

The Failure of Cable Deregulation


A Blueprint For Creating A Competitive, Pro-Consumer Cable Television Marketplace

U.S. Public Interest Research Group

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Pro-Consumer Cable Television Marketplace

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Photo descriptions: From top left: (1) Early coaxial cable for television (1938); (2) Comparing new wider angle picture tube, allowing television set to be less bulky, to older model (1957); (3) Demonstrating conversion of television signal for, (4) playback on tape (1960).

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The Telecommunications Act of 1996 restructured the entire telecommunications industry and left virtually all cable subscribers without protection from unrestricted rate hikes. Since the Act was signed into law, cable rates have skyrocketed; service levels have declined; cable concentration has heavily increased; vertical integration between critical programming developers and cable distributors has gone unabated; wireline cable competitors have faced enormous obstacles going head-to-head with cable incumbents; incumbent cable operators have effectively exploited statutory loopholes in order to deny vital programming content to emerging competitors; and the cable industry now also dominates the broadband residential high-speed Internet market.

Cable Rate Hikes Persist

Since enactment of the 1996 Act that deregulated cable rates, consumer cable prices have been rising at three times the rate of inflation and even faster for basic and expanded basic service, which is the choice of the overwhelming majority of cable subscribers. These rates have risen by more than *50 percent*.

Individual markets have suffered much larger increases. For example, New York consumers have been particularly hard hit. In the few years since enactment of the 1996 Act, New York City cable subscribers have seen their bills for the most popular programming tier soar. Cablevision customers in New York City have experienced a cumulative increase of 93.7 percent – nearly doubling monthly bills. Even on the “low” end, Staten Island Cable customers have seen their bills rise 52.5 percent.

Cable price increases have been restrained by competition only when a wireline competitor, often referred to as an overbuilder, enters a market to challenge the incumbent. Where such overbuilder competition exists, the effect is dramatic: The General Accounting Office (GAO) reports that cable rates are 17 percent lower where there is an overbuilder in a franchise area. By contrast, national competition from satellite providers – notwithstanding their increasing market share – has not resulted in lower cable rates.

Although cable operators argue that they face serious competition from the nation’s two Direct Broadcast Satellite (DBS) providers, data compiled by the Federal Communications Commission (FCC) also confirm that DBS, while growing in subscribers, appeals primarily to limited subsets of consumers, and is unable to restrain cable’s prices charged to consumers at large. Wireline competitors have proven effective at forcing cable operators to restrain their prices, but these competitors have entered only a very limited number of markets, due in large part to cable’s concerted anti-competitive efforts to keep them at bay.

With near universality, cable operators have blamed their skyrocketing rates on increases in their programming costs, despite the fact that the principal cable operators receive the most favorable pricing from programmers *vis-à-vis* overbuilders and satellite providers. Most importantly, augmented advertising revenues and revenues from new services more than cover any programming cost increases. Moreover, 40 percent of the top cable channels – which command the highest prices – are owned in whole or in part by cable operators themselves or by companies with large ownership interests in cable operators.

According to FCC data, price increases have occurred even on a per-channel basis, which proves that cable's "more channels" argument is simply wrong. The cable industry's "better programming" argument is equally implausible. A number of major cable operators have clearly pushed things in exactly the opposite direction by moving very popular channels off the lower tiers of service and on to the higher tiers, extending the cable strategy of bundling services to "drive consumers to buy bigger and bigger packages of programs at higher prices."

One way to raise prices is to do so directly; another way is to allow service quality to deteriorate. Cable companies have done both. When it comes to customer service, the cable industry has one of the worst track records of any service industry in the country. The latest American Customer Satisfaction Index – an annual survey by one of the nation's leading business schools – found that some of the largest cable companies "*now rank among the worst rated businesses in the history of the ACSI*."

In reality, ever-escalating consumer rates have flowed profitably to the cable industry's bottom line. The industry-wide operating margin is anticipated to be nearly $19 billion for 2002, up nearly 60 percent from 1997. And operating revenues per subscriber have commensurately jumped to $273 per year in 2002 from $190 in 1996. For the industry's largest player, Comcast, this has meant a nearly 36 percent increase in operating cash flow (to $1.597 billion) and operating cash flow margins – "profits" to most people – have reached 36.5 percent in the second quarter of 2003 despite a stagnant national economy and a depressed communications market.

The Cable Monopoly Continues

One reason for all the rate hikes that *is* supported by the facts is the rapid consolidation of the cable industry. These unabated rate increases reflect cable's enduring dominance in the multichannel video programming market. The FCC's most recent video competition report found that cable continues to corner the consumer market, controlling more than *three-quarters* of all subscribers to multichannel video services. The number of cable subscribers has increased in each of the last 25 years and now stands at approximately *72 million* – more than three and one-half times as many as cable's closest rival, DBS.

The 10 largest cable operators serve about *85 percent* of all cable subscribers. And the three largest cable operators – Comcast, Time Warner and Charter – together serve approximately 56 percent of all cable subscribers, up from 48 percent in 1996. Consolidation in the cable industry has been justified on the grounds that bigger companies would operate more efficiently and incur lower costs, which would translate into lower rates.

However, industry consolidation has not led to cost savings for consumers. Comparing rates across small and large cable systems, the FCC expected "to find lower average monthly rates due to increasing economies of scale." But it found just the opposite – the larger the cable company and the greater the dominance of a region through clustering of systems, the higher its rates.

DBS is widespread, has attracted millions of subscribers and may hold future promise to be a more serious competitor to cable. As the FCC's data show, however, DBS is not providing effective competition to cable in the most important segments of the market. Rather, even in areas where DBS has achieved significant penetration, "there is no measurable effect on . . . the price of cable service." Even the cable industry's own economic experts have acknowledged that "[t]he demand for cable is rather insensitive to . . . the DBS price," which "indicate[s] that DBS is not a particularly good substitute for cable in the minds of consumers." Indeed, cable prices have continued to rise steadily over the last decade, even as DBS penetration has risen and its prices have fallen.

This failure of DBS to restrain cable prices also reflects the fact that DBS is popular primarily at two edges of the market – in rural areas where there is no cable service at all, and among the minority of consumers that are willing to pay stiff premiums to receive large numbers of sports channels. DBS also has serious shortcomings that limit its appeal to many cable subscribers. DBS cannot reach many urban customers who lack a direct line of sight to the southern sky, and dishes are often difficult to install in the multi-family dwelling units that house approximately 30 percent of the U.S. population. DBS is still not able to offer local broadcast channels in many markets. Surveys indicate that 47 percent of cable subscribers would not subscribe to satellite service for that reason alone. DBS is also unable to offer customers the same bundles as cable operators, including telephone services, and has been extremely slow in offering efficient two-way high-speed Internet access services. Making matters worse, as the major cable operators have completed their nationwide upgrades to digital facilities, DBS loses the quality advantage it previously could offer to lure high-end subscribers.

Thwarting Competition

Cable operators have the incentive and ability to thwart competition in several respects. As FCC reports show, "where permitted, vertically integrated programmers will use foreclosure of programming to provide a competitive edge to their affiliated cable operators." For example, they continue to deny competing video distributors access to terrestrially (land-based) delivered programming that they own and control, exploiting loopholes in a federal law originally designed to prohibit such anti-competitive conduct. Not only do they own 40 percent of the most popular programming, but of the top 26 channels in terms of subscriber and prime-time ratings, all but one (the Weather Channel) is affiliated with either a principal cable operator or a broadcast network and eighty-six percent of “must have” regional sports programming is also vertically integrated.

The cable incumbents refuse, or create obstacles, to carry a large amount of programming that is owned or controlled by their competitors. And these operators aggressively attempt to deny competitively vital *independent* programming to new market entrants through the use of programming contracts, cable-owned content distribution networks and exclusive agreements for equipment, software or other technology.

Cable’s emerging competitors are facing increasing difficulty in obtaining access to cable-owned programming. In New York, for example, Cablevision obtained control of seven of the nine local professional sports teams and still denied an overbuilder, RCN, access even to the overflow programming (games not featured on Cablevision’s Madison Square Garden network) when more than one of the seven teams is playing simultaneously. By contrast, Cablevision did give RCN access to the same sports channels for distribution in those parts of New Jersey where Cablevision is not the dominant provider of cable service.

The recent battle between Cablevision and the YES Network over carriage of Yankee baseball games in the New York metropolitan area is a glaring example of how large incumbent cable operators can and do exercise enormous leverage over new and competing content providers, to the detriment of consumers. Using the impetus of the recent Cablevision-YES dispute in New York, at least one cable incumbent is proposing that Congress allow it to coercively “re-tier” programming that it does not control, particularly sports programming. For example, such a proposal would prohibit programmers from negotiating the carriage of their programming on a specific tier. This proposal does nothing to advance consumer interests, will not reduce cable prices and only benefits cable operators in their bargaining with programmers. The incumbent cable company could favor affiliated programming by placing it on a “preferred tier” at the expense of competing programming.

Cable operators enter into agreements with unaffiliated programming providers with the effect of creating exclusive rights to deliver the programmer’s content. Cable operators are now adapting that practice to lucrative video-on-demand (VOD) services. A number of major cable operators have formed a consortium called iN DEMAND that obtains VOD content from the major Hollywood studios, as well as other attractive programming content (such as sporting events), which is then made available exclusively to the cable operators’ own subscribers. Cable operators are also denying potential competitors access to VOD content indirectly by forming exclusive agreements with equipment suppliers that expressly deny rivals the technology (equipment, software, etc.) necessary to deliver VOD programming.

Cable operators have successfully undermined the leased-access provision of the cable act. Federal law requires cable operators to set aside up to 15 percent of their channel capacity so that unaffiliated programmers may offer competing service packages to consumers. As Congress envisioned it, the purpose of this requirement “is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public.” Instead the FCC, with the support of the cable industry, has successfully undermined this mandate by adopting a pricing methodology that sanctions a per channel rate that no competing programmer could pay and still remain commercially viable.

Extending the Anticompetitive Model to the Internet

Cable operators now also dominate the broadband Internet market, comprising a huge new source of profits. Cable now has nearly twice as many subscribers as its nearest broadband competitor, DSL (digital subscriber line). Comcast, the largest cable operator in the nation, has become the largest provider of broadband services, adding 350,900 subscribers in the second quarter of 2003 for a total of approximately 4.4 million subscribers, with its revenue from these services increasing 56.6 percent (to $548 million) over second quarter 2002.

As the largest providers of broadband Internet service, cable operators have become a critical link in the public's ability to participate in the Internet's growing virtual "town square" of American discourse and civic activities. The danger that cable's reign poses to the diversity and democracy of the Internet is quite simple: Cable operators are not required to share their networks with competitive Internet service providers (ISP's). Independent ISP's will not be able to provide cable broadband Internet services because they will not have access to cable wires, unless cable operators open their wires and networks to competitors. They will either have to provide DSL reseller service from phone companies or attempt to negotiate access with a cable operator, which is at the discretion of such operators.

Cable operators have taken anti-competitive action to limit access to certain streaming video content to prevent or limit broadcast quality streaming video over their broadband Internet cable modem service as a means of blocking current and future competition for video content. This has created significant concern on behalf of many of the Internet's leading content providers and e-commerce websites. Some cable operators have also apparently opted to condition the carriage of a video channel upon the provider's agreement not to distribute the same content over the Internet at all.

THE SOLUTION: MOVE DECISION MAKING OUT OF WASHINGTON, GIVE CONSUMERS REAL CHOICES AND CREATE CONDITIONS THAT GIVE COMPETITION A CHANCE

Since its inception and growth throughout the second half of the 20th century, cable television service has brought an enormous amount of popular news and entertainment programming into the living rooms of America. The cable industry has used public rights of ways to access those homes and in turn made huge profits. This report makes clear that the cable industry has not lived up to its public and civic responsibilities as holders of valuable public franchises and licenses. Congress, the FCC, and state and local governments must examine the recommendations made in this report and take appropriate action to restore competition to the multichannel video market. Fortunately, the harmful effects of cable deregulation are not insurmountable. Consumers could still reap the benefits of the 1996 Act's pro-competitive intent through a new model. The building blocks of a truly pro-competitive model are as follows:

Congress must empower state public utility commissions (PUC) to regulate all cable rates and charges for video services until meaningful competition emerges. Congress should grant state public utility commissions the authority to regulate all cable rates and charges and to combat anti-competitive predatory-pricing business practices. With the 1996 Act's deregulation, rates for the cable programming tier to which the vast majority of consumers subscribe have inflated without restraint. Consumer rate protections at the state level are needed, but state PUC rate regulation is only necessary and desirable until robust competition that actually disciplines cable prices emerges.

Return authority to local communities. Preemptive provisions of the Act have thwarted attempts by local communities to protect cable subscribers from the worst of the industry's depredations. These preemptive provisions must be abolished so that policy control may be returned to community leaders who are closest to consumers and who are most committed to ensuring that their communities have access to multiple providers of competitively priced video services.

Introduce *à la carte* programming requirement to expand consumer choices. Consumers should be able to choose their own suite of programming, rather than being force-fed the programming tiers that cable operator want them to purchase. Consumers must be given the right to purchase every individual channel on an *á la carte* basis at fair, reasonable and nondiscriminatory prices.

Adopt reasonably priced leased-access rates. Cable operators have avoided their obligation to lease channel capacity to independent programmers by setting the prices so high that no competing provider could possibly pay current fees and remain commercially viable. In order to promote competition with diverse and independent programming, reasonably priced leased access must be adopted. This pro-competitive pricing should be based upon the FCC's existing rate-setting methodology, which was designed to promote competition in the telecommunications market.

Ensure consumer input with a public board member. A public member representing subscribers should be placed on the board of directors of any cable operator with a greater than four percent market share of cable households as a condition of franchise or FCC approval. Such a public member should have no current or prior affiliation with a cable, broadcast or DBS distributor or programmer, or any of their industry trade associations, and should be barred from joining such a board as a public member for five years after serving in any such affiliation. Public members should be selected by a committee of outside directors and approved by the shareholders. This would ensure better consumer input and assist in preventing insider dealing and financial mismanagement, as has occurred with some of the nation's leading cable operators.

Empower the viewers and citizens. Citizen-viewers should have a direct voice in the process of cable regulation and the opportunity to use that voice to create their own well-funded news and public affairs channels. When cities negotiate franchise agreements with cable companies, they should require that cable operators include billing inserts that invite consumers to join a local Cable Action Group that would operate a local Audience Channel, well-funded and equipped by the cable company. Such a group would serve a dual purpose: operating the local channel and organizing consumers into a mobilized interest group to advocate for pro-consumer and pro-democracy media policy. Alternatively, local or state governments could assist in fundraising for the Cable Action Group, by collecting membership dues through inserts in tax or license renewal mailings. Illinois Citizen Utility Board (CUB) is funded in this manner and represents the interests of Illinois gas, electric, phone and other utility ratepayers.

