Mbps upstream. TWC will rollout DOCSIS 3.0 market by market over time. TWC currently offers its existing broadband customers the Power Boost feature, which provides up to 16 Mbps downstream to Turbo subscribers in five of its six operating regions.

Cox rolled out a super fast broadband service, with 50 Mbps download speeds, in Lafayette, LA, matching speeds offered by Verizon in parts of its territory. Cox plans to offer “Ultimate Internet” to more of its communities by the end of this year, and more than two-thirds of its footprint by 2010.<sup>53</sup> Cablevision recently introduced DOCSIS 3.0 home Internet service with download speeds of 101 Mbps and upload speeds of 15 Mbps throughout its New York

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<sup>53</sup> “Cox Joins the DOCSIS 3.0 Party,” The Cable Show Daily Day 2, April 2, 2009.

service area.<sup>54</sup> The company also introduced a Wi-Fi service as a free add-on to customer data services.

In February, Comcast announced that its goal is to reach more than 30 million homes and businesses, or 65% of its footprint, this year with ultra wideband DOCSIS 3.0 technology.<sup>55</sup> Comcast has already initiated the new faster Internet speeds across 30% of the communities it serves, including the Boston metropolitan region and parts of Southern New Hampshire, the Philadelphia metropolitan area, parts of New Jersey, Atlanta, Baltimore, Chicago, Ft. Wayne, Portland, Seattle and the Bay Area.<sup>56</sup> It offers speeds at 50 Mbps downstream and doubled speeds for the majority of its existing Internet customers.<sup>57</sup> Charter Communications is offering a 60 Mbps high-speed service in parts of St. Louis, MO.

Cable operators and programmers continue to look for ways to differentiate themselves in a highly-competitive marketplace. They are competing with advanced interactivity, such as interactive media guides. Comcast's Guideworks venture with Gemstar-TV Guide will have advanced functionalities to compete with Verizon's IMG and AT&T's U-Verse U-Guide. As they reclaim analog channel capacity, cable operators are looking ahead to MPEG-4 compression, increased use of switched digital video, and additional use of bandwidth-intensive 1080p advanced high-definition. On the near horizon, cable programmers and operators and other MVPDs are looking toward new technologies such as next generation HD formats, including 3-D images, higher pixel displays to increase picture resolution, and increased frames

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<sup>54</sup> "Cablevision Goes for U.S. Broadband Speed Record," Bits Blog, NY TIMES, April 28, 2009.

<sup>55</sup> "Comcast Puts the Pedal to the Metal: Announces New 65% Benchmark to Roll Out Wideband High Speed Internet Services in 2009," Press Release, February 19, 2009, NY TIMES, February 19, 2009.

<sup>56</sup> "Comcast to Roll Out Extreme 50 Mbps High-Speed Internet Service in Bay Area," Comcast Press Release, March 3, 2009, <http://www.comcast.com/About/PressRelease/PressReleaseDetail.aspx?PRID=841>.

<sup>57</sup> *Id.*

per second to improve delivery of high-action sports or movies.<sup>58</sup> Based on recent studies, about one-third of U.S. households have HDTVs, with sales of another 27 million expected in 2009.

## **VII. CABLE CONTINUES TO WORK WITH THE CONSUMER ELECTRONICS INDUSTRY AND CONTENT PROVIDERS ON TECHNICAL ADVANCEMENTS IN CUSTOMER EQUIPMENT AND SERVICES**

### **A. Tru2way Innovation**

In the NOI, the Commission asks about hundreds of models of unidirectional “plug and play” televisions, DVRs, and other CableCARD-enabled devices have now been certified by 29 manufacturers, and 420,000 of them are using CableCARDs. But the market has shifted to devices that are engineered to receive two-way services. The terms of deployment are embodied in a Memorandum of Understanding (Two-Way MOU) among the six largest cable companies – Comcast, Time Warner Cable, Cox, Charter, Cablevision and Bright House Networks – which serve more than 82 percent of all U.S. cable subscribers; some of the largest DTV manufacturers – Sony Electronics, Panasonic, Samsung, LG, and Funai Electronics (which trades under the brand names Philips, Magnavox, Sylvania and Emerson); set-top makers ADB and Digeo; and chip manufacturer Intel. This voluntary business agreement selected “tru2way” technology for “two-way” digital cable ready retail products to come to market.