Ensure access to vital programming. Newly formed competitors cannot survive, let alone thrive, if cable operators are allowed to continue their anti-competitive practices of locking up must-have programming, such as sports and other regional channels. The existing federal program-access law must be modified to eliminate loopholes that have allowed the cable industry to continue these anti-competitive practices and undermine the emergence of wireline competitors. Additionally, cable operators should be prohibited from entering into exclusive contracts for equipment or other technical services that prevent competitor access to such programming.

Prohibit cable broadband content restrictions to allow consumers full use of the Internet. Cable operators have a long history of restricting consumer access to content that cable operators disfavor. With the cable industry's ongoing dominance of the broadband market, cable operators must be prohibited from restricting consumer access to Internet content based on the source or nature of the consumer's request.

HISTORY AND BACKGROUND

Cable television started in 1948 as a means of providing signals of local television stations to rural and mountainous areas that could not receive adequate reception of those signals through conventional over-the-air antennas.[1] It was known as Community Antenna Television, and it used large antennas to capture the signals of nearby television stations and then retransmit those signals to homes through coaxial cables owned by the cable operators.

Currently, cable operators must obtain a franchise from a local governmental authority, which permits them to run cables along specified public rights-of-way. The Copyright Revision Act of 1976[2] grants cable operators a permanent license that allows them to transmit over-the-air television signals through their cable systems. During the 1970s, however, satellite technology developments enabled video signals to be transmitted economically via satellites, leading to the development of new cable networks, such as HBO and CNN, designed to be distributed via satellite to cable systems throughout the country. While broadcast networks gain revenues largely through advertising, these cable networks are supported through advertising, fees paid by cable operators, and in the case of premium pay networks such as HBO and Showtime, by subscriber fees. The cable operator primarily receives three kinds of signals: (1) over-the-air broadcasts by local TV stations from TV towers in the area, (2) signals via satellite from cable networks and (3) terrestrial (land-based) microwave transmissions or delivery over fiber-optic cable. All of these signals are provided to subscribers through the cable system's wires.

In 1984, Congress adopted the Cable Communications Policy Act of 1984.[3] The act deregulated the rates that cable operators can charge to most consumers. It also standardized the procedure for franchise renewal that gave operators relatively certain renewal and capped franchise fees at 5 percent. In 1992, in response to escalating cable rates following the 1984 act, Congress did an about-face and regulated cable rates as part of the 1992 Cable Act.[4] This statute, passed over a presidential veto, established a benchmark above which cable rates will be deemed excessive. The FCC required that any rates deemed excessive were required to be lowered 17 percent or reduced to the FCC benchmark.

In 1996, Congress did another about-face. It passed the Telecommunications Act of 1996,[5] which deregulated rates for basic cable service (the least expensive tier that includes local over-the-air broadcasts) in areas with "effective competition." It is estimated that 11 percent of all cable subscribers subscribe only to basic cable service.[6] The Act allowed local franchise authorities to continue to regulate basic cable service, within the limits of FCC rules, where effective competition did not exist. This is true for the overwhelming number of cable franchises across the country. According to the FCC, it is estimated that only 2 percent of all cable households reside in areas with effective competition,[7] and only 1.1 percent of consumers subscribe to the services of an overbuilder.[8]

The Act also established March 31, 1999, as the date for an across-the-board end to federal price regulation of the cable programming service tier (enhanced basic), the tier chosen overwhelmingly by cable subscribers – whether or not there was competition in the area. In addition, under the 1996 Act, small cable operators are partially or wholly exempt from rate regulation. A "small cable operator" is defined to include any operator that serves fewer than 1 percent of all subscribers in the United States and that is not affiliated with entities that have gross annual revenues exceeding $250 million. In any franchise area where a small cable operator serves fewer than 50,000 subscribers, rate regulation does not apply to the operator's cable programming services tiers or to its basic tier if it was the only tier subject to regulation as of December 31, 1994. The 1996 Act also authorized phone companies to provide cable services for the first time[9] and established an "open video system" regime,[10] under which an operator can avoid some of the regulatory requirements applied to traditional cable operators in exchange for making a specified percentage of its channels available to unaffiliated video programmers.[11]

Congress passed the Satellite Home Viewer Improvement Act of 1999,[12] facilitating the ability of satellite video providers to beam local broadcast signals back to their home markets. This was important and helpful in the development of DBS. However, it has not led to decreases in cable rates.

The multichannel video distribution industry has evolved into three principal types of service providers, due in part to and certainly enabled by regulatory incentives and disincentives that favor the large incumbent cable operators. The three types of service providers are as follows:

1. MSO – The large incumbent cable operator, also known as a principal multiple system operator (MSO) or principal cable operator, operating cable systems in multiple localities. It usually has a high-capacity, bi-directional, highly interactive wireline network that supports multiple video products, as well as interactive TV, high-speed data, voice and other services. These companies dominate the multichannel video distribution industry.

2. Overbuilder – These are emerging *wireline* cable providers that build their own cable infrastructure over public rights-of-ways – hence *over*builders – in communities in order to compete with the established incumbent cable operator. It uses the same, or very similar, bi-directional interactive wireline network structure. They are the only competition to incumbent cable operators that has been found to impact price. However, overbuilders hold a very small percentage of the consumer market.

3. DBS – This is direct broadcast satellite. It has been most effective in reaching noncable-served customers in rural areas and enthusiast consumers (e.g., heavy sports users). This provider can compete on certain video products but is limited in its ability to compete for other products such as Internet and telephony supported on a wireline system. EchoStar is the "Dish" network; DIRECTV is the other major satellite network. DBS refers to both of these companies.

Today, several cable operators dominate the cable industry. They are Comcast, Time Warner Cable (part of AOL Time Warner), Charter, Cox Communications, Adelphia Communications, Cablevision, Advance/Newhouse, Mediacom Communications, Insight Communications and CableOne.[13] These companies control approximately 85 percent of all cable subscribers.[14] The largest three companies control 56 percent of all cable subscribers.[15] These companies never compete against one another. The National Cable and Telecommunications Association (NCTA) is the major trade association representing these companies. There are also hundreds of smaller noncompetitive cable operators. The American Cable Association, which represents the interests of owners of independent cable television businesses and smaller cable systems, has a membership of approximately 900 franchised cable businesses, ranging in size from several hundred thousand subscribers to fewer than 100.[16] Today, cable companies claim that about 97 percent of homes in the United States have access to a cable system, and approximately 66 percent of these households subscribe to a cable service.[17]

The only *wireline* cable franchisees to directly challenge and compete with the major incumbent cable operators are overbuilders. These companies account for approximately 1.3 percent of the cable subscribers nationally.[18] Overbuilder competition is the only competition associated with restraining price increases in cable rates. The two largest overbuilders are RCN (the 11th largest cable company) and WideOpenWest (the 13th largest cable company), serving 506,700 and 310,000 subscribers respectively.[19] Overall, the Broadband Service Provider Association (BSPA), the overbuilder trade association, reports that it serves more than one million subscribers, with franchises authorizing them to serve more than 17 million homes.[20]

Currently there are two major DBS companies competing with cable television – Hughes Electronics' DIRECTV and EchoStar's DISH Network.[21] Cablevision, the nation sixth largest cable operator,[22] has announced its intention to establish a competing DBS service in the fall of 2003.[23]

Since the small parabolic "dish" antennae was first marketed in 1994, home subscribership to DBS had grown markedly. Currently, DBS has more than 20 percent of overall multichannel video subscribers as compared to cable's 76.09 percent. DIRECTV has approximately 12 percent of overall video subscribers and EchoStar has more than 8 percent of overall subscribers.[24] Historically, this growth has occurred in rural areas or in areas not traditionally served by cable. Although DBS is marketing aggressively, DBS market penetration has unfortunately not led to price competition with cable.[25]

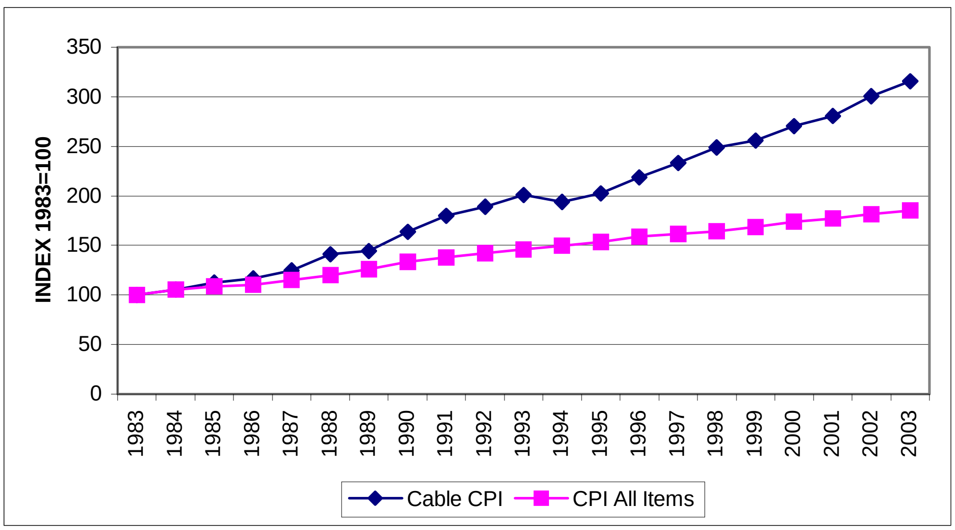
General Motors, owners of Hughes Electronics' DIRECTV, recently announced its intention to sell DIRECTV to Rupert Murdoch's News Corp., to be integrated into the Fox Entertainment Group.[26] Given Mr. Murdoch's and News Corp.'s close ties to the cable television industry, were this deal to go forward, it could significantly increase cable's programming dominance and diminish further DBS's ability to compete. EchoStar announced an agreement with SBC Communications, the nation's second largest local phone company, to offer DBS as part of a package of telecommunications services on a single bill.[27] If this bundling effort is successful and expands, it could enhance DBS competitiveness.

CABLE RATE HIKES CONTINUE

NATIONAL PRICE TRENDS

Congress deregulated cable rates in 1984 as part of broad legislation aimed at establishing a national policy for the rapidly growing cable industry.[28] Within a few years, a chorus of consumer complaints,[29] an FCC Study (1990)[30] and congressional surveys (in 1989, 1990 and 1991) all concluded that cable rates had increased considerably faster than inflation. *See* Figure 1.[31] Figure 1 shows the increase in the total package of services purchased by consumers. Average monthly rates for basic, enhanced and premium services increased by 55 to 60 percent between 1986 and 1991 – nearly three times faster than the Consumer Price Index (CPI).[32] Between 1986 and 1989 alone, the price of basic cable service rose 40 percent.[33]

Figure 1: Long Term View of Cable Price Increases



Source: *See* Figure Notes

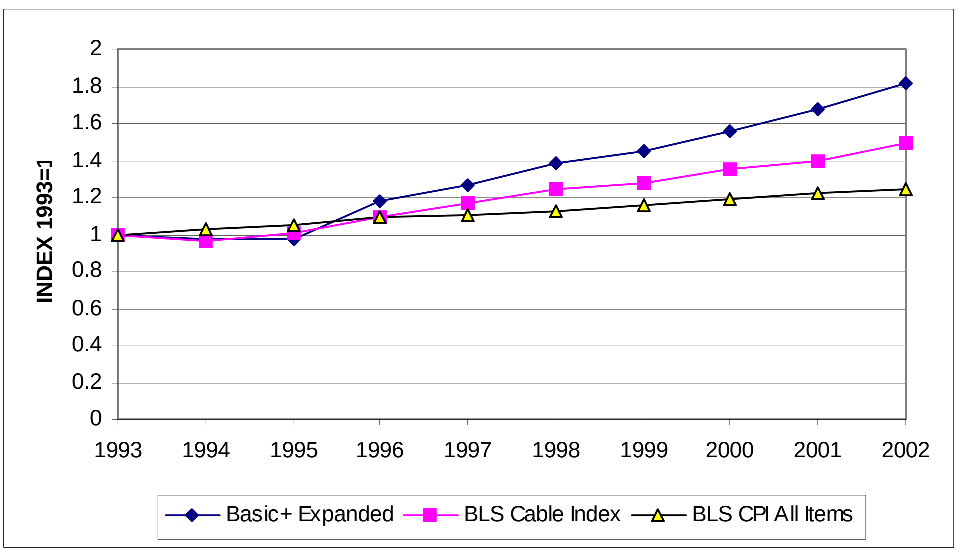
The 1992 Cable Act authorized the FCC to roll back cable rates that were too high.[34] The Commission established a benchmark; rates above the benchmark would be deemed excessive.[35] The FCC ordered cable operators to reduce their rates to the benchmark or to cut them by 17 percent.[36] The short period of rate relief resulting from the 1992 Act is evident in Figure 1 – the *brief* respite enjoyed by consumers during 1993-95.

On February 8, 1996, President Clinton signed the Telecommunications Act of 1996.[37] This bill restructured the entire telecommunications industry and left most cable television consumers without protection from unrestricted rate hikes. Since the 1996 Act was signed into law, cable rates have skyrocketed; industry concentration has heavily increased; vertical integration between critical programming and cable distributors has gone unabated; overbuilders have faced enormous obstacles going head to head with cable incumbents; and the cable industry has now begun to dominate the residential broadband high-speed Internet market.

The 1996 Act established March 31, 1999 as the date for an across-the-board end to federal price regulation of all service tiers above the basic tier, including the cable programming service tier (often called the "enhanced basic" package),[38] the tier chosen by the overwhelming majority of cable subscribers.[39] It also authorized the FCC to stop regulating the prices immediately for the few cable operators that could demonstrate that their "basic" service tier faced effective competition. Additionally the 1996 Act authorized phone companies to begin providing competing video services, although few have done so.

In 1992, Congress, concerned about rising cable rates, directed the FCC to publish an annual report on cable industry prices including to what extent competition is successfully restraining prices.[40] According to those FCC reports, cable rates for basic and expanded basic service have risen by 53 percent nationwide since 1996. *See* Figure 2. Backing out inflation, real rate increases have been nearly 35 percent since 1996.[41]

Figure 2: Details on Cable Rate Increases After the 1992 Act



Source: *See* Figure Notes

Not surprisingly, approximately two-thirds of the post-1996 Telecom Act increases occurred from 1999 to 2002, after the "cable programming services" tier was completely deregulated.

According to the FCC's most recent analysis – released in July 2003 – cable rates rose over 8 percent during the period from July 2001 to July 2002 — from $37.06 a month to over $40.[42] The FCC price report released the prior year examined the impact of wireline overbuilder competition on cable rates. The FCC found that cable offers a lower rate only when an overbuilder enters a market to challenge the incumbent.[43] That year, the FCC found cable service tiers are on average 6.3 percent lower in areas where incumbent operators face effective competition from overbuilders.[44] In its most recent report the FCC found that cable service tiers were on average 6.4 percent lower in areas where incumbent operators face effective competition from overbuilders.[45]

Even more drastically, an October 2002 report by the United States General Accounting Office (GAO) found that "the presence of a second cable franchise (known as an overbuilder) does appear to restrain cable prices. In franchise areas with a second cable provider, cable prices are approximately 17 percent lower than in comparable areas without a second cable provider."[46] These findings by the FCC and GAO confirm the importance of promoting wireline competition as the only documented means of restraining cable rates for consumers.[47]

The FCC and GAO reports do not take into account the most recent cable rate hikes. In what has become an "annual holiday tradition," the nation's major cable operators announced in December 2002 a new round of cable rate hikes, which took effect at the beginning of 2003.[48] The latest hikes are typically in the range of 5 to 8 percent,[49] and in some cases as high as 10 percent.[50] These hikes are well above historical averages. In fact, according to one trade press report, "[r]ate increases in 2001 were about 150 percent above the average increase since 1955."[51]

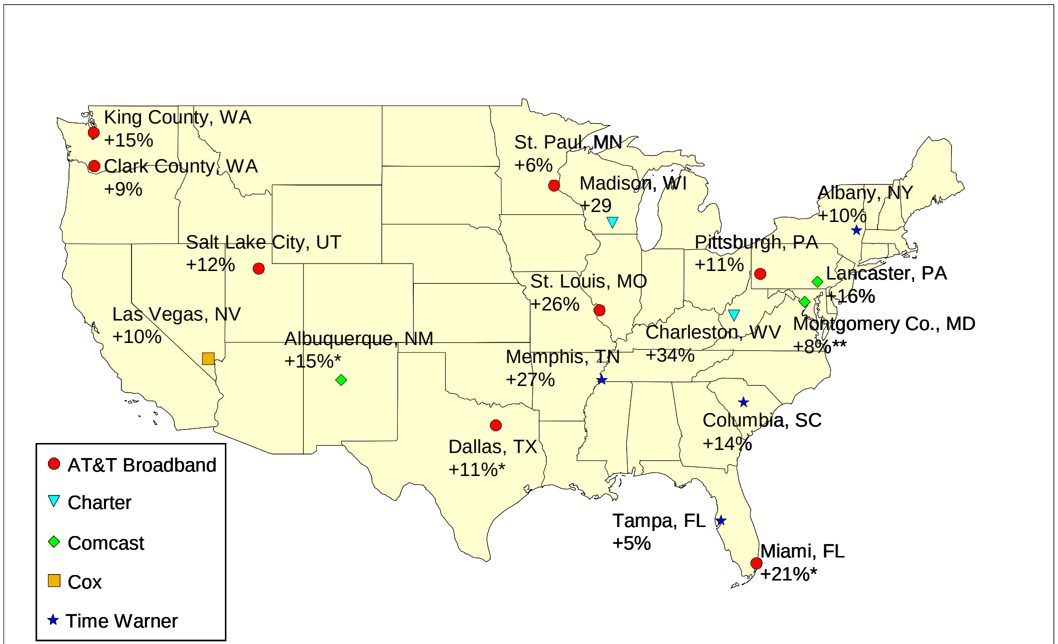
Consumer groups have reached the same conclusion as the FCC regarding cable rates. According to the Consumer Federation of America and Consumers Union, "cable operators moved aggressively to increase prices upon deregulation," and that "[t]heir behavior was consistent with the exercise of market power."[52]

Figure 2 suggests this exercise of market power in another way. The very large increase in basic and expanded basic prices reflects two factors: increases in the number of channels, and the ability of companies with pricing power to engage in price discrimination. Basic and expanded basic rates increase more rapidly because consumers are less able to reduce their demand.

MANY LOCAL PRICE INCREASES HAVE BEEN EVEN LARGER

Nationally, the Consumers Union says the cost of "expanded basic" service has jumped 45 percent since 1996. That's nearly triple the rate of inflation.[53] The Consumer Federation of America called the recent "holiday round of cable rate hikes" an "unwelcome gift to consumers" that "is part of a troubling trend that dates back to 1996," and proves that "cable deregulation is not benefiting consumers as promised."[54] A sampling of selected markets shows that cable rates have been rising across the country. *See* Figure 3.

Figure 3: Cable Rate Hikes: 1999-2002, Selected Markets



* Includes Converter Box, Remote, Taxes & Fees. ** Includes Franchise Fee.
Information on cable rates in specific markets has been taken from MSA Rate Cards or news articles and assumes expanded basic service. Rate increases have been normalized for inflation according to the Consumer Price Index for urban areas, U.S. Department of Labor Statistics. *See* U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Indexes, http://www.bls.gov/cpi. MSA-specific or region-specific CPI data have been used in all cases. AT&T Broadband and Comcast have merged, effective November 2002.

Sources: *See* Figure Notes.

New York consumers have been particularly hard hit by ever-escalating cable rate increases. For the most popular tier of cable programming – to which all but a handful of customers subscribe – New York City cable subscribers saw increases ranging from 93.7 percent for Cablevision customers to 52.5 percent for Staten Island Cable customers during the period since enactment of the Telecommunications Act of 1996. *See* Table 1.

Table 1. New York City Cable Rates

Cable Company	Rate in effect February 1996	Rate in effect February 2003	Nominal Rate Increase
Cablevision	$28.01	$54.24	93.65 percent
Staten Island Cable (Time Warner)	$30.34	$46.28	52.54 percent
Time Warner Manhattan North	$30.18	$46.77	54.97 percent
Time Warner Manhattan South	$30.18	$46.77	54.97 percent
Time Warner Brooklyn-Queens	$30.51	$47.17	54.61 percent

Rates are for the "cable programming tier" – the service tier to which a vast majority of cable customers subscribe.

Source: City of New York, Department of Information Technology and Telecommunications Office of Franchise Administration and Planning

As described in more detail below, these unabated rate increases reflect cable's enduring dominance in the multichannel video programming market. As one leading analyst succinctly noted, "[c]able is one of the few sectors of the broader market that has demonstrated *consistent pricing power* in recent years."[55] Indeed, the FCC's 2002 video competition report found that cable continues to corner the consumer market, being available to 97.6 percent of all TV households[56] and controlling more than *three-quarters* of all subscribers to multichannel video services.[57] As of June 2002, the number of cable subscribers has increased in each of the last 25 years, and, according to the FCC, stands at approximately *72 million* – over three and a half times as many as DBS, cable's closest rival.[58]

Ever escalating consumer rates have flowed profitably to the cable industry's bottom line. The industry-wide operating margin is anticipated to be nearly $19 billion for 2002. And operating revenues per subscriber have commensurately jumped to $273 per year in 2002, from $208 in 1997.[59] For the industry's largest player, Comcast, this has meant a 35.7 percent increase in operating cash flow (to $1.597 billion) and operating cash flow margins – "profits" to most people -- have reached 36.5 percent for the second quarter of 2003 despite a stagnant national economy and a depressed communications market.[60]

Many local regulators – who have been stripped of their authority to regulate rates for the programming tier to which the vast majority of consumers subscribe – have expressed outrage over recent cable rate hikes. Cable operators are often "the only game in town, so they can get away with it"[61] – there's nothing local regulators can do but sit back and "look forward to rate hikes and service cutbacks."[62] *See* Table 2. In response to Comcast's recent announcement of a 7.8 percent rate hike in Boston, the director of the city's cable TV office stated "[w]e're frustrated by this. . . These rate increases are a lot more than what the Bureau of Labor Statistics is saying the cost-of-living increase has been this year."[63]

Table 2. Local Regulators are Helpless and Outraged

Enterprise, AL	"I am extremely disappointed that Adelphia is raising cable rates at a time when corporate greed and owner misconduct have forced them to file bankruptcy . . . It gives the appearance of requiring Enterprise cable subscribers to pay for the transgressions of Adelphia owners." – Mayor Tim Alford
Los Angeles, CA	"We're disappointed that consumers have to pay for the financial problems at Adelphia [through rate increases]. . .We hope they reconsider their decision, and the mayor is going to continue to work to see if that can come about." – Deputy Mayor Matt Middlebrook
Oakland, CA	"Oakland already has higher rates and fewer channels than other Bay Area cities….[AT&T hasn't] done anything to justify the rate increase." – City Clerk Ceda Floyd
Simi Valley, CA	"This is an unconscionable way for Adelphia to enter our community, increasing rates over which we, as a city council, have no control and stripping our ability to protect our community's cable customers from escalating costs." – Mayor Bill Davis
Colorado Springs, CO	"It's a black hole . . . I would want us to be able to say we're monitoring it to the public." – Councilmember Jim Null regarding the lack of restrictions on cable rate increases
Jacksonville, FL	"When I picked up Saturday's paper, I was fried. Dumbfounded." – Mayor John Delaney on reading AT&T's full-page ad announcing higher prices
Jacksonville, FL	"I had worked hard . . .to build a bridge, to build a relationship, to try to solve the problem…We're [not] even asking for perfection. But you like to at least have good-faith effort, and we haven't been getting that." – Council President Matt Carlucci
Dubuque, IA	"Lo and behold [Mediacom] stopped paying their [franchise fees], then they turn around and raise their rates. It seems an odd logic." – Cable-franchise administrator Merrill Crawford
Boise, ID	"We've received more than a hundred calls in the last month, but there's not a lick we can do about it. . . This happens whenever the cable company makes changes or raises rates. But the city can't do anything about rates." – City budget director Alec Andrus
Sycamore City, IL	"I feel this is really an in-your-face reactive approach . . . It leaves a bad taste in our mouths, especially with the franchise agreement coming up within the next year, and we will remember this." – City Administrator Bill Nicklas on AT&T raising cable rates on short notice
Barnstable, MA	"The only option you've got is to find competition" (which Barnstable officials have not been able to do). – Chairman of the Cable Advisory Committee David Cole
Worcester, MA	"They're the only game in town so they can get away with it." – Councilor-at-large Michael C. Perotto, member of the Public Service and Transportation Committee
Montgomery County, MD	"We viewed the [AT&T/Comcast] transfer as a very unwise decision…We're going to be at great risk for the company failing, and it's not going to be good for residents along the way . . . We can look forward to rate hikes and service cutbacks." – Cable Communications Advisory Committee member Don Libes

Table 2. Local Regulators are Helpless and Outraged	
Montgomery County, MD	"I was extremely disappointed to learn that Comcast has decided to institute another rate increase, the second in nine months, especially following two successive years in which complaints to the County's Cable Office more than doubled and reached the highest level ever." – Councilmember Marilyn Praisner
Holland, MI	"I think it's arrogant of [AT&T] to pass this along just because they can...It simply is gouging an overpriced system." – Community Access Television Advisory Commissioner Carl Heideman
Sedalia, MO	"They [Charter] run the whole show, and we have nothing to say." - Councilmember Lawrence Roe
Gulfport, MS	"I didn't know anything about the rates going up until I opened my mail…They were at a City Council meeting two weeks ago, and they didn't mention anything about it at all . . . Most people think the city can do something about it. The truth is, our hands are tied." – Mayor Ken Combs
Cary, NC	"The rates are absolutely outrageous…Unfortunately, we have very little control over them at the local level." – Mayor Koka Booth
Akron, NY	"The deregulation of the cable industry has given us in rural areas a monopoly over which there is no control of the prices charged." – Mayor Michael Charles
Buffalo, NY	"As a result of deregulation, cable rates have risen astronomically, both locally and nationally. We don't have authority to approve or reject the increase. We do have a right to complain." – Common Council President James W. Pitts
Dallas, TX	"You come down here and rub our noses in this rate increase…Your service is lousy, but I really think your public relations is as lousy as your rate increase request." – Councilmember Donna Blumer to AT&T
Sources: *See* Table Notes. (AT&T purchased by Comcast Dec. 2002)	

Congress has begun to take notice again as well. Soon after the FCC released its rate survey in April 2002, Senator John McCain (R-Ariz.) requested that the GAO initiate another independent review of the basis for cable rate increases.[64] On May 6, 2003, Senator McCain, Chairman of the Committee on Commerce, Science & Transportation, held a hearing on "pricing and competition in the programming and distribution market." While the GAO's witness testified that work remains ongoing and that the agency's report would not be issued until October, he was unequivocal that the "FCC's 2002 survey does not provide a reliable source of information on the cost factors underlying cable rate increases."[65]

In other words, the FCC's finding that cable systems subject to wireline competition exhibit only a 6.3 percent "competitive differential" is suspect, particularly compared to GAO's findings that wireline competition keeps cable rates lower by an average of 17 percent.

Senator McCain has reacted with considerable concern to these cable price hikes: "[T]he FCC released its annual report on cable rate increases in which it has found that the cable industry raised its rates an astounding 8.2% during the 12-month period ending July 1, 2002. By comparison, the Consumer Price Index increased 1.5%. This means that cable rates increased an unbelievable 5½ times faster than inflation. The cable industry has risen to new heights in their apparent willingness and ability to gouge the American consumer. … These increases defy logic."[66] Indeed, while awaiting the GAO's anticipated report in September, the Senator says that "something is going to have to be done because apparently competition isn't working."[67]

CABLE PRICES AND PROGRAMMING QUALITY

That cable prices have risen sharply since 1996 is beyond dispute. The cable industry argues, however, that price increases have been justified by the provision of more channels and better quality programming,[68] and increases in their own programming costs from content providers such as ESPN.[69] This chapter examines each of these claims in turn.

ADDITIONAL CHANNELS DO NOT JUSTIFY CABLE'S RATE HIKES

The "more channels" argument is plainly wrong. The FCC analyzes prices on both a per-channel and a service-tier basis, and finds price increases both ways.[70] While the FCC has found per-channel price increases on a *national* basis, analysis of cable rate increases at the local level demonstrate the impact of rate hikes on consumers. In Denver, for example, AT&T's *per-channel* rates increased 6.9 percent in 2001; in Montgomery County, Maryland, they rose 5.6 percent. In 2001, Cablevision "le[d] the industry with its rate increases for basic cable service," even though at the time it was "the only major operator that has not yet launched digital video."[71] Industry analysts have concluded that, despite ongoing industry consolidation, "there was little reason to expect either a burst of new programming choices or any slackening in the fast pace of rate increases."[72]

Equally telling with regard to the "more channels" argument is the FCC's finding that, "[i]n areas where a wireline overbuild is present, cable subscribers receive more channels at lower prices . .".[73] Indeed, the FCC concludes that rates are 6.3 percent lower in the aggregate and 9.4 percent lower *per channel* in markets where a cable company faces competition from an overbuilder, not just from satellite.[74] "In those areas where a cable operator faces effective competition from an overbuilder . . . operators tend to offer more channels at a lower rate."[75]

Since 1999, when rates were officially and finally deregulated, prices have increased in each year-to-year comparison considered by the FCC's cable price reports.[76] The average annual increase for noncompetitive systems was about twice as large as the increase for competitive systems. This strongly reinforces the conclusion that the problem is lack of competition, not higher programming costs. The only other plausible explanation is that cable incumbents that do face competition are engaged in predatory pricing against challengers in the few markets where wireline challengers exist.