Multiple industries are now cooperating practically in the rollout of tru2way. The parties closely coordinate and synchronize cable network readiness to meet products as they appear in the marketplace. Panasonic’s new tru2way TVs are launched in Denver, Chicago, and Atlanta, which enable Comcast subscribers to utilize cable’s interactive programming without a set-top box. Comcast is continuing to rollout tru2way capability to additional markets. TWC has already deployed over 1.7 million set-top boxes with tru2way technology. Cable applications

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<sup>58</sup> “High-Def’s Next Step: Programmers Prepare for 3-D, More Pixels and ‘Higher Def,’” Multichannel News, February 16, 2009.

“ported” to tru2way include interactive programming guides, video on demand and StartOver. Where in the past applications had to be written for particular systems, Java-based tru2way enables programmers and application providers to create “write once, run anywhere” interactive applications that run on any tru2way-supported cable system. By using tru2way, rather than DCR+, in retail devices, consumers may purchase and own fully upgradeable devices that will allow them to receive new and innovative interactive cable services now and in the future.

Cooperation and open communication between cable and CE has never been better – cable and CE are holding regular tru2way “summits” to brief each other on the progress of deployments, stay abreast of new developments and coordinate solutions to bugs that develop in the implementation process. CableLabs processes have also been improved.

#### **B. Retail Devices**

Retail plug and play devices vary widely. Some of them replicate OEM set-top boxes and DVRs. Some of them replicate set-top navigation, VOD and program guides inside a DTV. Others contain all of that functionality in a “set-back” unit that slips behind a flat screen TV. Some of them translate cable programming for direct connection to a personal computer. Under the Two-Way MOU, CE manufacturers may integrate “cable” portion into a multifunction device, such as a gaming station; add its own user interface; combine cable programming with content from other sources, including the Internet; or otherwise differentiate their products. Cable operators will even pass along guide data carried nationally in broadcast feeds (*e.g.*, from Gemstar) to retail CE devices if the cable operator has the necessary carriage agreement and the

manufacturer has the necessary IP license from the guide data provider, so that a “tru2way” retail device may have two competing guides from which consumers may choose.<sup>59</sup>

The Notice seeks comment on the continuing effect of the integration ban. The integration ban has led to perverse results: in order to insure the “common reliance” operation of 420,000 CableCARD-enabled retail devices, the cable industry has deployed more than 12,350,000 operator-supplied set-top boxes with CableCARDS.<sup>60</sup> The requirement does not make sense, especially because consumer electronics companies are not obligated to deploy CableCARD devices. Under the current rule, “common reliance” is not required of both sides. By contrast, the two-way agreement defines reasonable “common reliance” to require that 20% of the MSOs’ new, interactive set-top boxes will use tru2way until there are – in the aggregate – 10 million such STBs in the marketplace.

### **C. Non-CableCARD technology**

The Commission has inquired about various developments in security outside of CableCARDS. Development efforts in “downloadable” security proceeded in various forums, in and outside of the cable industry. Cable has worked closely with key vendors and with specific retail manufacturers in this area. We understand that the same is true for the “K-LAD” system under development by Cablevision, which makes use of a key ladder that is already widely available in video-decoder semiconductors offered commercially by ten manufacturers (including Broadcom, STMicroelectronics and Conexant), offering over 60 models of chips to

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<sup>59</sup> Applicable licensing agreements affirmatively encourage this innovation. To our knowledge, no subscriber agreement or AUP restricts innovation, although they may include standard terms prohibiting such activities as unauthorized cable hook-up (theft of service), fraud, and transmission of viruses.

<sup>60</sup> All CableCARD manufacturers have CableLabs Qualified Multistream CableCARDS that exist in various configurations: Cisco, CCAD (Motorola), Cisco/NDS and Corecross/NDS. CableLabs has provided testing of UDPCPs for conformance to the M-Card interface test suite since January of 2007. Devices from TiVo and other manufacturers have been verified under this test program. Tru2way host devices also make use of the M-Card interface. Major cable operators have been deploying M-Cards since 2007.

manufacturers of DTVs, set-top boxes, and personal computers for video decoding, digital media, and “system-on-a-chip” operations. The FCC should continue to provide running room for innovation and investment like this, whether the experiment is spearheaded by cable operators, CableLabs, ATIS, or Microsoft Media Room.