BETTER QUALITY PROGRAMMING DOES NOT JUSTIFY CABLE'S RATE HIKES

The "better programming" argument is equally implausible. To begin with, a number of major cable operators have clearly pushed things in exactly the opposite direction by moving very popular channels off the lower tiers of service and on to the higher tiers. The cable subscribers targeted with this migration strategy are abruptly informed that favorite channels (like HBO for *The Sopranos* or *Sex and the City*) have been removed entirely from the analog tiers of service and are now available only on the digital tier of service.[77] As the Consumer Federation/Consumers Union report concluded, the cable industry has used new bundling arrangements to "driv[e] consumers to buy bigger and bigger packages of programs at higher prices."[78] *See* Table 3.

Table 3. Cable Operators Move Popular Channels from Analog to Digital Tiers

Operator – System	Channels Moved to Digital Tier
AT&T – Oakland, CA	Premium channels
AT&T – Palo Alto, CA	Turner Classic Movies, Ovation, Independent Film Channel, Sundance Channel
AT&T – Richmond, VA	Sci-Fi Channel, Turner Classic Movies, Trinity Broadcasting, Fox Movie Channel
AT&T – San Carlos, CA	HBO, Showtime, Starz!
AT&T – Seattle, WA	Premium channels, including HBO, Cinemax and Showtime
Charter – Northern Nevada	All premium movie channels, including HBO, Cinemax and Showtime
Charter – Salamanca, NY	Premium channels, including HBO, Cinemax and Showtime
Cox – Fairfax, VA	BET on Jazz, CNNfn/CNN International, ESPNews, Fox Sports World, HBO Family, HBO 2, HBO Signature, More Max, Ovation, Showtime 2, Tech TV, The Golf Channel
Insight – Springfield, IL	Sci-Fi Channel, Court TV, Turner Classic Movies
Time Warner – Memphis, TN	Premium channels, including HBO, Cinemax and Showtime
Time Warner – Milwaukee, WI	HBO Plus
Sources: *See* Table Notes. (AT&T purchased by Comcast Dec. 2002)	

As discussed above, the Bureau of Labor Statistics, which tracks cable rates in parallel with the FCC, adjusts prices for both the number *and the quality* of channels offered – and it too has consistently concluded that cable prices have been rising faster than inflation.[79]

While popular programming is being moved to the digital tier, this tier is expensive. Access to the digital tier costs an extra $15 per month[80] including service and the set top converter. These prices have been rising at about 5 percent per year since 1999.[81]

HIGHER PROGRAMMING COSTS DO NOT JUSTIFY CABLE'S RATE HIKES

Cable industry claims of increasing costs of their programming inputs – particularly Disney-owned ESPN – cannot justify their ever-increasing consumer rates. As FCC Commissioner Adelstein explained in his concurrence to the 2002 report on cable industry prices released in July of 2003, the cable industry's justification is suspect on its face: "[F]or this year's Report, cable operators attributed an average of 65.8 percent of their rate increases to programming costs, yet the Commission has not conducted even minimal audits to ensure the accuracy of this information. In rough calculations using this figure, if programming costs comprise about 30 percent of total costs, and rates went up an average of 8.2 percent, this would imply that all programming costs went up an average of 17.9 percent, which appears to be an unusually high increase."[82]

If rising programming costs are having an effect on cable rates, they have yet to harm cable's bottom line. To the contrary, "[o]perating margins have been increasing dramatically since 1997," during the same period that programming costs supposedly rose the most.[83]

In 2002, the operating margin for the cable industry was nearly $19 billion, up nearly 60 percent from 1997.[84] Operating revenues per subscriber have increased by more than 30 percent during that same period.[85] Cable companies' costs for digital programming are still nearly 25 percent lower than what DBS pays.[86]

In reality, augmented advertising revenues and revenues from new services are more than offsetting any programming cost increases that the major cable operators currently may be experiencing. Indeed, since 1996, increases in cable advertising revenues alone have far outpaced any programming cost increases – by more than $2.6 billion. *See* Table 4. And while the cable industry points specifically to ESPN programming cost increases, with the substantial penetration of ESPN and other sports programming services, sports advertising revenues have nearly doubled, from $231 million to $455 million.[87]

Table 4. Increased Revenues Outpace Costs	
Cable Advertising Revenues	**Programming Costs**
1996 $ 6.79 billion	1996 $ 5.66 billion
2002 14.71 billion	2002 10.99 billion
Source: *See* Table Notes.	

The industry's *positive* position is reflected in individual company results.[88] Comcast, which released its second quarter earnings report for 2003 and had large gains in its cable division, demonstrates that augmented advertising revenues and revenues from new services more than cover any programming cost increases. *Pro forma* Comcast revenue for the quarter ended June 30, 2003, was $5.685 billion, representing a 9.2 percent increase from the second quarter of 2002. Operating income rose to $611 million.[89]

For 2003, it is estimated that Comcast will generate in excess of $17.6 billion in cable revenues, reflecting a 9.8 percent growth, and approximately $6.3 billion in earnings before interest, taxes, depreciation and amortization (EBIDTA), or 40.8 percent growth.[90] Indeed, for the second quarter of 2003, Comcast had over 350,000 net additions to its cable modem subscriber base, with a total of nearly 4.4 million.[91] Additionally, Comcast announced it had added 56,900 new basic-service subscribers during the first quarter and 12,100 basic subscribers in the second quarter,[92] and was projecting as many as 100,000 new subscribers for 2003.[93] Comcast has well over 21 million cable subscribers, giving it approximately 30 percent of the nation's cable business. Of these, Comcast has a total of 6.787 million digital subscribers, reflecting 169,000 additions to these new and most profitable services.[94]

The $1 billion that Comcast earns in advertising revenue places it in the same league as the ABC and NBC networks, according to Comcast Communications president Steve Burke, and Comcast plans to be "the No. 1 source for local advertising."[95] Comcast may be well on its way to meeting this goal, having experienced an 8 percent growth in advertising revenue in the first quarter of 2003.[96] And Comcast intends to continue to fuel this growth with its foray into video-on-demand (VOD), which will reach 50 percent of Comcast's subscribers by year-end 2003 and 80 percent by year-end 2004. Burke says the VOD technology "is perfect for advertising."[97]

In reality, the principal cable operators – Comcast, AOL Time Warner, Charter, Cox, Adelphia, and Cablevision – receive the most favorable pricing from programmers *vis-à-vis* overbuilders and satellite providers.[98] The programming expenses for DBS operators are in the range of 37-40 percent of their monthly revenue while programming costs for the major cable operators are estimated to be 29 percent for basic programming and 28 percent for digital programming of monthly revenue.[99] Due to volume discounts and other concessions that the major cable operators are able to extract from programmers, even increases in programming costs benefit these incumbent operators from a competitive standpoint.

Cable companies have managed to thrive despite rising costs in part because they themselves own many of the channels carried on their systems.[100] As consumer groups have recently exposed: "Of the 26 top cable channels in subscribers' and prime time ratings, all but one of them (the Weather Channel) has ownership interest of either a cable operator or a broadcast network"[101] and "40 percent of the top channels . . . which command the highest prices, are owned in whole or in part by cable operators or companies that have large ownership stakes in cable companies."[102] Holding companies that own both cable systems and programming arms don't lose money when they boost cash flows from one subsidiary to another. *See* Table 5. Many of the cable networks are also supported by advertisers, thereby adding to – not subtracting from – the cable company's bottom line.[103] Thus, cable is using the classic tactic of moving revenues from one pocket to another.

Table 5. Cable Ownership of National Programming Networks			
Programming Network ***(Top 20 Rank)***	**Cable Operator Ownership (Interest)**	**Programming Network** ***(Top 20 Rank)***	**Cable Operator Ownership (Interest)**
Action Max	AOL Time Warner (100 percent)	HBO	AOL Time Warner (100 percent)
AMC *(19)*	Cablevision (60 percent)	HBO Latino	AOL Time Warner (100 percent)
Animal Planet	Cox (19.7 percent)	HBO 2	AOL Time Warner (100 percent)
@Max	AOL Time Warner (100 percent)	HBO Signature	AOL Time Warner (100 percent)
Cartoon Network	AOL Time Warner (100 percent)	HBO Comedy	AOL Time Warner (100 percent)
Cinemax	AOL Time Warner (100 percent)	HBO Family	AOL Time Warner (100 percent)
CNN *(6)*	AOL Time Warner (100 percent)	HBO Zone	AOL Time Warner (100 percent)
CNN En Español	AOL Time Warner (100 percent)	iN DEMAND	Comcast (55 percent), AOL Time Warner (33 percent), Cox (11 percent)
CNN Headline News	AOL Time Warner (100 percent)	Independent Film Channel	Cablevision (60 percent)
CNN International	AOL Time Warner (100 percent)	MoreMAX	AOL Time Warner (100 percent)
CNNfn	AOL Time Warner (100 percent)	Much Music USA	Cablevision (75 percent)
Comedy Central	AOL Time Warner (50 percent)	Outdoor Life Network	Comcast (100 percent)
Court TV	AOL Time Warner (50 percent)	OuterMax	AOL Time Warner (100 percent)
Discovery Channel *(4)*	Cox (24.6 percent)	Ovation: The Arts Network	AOL Time Warner (4.2 percent)
Discovery Civilization	Cox (12.3 percent)	Product Info. Network (PIN)	Cox (45 percent)
Discovery En Español	Cox (24.6 percent)	QVC *(13)*	Comcast (57 percent) (however, sale of stake to Liberty Media Corp. pending.)
Discovery Health	Cox (24.6 percent), Comcast (20 percent)	Style	Comcast (50 percent)
Discovery HD Theatre	Cox (24.6 percent), Comcast (20 percent)	TBS *(1)*	AOL Time Warner (100 percent)
Discovery Home & Leisure	Cox (24.6 percent)	TLC *(16)*	Cox (24.6 percent)
Discovery Kids	Cox (24.6 percent)	Thriller Max	AOL Time Warner (100 percent)
Discovery Science	Cox (24.6 percent)	TNT *(6)*	AOL Time Warner (100 percent)
Discovery Wings	Cox (24.6 percent)	Travel Channel	Cox (24.6 percent)
E! Entertainment	Comcast (50 percent)	Turner Classic Movies	AOL Time Warner (100 percent)

Table 5. Cable Ownership of National Programming Networks			
Programming Network *(Top 20 Rank)*	**Cable Operator Ownership (Interest)**	**Programming Network *(Top 20 Rank)***	**Cable Operator Ownership (Interest)**
5StarMax	AOL Time Warner (100 percent)	Viewers Choice 1-10 and Hot Choice (11 multiplexed channels)	Cox (20 percent), AOL Time Warner (17 percent)
Fox Sports Net (2 channels)	Cablevision (50 percent)	WE	Cablevision (60 percent)
G4 Video Gaming Network	Comcast (94 percent)	WMAX	AOL Time Warner (100 percent)
Golf Channel	Comcast (91 percent)		
Sources: NCTA, *Top 20 Cable* Networks, http://www.ncta.com/industry_overview/top20networks.cfm?indOverviewID=59 (accessed on Aug. 8, 2003) (top 20 networks as of Feb. 28, 2003); *Ninth Video Competition Report*, App. C at Table C-1 (ownership data).			

CABLE PRICES AND SERVICE QUALITY

One way to raise prices is to do so directly; another way is to allow service quality to deteriorate. Cable operators have done both. When it comes to customer service, the cable industry has one of the most criticized track records of any service industry in the country.

Although Congress set out to deregulate the cable industry in 1984, it was persuaded by cable's history of poor customer service to preserve the right of local franchise authorities to require, as part of a franchise, provisions for the enforcement of customer service requirements.

By 1992, however, Congress found that poor customer service in the cable industry was as prevalent as ever. "[C]able operators frequently break installation and repair appointments, subject customers to frequent service interruptions, fail to answer customer calls or place customers on hold for extended periods, and ignore or are slow to respond to customer billing inquiries."[104]

A Consumer Reports survey at that time found that "consumers are less satisfied with their local cable system than with any other type of service Consumer Reports has rated."[105] Congress accordingly concluded that leaving cable customer service up to local authorities was not sufficient. It directed the FCC to establish new federal customer service standards that local authorities could enforce.[106] The new standards were to include, at a minimum, requirements governing cable systems' office hours and telephone availability; installations, outages and service calls; and communications between cable companies and subscribers, including standards governing bills and refunds.[107] Although Congress decided to deregulate cable rates in 1996, it left these service-quality provisions in place.

Despite these regulatory efforts, cable's customer service remains abysmal. The May 2002 American Customer Satisfaction Index (ACSI) – an annual survey by the University of Michigan Business School – found that three of the then nation's largest cable companies –

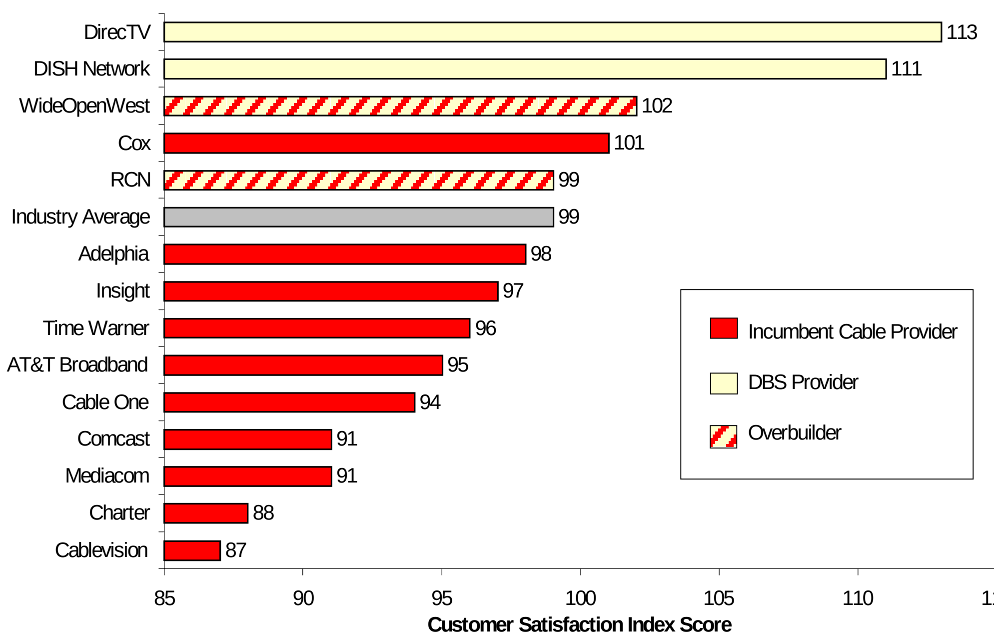
AT&T Broadband, Comcast and Charter – "now rank among the worst rated businesses in the history of the ACSI."[108]

The May 2003 ACSI report confirmed this trend, stating:

> The customer satisfaction scores for Cable TV remain dismal. No other industry in the ACSI has lower scores. Comcast (down 2%) and Charter Communications (up 4%) both score 55, which is lower than the Internal Revenue Service. That doesn't mean that people enjoy paying taxes more than they do watching cable TV, but in the context of what these organizations do, the former offers more satisfactory assistance than the latter. Obviously, the nature of the "product" colors the experience, which is why it is all that more remarkable for any company to have such low levels of customer satisfaction. In most competitive situations, such scores are not sustainable: Either the firms improve or they are forced out of business. Things appear to be different in the cable TV industry. Whereas many industries lack pricing power today, this is not the case for Cable TV. Prices have gone up more than in just about any other sector in the economy. Price hikes in the absence of satisfied customers are possible only if consumer choice is restricted.[109]

A recent study by J.D. Power and Associates found that incumbent cable companies consistently score below overbuilders and DBS providers in customer satisfaction.[110] *See* Figure 4. Other independent studies have reached similar conclusions.[111] And cable operators themselves have acknowledged that "[f]rom a customer care perspective, we weren't doing a really good job,"[112] that they are "embarrassed about the service problems"[113] and have "dropped the ball on some issues."[114]

Figure 4: J.D. Power 2002 Cable/Satellite TV Customer Satisfaction Study



Source: J.D. Power and Associates News Release, *J.D. Power and Associates Reports: Satellite TV Grows in Consumer Popularity, Cable Servic* *Sees Slight Decline* (Sept. 5, 2002).

While local regulators retain some limited authority to monitor cable's customer service, getting cable to live up to its obligations has proven extremely difficult. Local regulators throughout the country continue to express frustration over the large and increasing numbers of consumer complaints they receive. *See* Table 6. In Los Angeles, for example, formal consumer complaints about cable service increased 117 percent in 2001, "an escalating trend that city regulators expect to continue, according to a preliminary report from the city."[115]

Table 6. Local Regulators are Plagued by Cable Complaints

Los Angeles, CA	Complaints from AT&T Broadband customers have risen over the last three years . . . Many of the calls related to lapses in cable connections and lengthy delays in talking to a customer service agent . . . AT&T has been given three months to improve service for its 20,000 subscribers or risk a $100 daily fine. – Los Angeles Telecommunications Manager Gerald Verwolf
Los Angeles, CA	"Whenever there's a change, we get a flood of calls for both information and formal complaints." – Telecommunications Regulatory Officer Stacy Burnette on cable upgrades, high-speed data offerings and consolidation
San Francisco, CA	"Generally, customer service has gone downhill under AT&T . . . It has been really hard to get through to a human being." – Dept. of Telecommunications and Information Services Deputy Director Denise Brady
Boca Raton, FL	There have been complaints about poor customer service and property damage done by cable installers. Those complaints don't count service problems that were reported directly to the cable company. – Boca spokesperson Constance Scott
Port St. Lucie, FL	"That [fine] was for [previous service] outages . . . Now it's mushroomed into a different problem. Now it's much larger than that . . . My biggest concern is their response to the customers . . . It's totally unacceptable." – Councilmember Jack Kelly
Port St. Lucie, FL	"Adelphia has violated the city's noise and litter laws and failed to provide adequate insurance." – Deputy City Manager Victor Granello
Chicago, IL	"They just make an attempt here and an attempt there" (with no real improvement). – Trustee Lloyd Baker on AT&T's answering of customer service calls
Amherst, MA	"The level of frustration we experience comes, I think, from a large corporation that seems inaccessible to customers." – Director of Administration and Finance Nancy Maglione on AT&T's poor customer service, lack of responsiveness and rate increases
Lakeville, MA	AT&T is "definitely below standard . . . It takes an average call well over half a minute to reach a live person. They have the rights under deregulation laws to change their rates and their channels, but we can attack them on their poor customer service." – Selectman Chawner Hurd
Sudbury, MA	"As a committee, we still feel that AT&T could improve their customer service, and the sense that we have is that the local people felt that way as well." – Cable Committee Chair Jeff Winston
Dearborn Heights, MI	"People are frustrated. They still call and complain, but they have to understand that we have almost no control over anything that affects the basic customer." – Dearborn Heights Assistant Corporate Attorney Kurt Heise on consumer complaints concerning cable customer service
Suffolk, VA	"They don't deliver basic cable service the way they're supposed to . . . It's time for Charter to go." – Councilmember Thomas Woodward Jr.
Sources: *See* Table Notes. (AT&T purchased by Comcast Dec. 2002)	

Many local authorities have begun to take action. Some have prescribed customer-service standards that are more stringent than those the FCC has prescribed.[116] Others have threatened fines unless service quality improves.[117] Still others have demanded moratoriums on rate increases.[118] Some have threatened to revoke or fail to renew the incumbent's franchise altogether.[119] And in at least one state, cable's practices have prompted a statewide investigation by the state attorney general.[120] But even these actions have done virtually nothing to reform the cable industry.

Cable's main defense of its poor customer-service quality has been to point to the large amounts of capital it has invested to upgrade its systems to provide new services – such as digital cable, cable modem service and cable telephony.[121]

The National Cable & Telecommunications Association (NCTA) estimates that the cable industry has invested more than $70 billion to provide consumers new services since passage of the 1996 Act through 2002.[122] While that may seem like a large amount at first glance, it is less compared to the amount that other segments of the communications industry have invested during the same period. Wireless companies, for example, have invested more than $80 billion since the 1996 Act through June 2002.[123]

Many local franchising authorities are indeed complaining that cable has not invested fast enough and is not fulfilling its promises to implement system upgrades. *See* Table 7. Increasingly, cable operators are opting to cut costs by slowing the build-out process, even when doing so puts them in breach of franchise agreements and other regulatory commitments and obligations. Local regulators are responding with stiff fines.[124] Some have demanded refunds for cash already paid to help fund upgrades.[125] Others have attempted to block national mergers (*e.g.*, AT&T/Comcast) on the grounds that a merged company would have even less financial commitment to completing upgrades already promised.[126]

In any event, upgrades in new services cannot logically be used to explain declining service quality for existing ones. The amount spent on cable upgrades pays for itself with the brand-new revenue streams they create. Cable companies have indeed admitted that they are recovering their upgrade expenses – and increasing their profits – with revenues from their new services.[127]

Table 7. Local Regulators Are Frustrated with Cable's Failure To Upgrade

Los Angeles, CA	Adelphia is under heavy criticism in Los Angeles for its failure to deliver promised system upgrades.
Monterey County, CA	The AT&T/Comcast merger was rejected for failure to complete upgrades AT&T promised to deliver when it was granted the franchise in 1998. AT&T Broadband has been fined.
Oakland, CA	$10 million in damages sought for AT&T's failure to wire some parts of the city for basic cable services. AT&T has stated that it may take a year or two to wire those residents, even though the original deadline was March 2001.
San Francisco, CA	AT&T started a five-year plan to upgrade networks throughout the region in 1998; AT&T's upgraded network passed only about 15 percent of homes through June 2002.
San Jose, CA	The city has threatened to award its franchise to a competitor if AT&T does not agree to upgrade the entire city for high-speed Internet access, which it has been extremely reluctant to do.
San Jose, CA	Numerous towns in the area (including Sonoma County, Santa Rosa, Rohnert Park and Calistoga) have filed a joint suit against AT&T for failure to upgrade its systems.

Table 7. Local Regulators Are Frustrated with Cable's Failure To Upgrade	
Vernon, CT	AT&T was to have completed its upgrades for town schools by May 2001 but instead asked for an 18-month extension. AT&T then ran out of money when only 25 percent of the upgrades had been completed.
Waterbury, CT	AT&T agreed, in its franchise agreement, to build out service to a total of 110 miles. By June 2001, it was to have been extended by 80 miles, but only 24 miles were completed. AT&T is seeking to alter the franchise agreement to upgrade instead of building out basic service.
De Kalb County, GA	AT&T Broadband failed to meet its upgrade schedule for De Kalb County, as well as providing poor service, and, as a result, the county denied AT&T's request to transfer control to AT&T Comcast.
Fayette County, GA	Began fining AT&T Broadband $700/day in Apr. 2001 for failure to complete upgrades, which were to have been completed by Nov. 2000.
Peachtree City, GA	AT&T was to have completed upgrades by Dec. 2001, but were pushed back to Mar. 2002. Customers have complained of hour-long waits to complain about poor reception and cable outages during the upgrades.
Clay County, FL	Recently increased the fines it can charge cable operators because there had been so many complaints about the quality of cable services, and AT&T and other companies have postponed system upgrades for years.
Fort Lauderdale, FL	Rejected a 10-year franchise agreement with AT&T because of poor customer service and disagreements over whether AT&T had promised to upgrade its systems there.
Martin County, FL	Adelphia has been accused of violating numerous provisions of its franchise agreement, including failing to upgrade systems on time and providing horrible customer service.
Miami, FL	Began fining AT&T $2000/day on Sept. 1, 2001 for failure to complete upgrades on time. AT&T estimated that the upgrade would be completed by Sept. 2002, at which time it would owe the city about $730,000 in fines.
Dupage, IL	AT&T was supposed to have completed upgrades two years ago but now states they will be completed by year end 2002.
Tri-Cities (Chicago), IL	AT&T has announced systems upgrades numerous times, but in each instance has backed away from its pledges. The cities are looking into creating their own cable company.
Boston, MA	AT&T failed to meet deadlines for upgrading systems set forth in its franchise agreement. A compromise was reached under which AT&T must complete upgrades by June 2003 or face fines of up to $1,000/day thereafter.
Boston, MA	Numerous towns in the Boston area (including Barnstable, Cambridge, New Bedford and Wellesley) denied AT&T's request to transfer control to AT&T Comcast because AT&T had failed to upgrade their systems and had provided poor customer service.
Gardner, MA	AT&T was to have completed its upgrades by Dec. 2001, but as of Sept. 2002, had not completed the project because it could not borrow the $6 million or $7 million because of the economy.
Massachusetts	AT&T has said that it cannot afford to upgrade the systems in 39 towns in Massachusetts that were acquired from Cablevision.
Newmarket, NH	MediaOne had promised to complete upgrades by June 2001, but those plans were shelved after the AT&T merger. AT&T has announced that it will complete the upgrade, but local officials are doubtful that this will actually happen any time soon.
Clifton, NJ	Cablevision has come under harsh criticism for taking too long to upgrade its systems.
Washington County, OR	AT&T was to have completed upgrades by year-end 2001 but could not and was given a six-month extension, after which, it will face a $100,000 fine plus $1,000/day in additional fines along with shortening of its franchise.
Pittsburgh, PA	AT&T Broadband admitted, in June 2002, that it could not complete the upgrades to the cable system by the end of June as promised. In fact, AT&T Broadband, in May 2002, only 25 percent of the upgrade had been completed. AT&T could face fines of $5,000/month until the upgrades are complete.
Fairfax County, VA	In July 2002, Fairfax County officials voted to fine Cox $2,000/day and up to $2 million more for failure to complete promised upgrades to the county cable system.
Suffolk, VA	Charter has reneged on commitments it made in its franchise agreement, leading the city to fine Charter $255,000 for various violations, including failure to upgrade. Sources: *See* Table Notes.

A NONCOMPETITIVE INDUSTRY STRUCTURE

ONLY WIRELINE COMPETITION RESULTS IN LOWER CABLE RATES

As discussed above, the only markets where cable prices have held steady, or simply not risen as fast, or in some cases fallen, are those in which cable operators face direct, *wireline* competition from overbuilders. The national statistics compiled by the FCC and summarized earlier do not fully convey the dramatic changes that have occurred in certain markets. *See* Table 8. In Dearborn, Michigan, for example, Comcast dropped prices from $33.95 to $21.95 per month for customers who expressed an interest in switching to WideOpenWest (WOW)[128] In Kansas City, Time Warner offered customers discounts as deep as 45 percent to forestall defections to Everest Connections.[129]

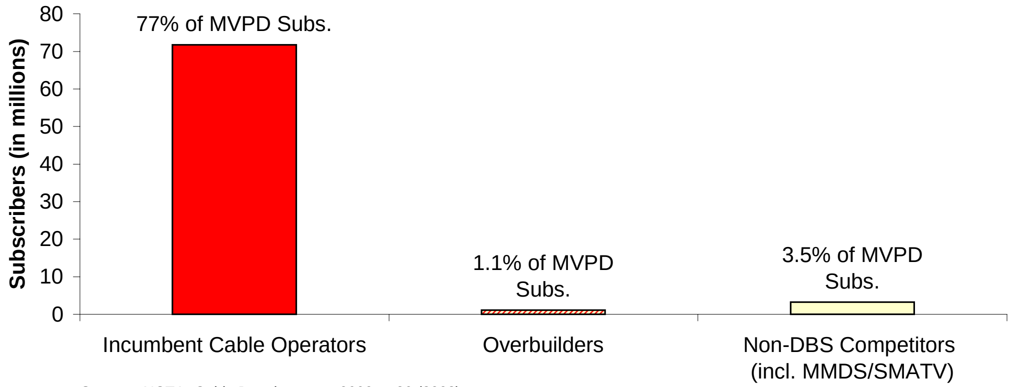
In some cases, cable's attempts to lower prices in response to overbuilders have been so blatant that, in September 2002, the Department of Justice confirmed that it is investigating an unnamed cable company for predatory pricing practices.[130] More recently, overbuilder WOW has filed a complaint with the FCC, alleging that Comcast is improperly targeting price reductions in the areas that WOW serves in Warren, Michigan.[131] According to WOW, Comcast is attempting to negotiate private rates with select subscribers that are so low that "they wouldn't be able to stay in business if everyone in the market got that deal."[132] The FCC is currently considering the complaint, and in the meantime, has put the cable industry "on notice" of its concerns.