We share the interest expressed by the Commission in a portable an “all-provider” plug-and-play solution. NCTA and traditional cable operators spent more than a year, from 2007-2008, advocating a solution that uses a standard network interface that is platform agnostic. Unfortunately, AT&T, Verizon, and satellite all declined cable’s invitation, and cable proceeded with its plan to negotiate and conclude the Two-Way MOU. When we announced the MOU in June, 2008, we specifically renewed the invitation to collaborate on a voluntary all-provider solution. But the Commission should be cautious in trying to prescribe a specific technical solution. Part of what makes a robust competitive market is the ability of each multichannel video program distributor (MVPD) platform to design, deploy, and utilize the network and premises technologies of its choice. Today, CableCARDs are not portable from cable to DirecTV or U-Verse, but CableCARD TVs can be used with all platforms. Tomorrow, an “all-MVPD” solution may be as straightforward as a small set-back box (as ADB supplies for a Sony DTV) that can vary by platform.

#### **D. Home networking and Content Protection**

The cable industry continues to work cooperatively with the content provider community and the CE community to assure consumers' ability to record and network broadcast and subscription programming, in digital formats, for personal use. Working in cooperation with studios and the Digital Transmission Licensing Administrator (DTLA), CableLabs approved

DTCP-IP technology for protection of cable content including two-way video-on-demand.<sup>61</sup> Such approval processes are used in many technology regimes,<sup>62</sup> and involve careful balancing of content providers, manufacturers, and consumer interests. In the case of DTCP-IP approval, the licensor of DTCP-IP created a new Operator Participant Agreement that provides MVPDs with participation in the DTLA change management process. In the case of tru2way, CableLabs now provides that new “two-way” content protection technologies may be approved automatically if four studios approve; and CE can appeal an adverse CableLabs decision content protection technologies to the FCC.<sup>63</sup>

While rights protection technologies are in wide use, many of them have limitations which have prevented content providers from releasing high-value early release content to their protection. For example, several regimes still provide that a “protected” motion picture can leak out the back end of the protection regime through high-definition component analog outputs, with no protection around them. While other non-MVPD distribution platforms can carefully choose which titles in a library will be offered, which protections will apply, how to plug such leaks out the back end, and how to offer high-value motion pictures for display only, an FCC regulation has precluded such early release offerings on cable. As NCTA has previously

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<sup>61</sup> DTCP-IP joins a long list of approved content protection technologies, including HDCP (for HDMI), DTCP (for 1394), Microsoft Windows Media Digital Rights Management (WMDRM), Real Helix DRM, IP Rights Management (IPRM), Macrovision, CGMS-A, and recording technologies VCPS, CPDO, and others than can provide at least the level of protection of 128 bit Advanced Encryption Standard or 112-bit Triple DES Encryption Algorithm.

<sup>62</sup> Examples include the DVD Copy Control Association on DVD players, AACS for high definition optical discs, Association of Radio Industries and Businesses (ARIB) in Japan, Digital Living Network Alliance (DLNA) for networked devices, and the Content Management License Administrator (CMLA) trust model for the Open Mobile Alliance Digital Rights Management for handsets and PC laptops.

<sup>63</sup> CableLabs and/or individual cable operators are also participants in many inter-industry forums where home networking technologies are being developed, including DLNA, UPnP™ Forum, and Multimedia over Coax Alliance (MOCA). Other home networking solutions are also under development in forums such as through the Digital Entertainment Content Ecosystem (DECE), a new concept in which consumers may have content from many sources stored in a personal “rights locker” and forwarded to their devices that use different security technologies but can be served from a wide variety of distribution platforms.

suggested, a pending request by MPAA for a limited waiver would resolve this log jam, and allow studios and MVPDs to negotiate the delivery of early release motion pictures for MVPD delivery to the home. If the MPAA Petition were granted, consumers could have the ability to order movies that are recently released in theaters for viewing over cable and other MVPDs from the comfort of their homes. Consumers would no longer need to wait for the DVD release, or release to pay-per-view, subscription television, or television broadcast services which today are normally delayed by many months or longer after theatrical release. It is time to lift the restriction so that consumers can benefit from access to more highly attractive programming for home viewing.

## CONCLUSION

As the Commission evaluates the state of video competition in its Fourteenth Annual Report, it is inescapable that competition is driving the continual transformation and reshaping of the video programming distribution industry. In an intensely competitive video marketplace, where companies are seeking to keep pace and meet consumer demands, the Commission should support policies that promote the ability of all providers to fully utilize new technological advancements. This means policies that support cable's ongoing migration of channels to a digital platform and the deployment of new, switched digital technologies. It also means policies that resist placing new demands and constraints on bandwidth use that are at odds with what consumers want: faster broadband, more high-definition content, and the deployment of new innovative and interactive services that take advantage of cable's two-way plant.

Respectfully submitted,

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