In approving the AT&T/Comcast merger, the FCC found that cable operators "have the incentive and ability to target pricing in an anti-competitive manner," and that AT&T and Comcast "may well have engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition."[133] While the cable operators argued that the practice of targeting pricing decreases enhances competition, the FCC found that such practices would instead "keep prices artificially high for consumers who do not have overbuilders operating in their areas because of the overbuilder's inability to compete against an incumbent who uses such strategies."[134]

Table 8. Overbuilders Force Cable Incumbents To Reduce Prices Sharply	
Adelphia (Los Angeles, CA)	Offered “minute-by-minute” short-term rate cuts to dissuade customers from switching to overbuilder Altrio after Altrio entered the market in November 2001.
Charter (West Point, GA)	Engaged in “bare knuckled” pricing wars with Knology, an overbuilder, until expanded basic service was offered for approximately $20 – well below the national average. Charter’s discounting was limited to areas in which it faced competition from Knology; expanded basic service in noncompetitive areas ranged to more than $35 per month for expanded basic service. Charter offered a cash payment of $200 and free installation to Knology customers.
Charter (Scottsboro, AL)	Offers programming that costs Charter approximately $37 per month to Scottsboro customers for $20-$25 per month. Charter charges residents in nearby communities $72.90-$77.90 for the same services. Charter also offered Scottsboro Electric Power Board’s customers $200 to switch to Charter cable service and an additional $200 if they switched to Charter high-speed Internet service. (Scottsboro Electric Power Board operates a municipal cable system.)
Charter (Montgomery, AL)	Offered Knology customers $300 to switch to Charter, as well as a “digital complete basic” service – including expanded basic programming, 50 digital channels and digital music channels – for less than $23 per month. Forgave customers’ debt incurred with Charter and other cable providers.
Comcast (Montgomery County, MD)	Discreetly offered Starpower customers win-back promotions (*e.g.*, 64 movie channels for six months at no charge) and aggressively campaigned to keep potential Starpower customers.
Comcast (Washington, DC)	Distributed fliers to residents of MDUs served by Starpower, offering discounts and free services (*e.g.*, digital cable at less than $30 per month for three months, with two months of seven Starz! channels at no charge).
Comcast (Warren, MI)	Offered customers threatening to switch to WideOpenWest the Comcast digital package for $21.95 per month for six months, more than a 50 percent discount off regular rates.
Comcast (Folcroft, PA)	Shortly before RCN launched service, Comcast gave its representatives significant incentives to encourage customers to sign 18-month contracts, locking them into Comcast service, in exchange for lower cable rates. Comcast succeeded in signing up 80 percent of existing subscribers in Folcroft to long-term contracts.
Time Warner (New York, NY)	Adopted an aggressive bulk discount plan for apartment buildings targeted for service by RCN.
Time Warner (Lenexa, KS)	Offered MDU residents served by overbuilder a $60 package (standard service, three premium channels and high-speed Internet service) that is offered elsewhere in the Kansas City metropolitan area for $120. Also offered three months of service for the price of one month.
Time Warner (Overland Park, KS)	Offered MDU residents served by overbuilder an $80 package (standard service, three premium channels and high-speed Internet service), including three months free that is offered elsewhere in the Kansas City metropolitan area for $120.
Sources: *See* Table Notes.	

Incumbent cable operators dominate the market. Approximately 6 percent of cable households nationwide are served by cable operators that face what the FCC defines as “effective competition” from non-satellite providers.[135] Non-DBS wireless competitors, such as MMDS (a microwave wireless based cable system), and Home Satellite Dishes (HSD or C-band), and SMATV (private cable operators serving large residential complexes without using public rights-of-way), serve less than 4 percent of MVPD subscribers nationwide.[136] Overbuilders hold only slightly more than 1 percent of the MVPD market, while incumbent cable operators control more than 76 percent of the market. DBS holds about 20 percent of the MVPD market. *See* Figure 5.

Figure 5. Cable Faces Very Little Overbuild Competition



Source: NCTA, *Cable Developments 2002* at 26 (2002).

According to the FCC, "of the 33,246 cable community units nationwide, 671, or approximately 2 percent have been certified by the Commission as having effective competition as a result of consumers having a choice of more than one wireline MVPD."[137] Conversely, the rapid consolidation of cable operators since 1996 has clearly pushed prices up in the vast majority of markets where cable operators retain their monopoly. The 10 largest cable companies serve about 85 percent of all cable subscribers.[138] The three largest cable companies today – Comcast, Time Warner and Charter – together serve approximately 56 percent of all cable subscribers.[139] In 1996, by contrast, the three largest cable companies served only 48 percent of all cable subscribers.[140] As the FCC has recently concluded, the market "continues to be highly concentrated."[141]

INDUSTRY CONSOLIDATION HAS NOT LED TO COST SAVINGS FOR CONSUMERS

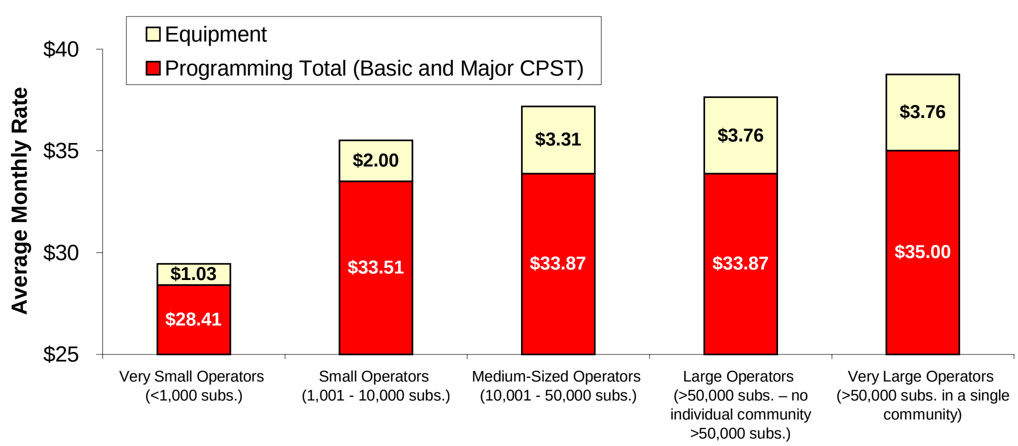
The industry's consolidation has been justified on the grounds that bigger companies would operate more efficiently and incur lower costs, which would translate into lower rates.[142] Comparing rates across small and large cable systems, the FCC expected "to find lower average monthly rates due to increasing economies of scale."[143] But it found just the opposite – the larger the cable company, the higher its rates.[144] Similarly, in the FCC's most recent price report (2002), released in July 2003, the FCC also found that large cable systems have higher prices than medium or small cable systems.[145]

The Consumer Federation of America and Consumer's Union have reached the same conclusion: "[O]wnership of multiple systems by a single entity, large-size cable systems and clustering of cable systems all result in higher prices."[146] In their July 2000 study, the GAO likewise found that "[c]able rates were slightly higher if the owner of a system in a particular franchise area was one of the larger national cable companies."[147]

In the cable industry, the costs of programming should be dropping – with consolidation, bargaining power continues to shift steadily toward cable operators and away from video programmers. For example, AT&T and Comcast argued that their merger would permit them to save between $250 million and $450 million a year on license fees negotiated with programming networks.[148] Now that the merger is complete, Comcast has begun efforts to "squeeze" programming fees by insisting that the prices it pays for programming are reduced by 10 percent or more and are "going to drop channels to get this."[149] It remains to be seen if Comcast will pass any of these possible savings along to consumers.

Cable has been raising prices in spite of increasing scale for some time. The FCC finds that, as of July 2001, "operators with two or more systems, on average, had rates that were approximately 23 percent higher than single system operators."[150] Cable systems rated "large and very large" had the highest rates of all.[151] In the 2002 FCC price report (released in July 2003), the trend towards higher cable prices in larger cable operators continues. For combined programming rates (basic and enhanced basic) and equipment charges, monthly rates for very large operators was $41.89, the rates for large operators was $41.20, the rates for medium operators was $40.26, the rates for small operators was $38.25, and the rates for very small operators were $31.86.[152]

Figure 6: Large Cable Companies Charge More



Source: *2001 Report on Cable Prices* at Attachment B-3 (noncompetitive markets).

DBS IS LIMITED AS A COMPETITOR AND DOES NOT REDUCE CABLE RATES

DBS now serves approximately 20 percent of all multichannel video programming subscribers. DBS holds out promise to be a serious competitor to cable. Up to now however, it has not been so. Even in areas where DBS has achieved significant penetration, "there is no measurable effect on . . . the price of cable service."[153] Consistent with this finding, the GAO also found that the provision of local broadcast channels by DBS companies has not led to lower cable prices.[154] However, the GAO did find that where DBS companies provide local broadcast networks to their customers, cable operators provide more channels than in areas where DBS companies do not provide local broadcast channels. Presumably this is because the GAO "also found that DBS providers obtain a substantially higher level of subscribers in areas where they are providing local broadcast channels."[155]

Consumer groups have likewise concluded that "the presence of DBS has no statistically significant or substantial effect on cable prices, penetration or quality," and that "[t]he higher the penetration of satellite, the higher the price of cable."[156] Even the cable industry's own economic experts have acknowledged that "[t]he demand for cable is rather insensitive . . . to the DBS price," which "indicate[s] that DBS is not a particularly good substitute for cable in the minds of consumers."[157]

Cable prices have continued to rise steadily over the last decade, even as DBS penetration has risen and prices have fallen.[158] Churn rates for cable service – the measure of the extent to which consumers switch their providers – are extremely low, "just 1.3 percent per year during the past five years, suggesting that former cable customers make up less than one-third of DBS's current customer base."[159] And most of the cable churn – "more than 95 percent" according to J.P. Morgan – "is caused by factors other than DBS competition."[160] Comcast, for its part, added approximately 57,000 new subscribers in the first quarter of 2003, reversing a prior year-over-year decline of 2.7 percent.[161] For the second quarter of 2003, Comcast added another 12,100 basic subscribers.[162]

Another sign that DBS is not an effective competitor to cable is the fact that it has had no impact on cable's advertising revenues, which now constitute approximately 30 percent of total cable industry revenues.[163] As an analyst at PricewaterhouseCoopers has recently noted, "[w]e don't see any near-term to medium-term impact on local cable advertising" as a result of DBS, and over the long term, "cable will continue to dominate the market."[164] Cable's share of ratings is instead "stronger than ever," as "satellite has not caused one blip for cable."[165]

While DBS is adding subscribers more quickly than cable, this is unsurprising given their much later start in the market. Moreover, the major cable operators have been focusing more on profitability than on gross subscriber additions. As one industry analyst has explained, cable operators "are willing to sacrifice subscriber growth in exchange for higher revenue and cash flow growth."[166] This is not to say that the cable industry is unable or unwilling to attack satellite as a nettlesome competitor, particularly when the weapon of choice is government intervention. Recognizing satellite's recent gains, an effort to impose another level of taxation on satellite video services is underway in a number of states.[167] If the cable industry is successful in this regard, it will drive up DBS provider costs and widen even further cable's cost advantages over satellite.

The limited success of DBS in obtaining market share reflects the fact that DBS is popular primarily at the two edges of the market – in rural areas where there is no cable service at all[168] and among the minority of consumers that are willing to pay stiff premiums to receive large numbers of sports channels.[169] More than eight years after the introduction of DBS, approximately 20 to 30 percent of DBS subscribers still reside in the rural areas where cable service remains unavailable.[170] DBS penetration remains heavily weighted in favor of rural markets, and the share of DBS's customers from such markets actually increased in the period 2000-2002.[171] *See* Table 9. Cable companies typically compare their digital tiers – and not their basic services – against satellite.[172]

Table 9. Top 10 Satellite Markets By State (market penetration)	
Vermont 29.07 percent	Mississippi 23.48 percent
Montana 27.95 percent	Arkansas 22.85 percent
Wyoming 25.09 percent	Missouri 22.68percent.
Idaho 24.80 percent	North Dakota 20.95 percent
Utah 24.29 percent	Georgia 20.85 percent
Source: *See* Table Notes	

Further, DBS can't reach many urban customers who lack a direct line of sight to the southern sky,[173] and dishes are often difficult to install in the multi-family dwelling units that house approximately 30 percent of the U.S. population and that are responsible for about 20-23 percent of cable revenues.[174] DBS is still not able to offer local broadcast channels in many markets.[175] One survey indicates that 47 percent of cable subscribers would not subscribe to satellite service for that reason alone.[176]

DBS is also unable to match cable company service bundles. DBS has been slow to provide efficient two-way high-speed Internet access services. The former broadband Internet partner of EchoStar, StarBand, filed for bankruptcy in May 2002.[177] In the wake of the failure of the EchoStar/Hughes merger, DIRECTV announced that it was abandoning the resale of DSL service it had been offering in an attempt to compete with cable's video/broadband bundle.[178] It does, however, continue to offer two-way Internet service through its DirecWay brand.[179] DBS also has no ability to provide telephony services,[180] which cable companies now offer to at least 12 percent of all homes passed by their networks,[181]and now serves 2,500,000 residential customers.[182] In the meantime, cable companies may gain an advantage over DBS by bundling cable video services with telephone by reducing their prices for customers that purchase cable broadband and telephony together with cable's video offerings.[183]

Despite a rising customer base, satellite's 19 million subscribers are still less than the 20 to 21 million households now served by digital cable, and digital cable's penetration is rising faster than satellite's.[184] As cable operators upgrade to digital facilities, DBS loses the quality advantage it previously could offer to lure high-end subscribers. Digital cable facilities have now moved ahead of DBS in channel capacity and picture quality (cable systems, unlike satellite dishes, aren't vulnerable to rain and snow) and are far better than satellite in providing broadband Internet service, voice telephone service, VOD service and all other interactive services. Analysts generally agree that digital cable has "competitive advantages over . . . direct-broadcast satellite," and that DBS providers will "continue losing competitive ground" to cable companies.[185] Upgraded cable systems now give the cable industry "tangible competitive advantages over the DBS companies."[186] Cable is now winning the majority of subscribers that sign up for digital service;[187] analysts expect cable to capture "most of the growth" in the video market over the next 10 years.[188]

CABLE COMPANIES ABUSE THEIR MARKET POWER TO DEFEND THEIR MONOPOLY

For many years, regulators protected and favored cable on the theory that it was the only video distribution medium that could broadly challenge the (then dominant) over-the-air broadcasters and the lock they held on video content. Local broadcasters and the networks that fed them much of their content were so dominant that almost anything that was good for cable would be good for competition. Thus, local regulators didn't hesitate to grant exclusive franchises to cable operators and were generally sympathetic to rules that barred various forms of non-cable competition, such as the satellite master antenna systems (SMATV) operated by some landlords to serve multi-tenant dwellings. A 1981 FCC study concluded that deregulating cable would promote much-needed competition in video programming.[189]

By 1984, however, it was apparent that cable had already superseded over-the-air broadcasting as the dominant distributor of video programming. In 1985, a federal appellate court struck down an exclusive franchise requirement on First Amendment grounds.[190] By 1992, Congress had concluded that far from spurring competition, the 1984 Act had permitted cable companies to seize control of video markets, and use their market power to suppress competition by others.[191] In the 1992 Cable Act, Congress therefore reversed course and declared that a franchising authority "may not unreasonably refuse to award an additional competitive franchise."[192]

But cable operators have successfully used regulatory lobbying and a variety of pricing and other tactics to deter competitive entry and maintain their monopolies. The cable incumbents have let it be known that every competitive threat will be met "swiftly and forcefully."[193] For these reasons, magnified by capital cost of entry, exclusive franchising – *de facto* if not *de jure* – has remained the norm to this day. As discussed below, only a tiny fraction of markets are served by two or more cable systems.

A LONG HISTORY OF DISCRIMINATORY PRACTICES BASED ON PROGRAMMING

As cable operators grew and consolidated in the 1980s, they built up their own programming operations. Several bought production studios and film libraries. By 1988, cable operators had taken a minority equity interest in "virtually every new programming channel that has started in the past two years."[194] A year later, Congress would receive testimony that it was "almost impossible . . . to start a new cable system service without surrendering equity to the owners of the monopoly cable conduits."[195] By 1990, almost two-thirds of newly launched cable channels were affiliated with cable companies.[196] By 1992, 10 of the 15 most popular (non-premium) cable networks were owned or controlled by cable companies.[197] Cable companies controlled virtually all of the regional sports networks and four of the top five pay-movie services.[198] TCI, then the largest owner of cable properties, had financial interests in CNN, TBS, TNT, Headline News, the Cartoon Network, the Learning Channel, the Discovery Channel, the Box, Cable Health Club, the Family Channel, BET, E!

Entertainment Network, Court TV, Home Shopping Network, QVC Networks, Inc., Prime Sports Channel Networks and Encore.[199]

By acquiring such dominant positions in the markets for video content, cable operators have put themselves in a position where they can easily block the development of competitive distribution media, such as overbuilders, satellite or new terrestrial wireless services. *See* Table 10. Congress has attempted to address these problems step-by-step but only in a piecemeal fashion and with mixed success.

The 1988 Satellite Home Viewer Act gave satellite providers a copyright license to retransmit broadcast network programming only to those customers who could not adequately receive broadcast signals over the air via traditional rooftop antennas.[200]

In a related move to preempt new distribution media competition, almost every major cable company then joined a consortium – Primestar – that leased the only available medium-power satellite. The consortium then launched a satellite of its own, unequivocally signaling to all potential satellite competitors that the cable incumbents would use satellites themselves to crush satellite-based competition. The Department of Justice recognized this for what it was – a scheme to "block DBS entry by any other firm."[201]

In follow-up hearings in 1992, Congress concluded that cable operators were still using several different strategies to suppress competition in video markets. The companies refused to carry new channels that competed most directly with those in which the cable companies themselves owned equity interests.[202] They also refused to sell their programming to competing distributors like satellite carriers or sold them on discriminatory terms calculated to suppress competition.[203] Cable companies were using other coercive tactics to depress the value of independent video channels.[204]

Accordingly, the 1992 Cable Act prohibited exclusive contracts between cable companies and affiliated satellite, cable and broadcast programmers, absent express FCC approval.[205] These rules, sometime referred to as the "program-access" rules, require that any cable network programming that is at least in part owned by a cable operator and delivered by satellite must be made available to any other multichannel video competitor, whether it be an overbuilder or DBS company. (However, satellite-delivered programming can still be subject to exclusive contracts when the programmer and the cable operator are not affiliated.) The FCC's rules were scheduled to end in October 2002, but the FCC decided to extend them for another five years.[206] The FCC found that "marketplace evidence . . . tends to confirm that, where permitted, vertically integrated programmers will use foreclosure of programming to provide a competitive edge to their affiliated cable operators. The evidence suggests that the ability to foreclose vertically integrated programming is especially significant in the regional programming market, which is not covered by the program-access rules if the programming is distributed terrestrially. This type of programming has in fact been withdrawn from DBS competitors."[207] The cable industry has effectively exploited this "terrestrial" or non-satellite loophole by denying content to competitors when their affiliated programming is delivered terrestrially rather than by satellite.

Table 10. Maintaining the Monopoly through the Control of Programming	
Date	**Action Taken**
1990	Cable operators (TCI, Time Warner, MediaOne, Comcast, and Cox) form Primestar Partnership to "[d]o our best to keep core services off Hughes DBS to minimize long-term competitive bypass threat."
1990	In the *1990 Cable Report*, FCC finds that cable had restricted wireless cable systems' access to numerous channels (including HBO, ESPN, Showtime and TNT) and had charged between 36 and 70 percent more than cable operators were charged for access to these channels in the few instances that such access was granted.
1990	Turner Broadcasting and ESPN refuse to allow Glasgow, KY municipal cable system to carry programming from TNT and ESPN.
1993	Department of Justice and state attorneys general file antitrust suits against Primestar and its respective members, stating that the cable industry has engaged in "anti-competitive conduct with the effect of delaying, if not pre-empting, cable-competitive entry into DBS by imposition of unreasonable restraints on the availability of programming to DBS entrants."
1993	Viacom claims that TCI has used its dominant position as a cable company to impede competition in cable programming. The suit is dropped in 1995 after TCI agrees to purchase Viacom's cable systems.
1998	DIRECTV files a complaint with the FCC against Comcast because Comcast will not grant access to Comcast Sportsnet as it is not satellite-delivered programming. EchoStar files a similar complaint in 1999.
1999	RCN files a complaint against Cablevision for refusing to provide RCN access to overflow sports programming that it carries on its "MetroChannels."
1998-1999	Seren Innovations, during the AT&T-MediaOne merger proceedings, states that it is being denied access to the MidWest Sportschannel, the Game Show Network and MSNBC in the Minneapolis market due to exclusive contract arrangements between AT&T and programmers.
2001	Everest has been unable to gain access to Time Warner's Metro Sports channel (the Kansas City regional sports network) because it is accessed via a terrestrial feed. Everest also states that the Metro Sports channel is offered on Comcast's Kansas systems through a terrestrial interconnection agreement with Time Warner.
2001	Qwest Broadband Services states that Cox "hold[s] exclusive cablecasting rights to a popular professional sports franchise in Phoenix [and] settled an antitrust complaint by agreeing to make the games available for display to competitive MVPDs. However, the incumbent has subsequently changed its terms and now demands a rate for such games that exceeds the rate for ESPN. Further, as a condition of carrying such games, the buyer must agree to carry Cox's local cable origination channel full time."
2001	CT Communications Network, a video over DSL provider, states that "AT&T is refusing to sell HITS to any company using DSL technology to deliver video services over existing phone lines because such companies would directly compete with AT&T's entry into the local telephone market using both its own cable systems and the cable plant of unaffiliated cable operators."
2001	Paul Bunyan, an Open Video System operator competing with Charter in numerous Minnesota markets, is denied access to the Disney Channel because Charter has an exclusive contract with Disney.
Sources: *See* Table Notes. (AT&T Purchased by Comcast Dec. 2002)	

The 1992 Act also directed the FCC to adopt rules to prevent cable operators from requiring a financial interest in programming as a condition of carriage – to prohibit cable companies from "coercing" exclusive rights from a programmer and to forbid unreasonable discrimination in favor of affiliated programmers.[208]

Cable's video-content abuses have triggered a series of antitrust actions as well. In a 1993 suit, Viacom accused TCI of impeding competition in cable programming.[209] The suit was dropped in 1995 after TCI agreed to purchase Viacom's cable systems.[210] In 1993, the Department of Justice and more than 40 state attorneys general filed antitrust suits against some of the larger cable operators, alleging that the defendants engaged in a continuing agreement, combination and conspiracy to restrain competition in multichannel subscription TV service by forming Primestar to block other firms from entering the DBS business. The effect of the Primestar venture, the attorneys general claimed, had been to delay, if not prevent, entry into the DBS market through the restriction of access to programming owned or controlled by the venture's companies to other DBS companies.[211] These anti-competitive abuses are similar to those found by Congress.[212] The Justice Department brought another action against TCI when it attempted to merge with Liberty Media. All of these actions culminated in consent decrees that limited, in varying degrees, cable's right to discriminate in favor of affiliated video programmers or to deny programming to unaffiliated video distributors.[213] *See* Table 11.

Table 11. The Suppression of Cable Programming
Cable TV's "monopolistic practices" have made the public "captives of cable." "Our investigation found that the cable industry used threats and intimidation to place itself as the gatekeeper in control of the price and distribution of virtually all subscription television programming." – New York Attorney General Robert Abrams (1993)
"The cable marketplace is choked to death because would-be competitors are prevented from being in the game. Any new programmer who comes into the cable business is going to be coughing up a share of his company (to cable operator) as the price of showing his wares to the public." – Tennessee Senator Al Gore (1992)
"For competitors to cable, such as satellite dishes or wireless cable, to be effective, they had to offer the most popular programming, such as HBO, CNN and ESPN . . . But when a programmer considered selling to cable competitors, the cable companies threatened to drop the channels from their systems." – Pennsylvania Attorney General Ernie Preate, Jr. (1993)
"Without adequate programming, a service competitive with existing cable monopolies can't get off the ground . . . Prime-Star's formation made programming much more difficult to obtain, and deferred entry by others." – Acting Assistant Attorney General, Antitrust Division, John Clark (1993)
Sources: *See* Table Notes.

EXPLOITING THE NON-SATELLITE DISTRIBUTION LOOPHOLE

A decade ago, virtually all cable programming was distributed by satellite, and Congress thus made reference to "satellite cable programming" in the 1992 Act's program-access provisions of the new law.[214] The 1992 Act's program-access provisions, as noted above, left open a significant loophole that cable operators are now exploiting aggressively. For example, fiber-optic cable is now readily available to move local sports events from the stadium to the cable company's local head-end, and with no satellite in the loop, cable operators are once again able to monopolize key programming to suppress competition by competing video distributors. A federal appellate court recently accepted that a cable incumbent could therefore avoid the program access requirements by moving programming from satellite to terrestrial delivery.[215] This form of delivery has been developed on a national scale.

How the Loophole Works on a National Scale

Incumbent cable operators can now replicate the regional non-satellite loophole on a national scale by using a new terrestrial-based national fiber network. In an effort to undermine the federal program-access requirements, Jerry Kent, President and CEO of Sequel III, teamed with Corves Corporation in February 2003 to purchase the assets of high-speed data and telecom provider Broadwing Communications for $129.3 million. Broadwing has an intelligent optical-switched network, reaching 150 markets. Kent has said his decision to buy an optical network with a national footprint could help operators avoid federal program-access laws: "The cable industry can develop its own programming and deliver it via our Broadwing network and take programming exclusivity."[216]

Broadwing has 18,700 miles of interconnected fiber covering over 130 U.S. major markets and overlays much of the top four cable providers' major clusters. Cable operators have been distributing exclusive, regional content over metro fiber rings; Broadwing expands this tactic to a nationwide footprint. Broadwing's network clusters, as of July 2002,[217] overlay a minimum of 15 out of the top 25 cable clusters in the continental United States, served by Comcast, Cox and Time Warner Cable, based on 2000 year-end data.

How the Loophole Works on a Local Scale

In the New York area, Cablevision has obtained control of seven of the nine local professional sports teams, and it denies overbuilder RCN access, not only to the event being aired but even to the overflow programming (games not featured on the Madison Square Garden network) when more than one of the seven teams is playing simultaneously. These programs are delivered terrestrially and hence subject to the non-satellite loophole. By contrast, Cablevision did give RCN access to the same sports channels for distribution in New Jersey, where Cablevision doesn't compete.[218] Comcast threatened to use similar tactics in Philadelphia but backed off when the Department of Justice began a review of Comcast's proposed acquisition of Home Team Sports in Washington.[219] Seren Innovations, an overbuilder in Minneapolis, encountered similar problems with AT&T.[220] The list of cable competitors running into similar difficulties is now growing rapidly. *See* Table 12.

Table 12. Maintaining the Monopoly by Limiting Access to Regional Networks	
AT&T	During the review of the AT&T-MediaOne merger, Seren Innovations, an overbuilder in Minneapolis, had raised issues regarding access to AT&T's exclusive contract to carry lucrative sports programming in Minnesota. AT&T had promised, in response, to reach a reasonable accommodation. But after the merger was approved, AT&T simply reasserted its exclusivity rights to this programming.
AT&T	CT Communications Network (CTCN), a subsidiary of Champaign Telephone is testing providing video service over DSL lines in its ILEC (incumbent local exchange carrier) territory. AT&T has refused to provide CTCN with its HITS transport service. CTCN stated that "AT&T is refusing to sell HITS to any company using DSL technology to deliver video services over existing phone lines because such companies would directly compete with AT&T's entry into the local telephone market using both its own cable systems and the cable plant of unaffiliated cable operators."
AT&T	Braintree Electric Light Department (BELD) has been denied access to the New England Cable News network because it is AT&T-owned and provisioned via a terrestrial feed.
Cablevision	In New York, Cablevision has obtained control of programming for seven of the nine local professional sports teams; it denies overbuilder RCN access to overflow programming when more than one of the seven teams is playing simultaneously.
Comcast	In Philadelphia, Comcast threatened to deny RCN long-term access to local sports programming and backed off only when the Department of Justice began a review of Comcast's proposed acquisition of Home Team Sports in Washington. And while multi-year programming contracts are standard in the industry, Comcast still won't sign any contract with RCN that runs longer than three months.
Cox	Qwest Broadband Services states that Cox, "holding exclusive cablecasting rights to a popular professional sports franchise in Phoenix, settled an antitrust complaint by agreeing to make the games available for display to competitive MVPDs. However, the incumbent has subsequently changed its terms and now demands a rate for such games that exceeds the rate for ESPN. Further, as a condition of carrying such games, the buyer must agree to carry Cox's local cable origination channel full time."
Time Warner	Everest Connections, in Kansas City, KS, has been unable to gain access to the Time Warner's Metro Sports (the Kansas City regional sports network) channel because it is accessed via a terrestrial feed. The Metro Sports channel is offered on Comcast's Kansas systems through a terrestrial interconnection agreement with Time Warner.
Sources: *See* Table Notes (AT&T purchased by Comcast in Dec. 2002)	

Local programming – especially sports programming – is crucial in the video distribution market. RCN estimates that it will lose half or more subscribers without it, pushing subscription rates "so low that no entrepreneur would be willing to risk the hundreds of millions of dollars required to overbuild an urban area with a modern fiber optic plant."[221] In the Philadelphia area, DBS subscription rates are less than half the national average for the top 20 cities (other than Philadelphia), where Comcast has refused to license its regional sports network to competing DBS providers.[222] Cable clearly recognizes the importance of local programming – in particular local sports.

As the FCC found in its 2001 report, 86 percent of "must have"[223] regional sports programming is vertically integrated.[224] In its 2002 report, the FCC recognized the concerns of emerging competitors that, "despite the presence of the program access rules, lack of access to programming, especially sports programming, remains a significant barrier to entry and an impediment to the successful development of a competitive MVPD business."[225] While national sports programming is dominated by ESPN, regional sports distribution is dominated by Fox Sports Net, which owns 60 percent of all regional sports networks and is jointly owned by the sixth largest cable operator, Cablevision, and News Corp.[226] Indeed, local programming in general is "significantly more vertically integrated than national programming services."[227]

To date, attempts to close the non-satellite distribution loophole have been singularly unsuccessful. In Los Angeles, both the cable industry[228] and the motion picture industry[229] have vehemently opposed adoption of a local program-access ordinance that would address the deficiencies in federal law. This opposition comes in the face of a city attorney opinion confirming that Los Angeles has the right to adopt such an ordinance[230] and city council direction that a local program access ordinance be drafted.[231] Nonetheless, the cable industry has been able to thwart such action.

Correcting the deficiencies in the current program-access rules will take congressional action – action that is now long overdue.[232] Congress must act to close the loopholes through which the major cable operators continue to distort the video-programming market and maintain their dominance in the provision of video programming to consumers.

A Case Study of Cable Leverage Over Independent Programmers: Cablevision and The Yankees

The recent situation regarding carriage of the Yankees Entertainment and Sports Network, LLC ("YES") in the New York City region illustrates what happens when a relatively powerful and large incumbent cable operator – Cablevision – collides with an independent content provider that controls decisional sports programming. The YES Network is currently aired throughout parts of New York, Connecticut, New Jersey and Pennsylvania.

Cablevision is the nation's sixth largest cable operator.[233] It currently operates the nation's single largest cable cluster, serving 3 million households in the New York metropolitan area.[234] Cablevision owns Madison Square Garden and its teams, the Knicks, Rangers and the WNBA Liberty.[235] In addition, Cablevision's programming arm, Rainbow, is a 50 percent partner in Fox Sports Net and owns five regional sports channels outside of the New York market.[236] Cablevision has also recently announced its interest in acting as a partner in the purchase of Vivendi's U.S. entertainment businesses, including Universal

Studios, Universal Music and the USA and Sci-Fi cable channels.[237] It also has stated it intention to start a DBS system in the fall of 2003.[238]

Cablevision held the cable rights to the Yankees in its subscriber footprint for several years through the 2001 season.[239] Thereafter, the YES network was established and now controls the rights to air the Yankees on both cable and satellite in the New York area. YES was asking cable operators to pay approximately $2.00 per subscriber and was requiring that YES be placed on the cable-programming tier (enhanced basic), as opposed to a more expensive digital tier or as a pay channel. Cablevision refused, saying that the programming costs were high and that it would air YES as a separate pay channel for those subscribers who wanted to pay for it.[240] In other words, YES preferred that the Yankees be aired at no extra cost to most subscribers. Cablevision argued that those who did not want to see the Yankees should not have to bear possibly higher subscriber costs, even though Cablevision carried the Yankees without extra charge in prior years when they had held Yankee rights. Moreover, while Cablevision wanted to carry the Yankees on its digital tier (costing additional subscriber fees for most consumers), it intended to keep its own sports programming on the expanded basic tier. In contrast, competing cable overbuilder RCN had agreed to carry Yankees games without additional charge to subscribers, as did neighboring New York cable incumbent, Time Warner.[241]

A very high profile standoff between Cablevision and YES followed, with all parties taking losses – Yankee fans most of all. Cablevision subscribers did not see Yankee games for the entire 2002 season. This loss angered many New Yorkers, who switched from Cablevision to overbuilder RCN or satellite services. YES estimates that Cablevision lost as many as 40,000 subscribers in the first two months of the standoff alone; Cablevision says it was only 5,400 subscribers.[242] At the same time, the standoff cost the YES network vital distribution in its first year of operation.

The standoff ended only hours before the 2003 opening game, after extensive and repeated mediation efforts first by New York City's mayor and finally by New York State's attorney general, as well as by proposals introduced in state legislatures in both New Jersey and New York to enact program-access legislation. The deal allowed Cablevision to keep YES off its enhanced basic cable programming tiers and offer it as part of a special-pay sports tier, which includes two other Cablevision-owned sports networks, for $4.95 per month. Alternatively, subscribers could choose to pay $1.95 per month to purchase YES alone.[243] The deal helps Cablevision draw subscribers to its more lucrative digital tier and gain profits by selling new digital set-top boxes. Consumers will now have to pay an additional $3.24 per set box. That means if a consumer has three television sets, the cost will be an additional $13.62 per month for set top boxes.[244]

Although many sports fans were enormously frustrated and inconvenienced by Cablevision's refusal to carry YES, the ultimate resolution of this dispute appears positive for consumers in at least two respects: *first*, Cablevision customers who want to watch the Yankees now have multiple choices for doing so, whether by subscribing to a premium tier (the new all-sports tier) or by buying YES on an *à la carte* basis; and *second*, and most importantly, by preventing Cablevision from discriminating against YES in favor of its own sports networks to the competitive detriment of an independent programmer by placing each network on the same tier. Of course, due to Cablevision's insistence, subscribers will pay an additional charge above their cable-programming tier to view the Yankees, where previously the Yankees were aired as part of the cable programming tier at no additional cost.

Subsequent to the Cablevision – YES resolution, Time Warner announced that effective July 29, 2003, that it would permit New York-area customers to choose not to receive the YES network and reduce their bill by $1.00.[245] This was viewed by YES as a breach of its agreement with Time Warner who called the decision "unfair and discriminatory" and further stated "Time Warner was treating YES differently from the way it treats channels owned by its parent company AOL."[246]

Cablevision's refusal to carry YES is an industry strategy not limited to New York. Taking a page from the Cablevision playbook, Time Warner ceased carriage of the Sunshine Network in Florida in January 2003. In pulling the Sunshine Network, Time Warner blacked out the NBA's Miami Heat and Orlando Magic, the NHL's Tampa Bay Lightning, and the Florida State Seminoles and University of Florida Gators sports for its Sunshine State customers. Instead of continued carriage, Time Warner offered the Sunshine Network an unwanted *à la carte* arrangement. Only after a 71-day standoff did Time Warner return the Sunshine Network and its popular sports programming to the air.[247]

In the aftermath of the YES battle, Cablevision has proposed in testimony before the United States Senate that independent programmers be prohibited from distributing programming conditioned on the cable operator placing such programming on a specified cable tier or pay channel.[248] The problem with this proposal is that it gives further power to cable operators at the expense of independent programmers. As we have seen, Cablevision was able to keep YES off the air for quite some time, and, achieved its objective of keeping YES off its expanded basic programming tier.

Moreover, nothing in Cablevision's proposal prevents a cable operator from placing competitor programming on more expensive and less-watched tiers, while placing programming they own or control on the most widely viewed tiers, or any other tiering configuration that suits their interests. Thus, the proposal would have negative impacts on independent programmers.

While Cablevision's re-tiering proposal is anti-competitive and anti-consumer, a true *à la carte* regime would be both pro-competition and pro-consumer. Consumers should be able to choose their own suite of programming, rather than being force-fed the programming "tiers" that cable operators want them to purchase. This is true consumer choice. Offering *à la carte* programming is good for consumers, as long as such programming is offered in a fair and nondiscriminatory manner.[249]

À la carte programming is fiercely opposed by most cable networks, including powerful programmers such as ESPN, and is often prohibited by contract. Recently Liberty

Media Corp. Chairman John Malone used his appearance during an annual conference for investors to wade into the escalating debate over *à la carte* pricing of cable programming. In his remarks, Mr. Malone said *à la carte* pricing would jeopardize ESPN's business model. "End of story. End of Disney," he told investors, adding that in retrospect he wishes he had imposed *à la carte* pricing on ESPN, and set an industry standard, when he had a contractual window to do so as the head of TCI Cable in the mid-1990s, before he sold to AT&T.[250] Recently, the American Cable Association (ACA), the trade association representing small and mid-sized independent cable operators, has argued that *à la carte* pricing will allow "small systems to control sky rocketing program costs and that if programmers don't voluntarily agree to such packaging, the government should step in."[251]

ENLISTING REGULATORS

As noted earlier, cable operators historically enjoyed an exclusive franchise – direct competition was either expressly barred, or effectively barred, by local licensing policies that made entry by a second player extremely difficult. By the 1980s, exclusivity had become the almost universal,[252] though often unwritten, practice. In urban markets, cable waged lengthy battles against SMATV that landlords attempted to operate as competitive cable networks for apartment buildings.[253]

Although exclusive franchise laws are no longer expressly on the books, cable operators have nevertheless been remarkably successful in enlisting the help of regulators to limit direct competition by overbuilders. And where cable does not get its way, there is little hesitation to haul the local franchising authority into court.[254]

Until 1996, phone companies were barred from providing cable video services by a series of decrees,[255] FCC regulations[256] and federal statutes.[257] *See* Table 13. By 1992, the FCC was formally recommending that Congress repeal the ban.[258] The Department of Justice reached a similar conclusion,[259] as did the National Telecommunications and Information Administration (NTIA).[260] In 1996, Congress finally did so.[261]

	Table 13. Maintaining the Monopoly through Regulation
Date	**Regulation**
1956	*United States v. Western Elec.* (D.N.J.): Telephone companies were prohibited from offering anything other than rate-regulated "common carrier" services, and the FCC had ruled in Frontier Broadcasting Co. that cable providers are not "common carriers" because they determine the content of what is being communicated.
1968	*FCC:* Telephone companies could not construct or operate cable TV facilities or provide common carrier channel services to local cable TV operators without first obtaining FCC permission.
1970	*FCC:* Telephone companies were prohibited from providing "cable television service to the viewing public in its telephone area," either "directly or indirectly through an affiliate." 47 C.F.R. § 64.601(a) (1970)
1982	*United States v. AT&T* (D.C. Cir.): The Justice Department viewed cable television as an "information service" within the meaning of the decree. While this restriction was removed in its entirety in late 1991, the decree's interLATA restriction prohibited Bell company provision of video services.
1984	Section 613(b) of the 1984 Cable Act codified the FCC's 1970 cross-ownership restrictions. "It shall be unlawful for any common carrier . . . to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by or under common control with the common carrier." 47 U.S.C. § 533(b)
Sources: *See* Table Notes.	

Cable incumbents have encouraged many local regulators to enact "level playing field" laws that typically require new entrants to build-out their networks to serve the entire market.[262] These local regulations sharply raise entry barriers – the exact opposite of the policy that Congress has required to promote competitive entry into multichannel video markets.

According to overbuilders, cable operators also routinely interfere with the cable-franchise process itself. For example, RCN has claimed that Comcast's "interference with its local franchise negotiations in Prince George's County, Maryland, and in Philadelphia, Pennsylvania, kept RCN from securing a cable franchise."[263]

Elsewhere, cable incumbents have successfully lobbied to require competitors to contribute to the subsidy of "public, educational and government" channels not in proportion to their relative market share but rather, dollar for dollar with the incumbents.[264] These, and other similar demands that the incumbents make of local regulators, have been backed by threats of litigation if any competitor is allowed to enter on terms less burdensome than those imposed on the monopolist incumbent.[265]

Similarly, at the federal level, cable has backed Congress in imposing even more onerous must-carry obligations on satellite providers than it has imposed on cable. If a DBS operator delivers even a single local broadcast signal in a market, it must carry all of them.[266] The must-carry obligation for cable, by contrast, recognizes a channel-capacity limit. Satellite starts out at a substantial disadvantage in this regard, because a single satellite beam covers a substantial fraction of the continent. There are approximately 1,650 television stations within the 210 Nielsen Designated Market Areas (DMAs)[267] – an average of eight per market, with some markets having up to 24. There are thus many more local stations than there are available channels on the geostationary satellites used for DBS operations.[268] The problem can be solved, up to a point, using "spot beams" from the satellite that direct local stations to smaller clusters of local markets, but there are still definite limits to how far spot-beam fixes can be pushed.

The cable incumbents have been particularly aggressive in their efforts to limit competition in apartment buildings and other multiple dwelling units. They have asked many landlords to sign "easement agreements." These agreements purport to comply with FCC rules that give building owners the freedom to replace the incumbent with an overbuilder but actually have the opposite effect. As one overbuilder has noted, landlords that have signed these agreements now fear the threat of contract litigation "if they allow a competitor onto their property" and are therefore not invoking the FCC's rules.[269] The incumbents have also signed "exclusive marketing agreements" with landlords that reward the landlords generously for giving the incumbent operator exclusive access to the premises.[270] The aggressive marketing of these agreements begins as soon as a competitor announces its plans to enter the market.[271] *See* Table 14.

Table 14. Maintaining the Monopoly through Access to Multiple Dwelling Units (MDU)

Comcast (Indianapolis, IN)	Less than one month after a cable franchise was awarded to TOTALink, Comcast sent out a mass mailing to property owners and management companies controlling MDUs, attaching a new 15-year exclusive service agreement for the owners and managers to sign immediately. In conjunction, Comcast offered to pay $75 for each resident apartment covered under the agreement.
Comcast (Washington, DC)	Starpower has encountered numerous instances of MDUs where Comcast has received exclusive building rights for a number of years.
Comcast (Washington, DC)	Distributed fliers to residents of MDUs served by Starpower, offering discounts and free services (*e.g.*, digital cable at less than $30 per month, for three months, with two months of seven Starz! channels at no charge).
Comcast and Time Warner (Kansas City, KS)	Offered MDU property owners highly profitable revenue sharing agreements only after it became apparent that a competitive MDU provider would soon be offering service in the area.
Time Warner (Charlotte, NC)	Carolina BroadBand surveyed owners and managers of MDUs in Charlotte, NC, and found that 80 percent of the units surveyed there had committed to a long-term exclusive agreement with Time Warner.
Time Warner (Lenexa, KS)	Offered MDU residents a $60 package that is offered elsewhere in the Kansas City metropolitan area for $120. Time Warner also offered three months of service for the price of one month.
Time Warner (Overland Park, KS)	Offered MDU residents an $80 package (including three months free) that is offered elsewhere in the Kansas City metropolitan area for $120.

Sources: *See* Table Notes.

Cable Operators Have Successfully Undermined the Leased-Access Provision of the Cable Act

Federal law requires cable operators to set aside up to 15 percent of their channel capacity so that unaffiliated programmers may offer competing service packages to consumers.[272] As Congress envisioned it, the purpose of this requirement "is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public."[273] The cable industry has successfully undermined this mandate and thwarted congressional intent.

The industry's strategy has been a simple one: Cause the FCC, which has authority to regulate the prices for leased access, to adopt a methodology that sanctions a per-channel rate that essentially no competing programmer could pay and remain commercially viable.[274] The FCC's action in this regard is particularly troubling and stands in stark contrast to its commitment to viable intramodal competition in the telecommunications sector.[275] In addition, further undermining congressional intent, the FCC has prohibited programmers seeking to utilize the leased-access provision of the Act for the purpose of providing a competitive Internet access service from doing so.[276]

By undermining the Act's leased access mandate, cable operators have also "limit[ed] the availability of diverse local minority programming and allow[ed] for potential discrimination against individual speakers or specific points of view."[277] For this reason, the United States Conference of Mayors is calling on the FCC to act to ensure reasonable rates for independent programmers who desire to utilize leased access from cable networks.[278] The most effective way for the FCC to accomplish this would be to set rates for channels that cable operators are required to make available pursuant to the leased-access provision of the Cable Act via its existing unbundled network element pricing methodology.

EXTENDING THE CABLE MONOPOLY TO OTHER MARKETS AND PRODUCTS

DOMINATING BROADBAND INTERNET SERVICE

Cable operators now dominate the broadband Internet market, constituting a huge new source of earnings. Since the Internet is now present in approximately 60 percent of American homes,[279] consumer expectations about availability and speed of Internet access have changed. Many Americans, once content with dial-up connections with slow speeds, have now demanded always-on connections at higher speeds. Hence "broadband Internet" service through a digital "cable modem" has now become an enormous and unanticipated new profit center for the cable industry. According to the FCC's latest national broadband data, "[a]t the end of 2002, the number of high-speed lines connecting homes and businesses to the Internet was nearly 20 million compared to 2.8 million at the end of 1999.[280] This trend is only expected to continue, with the majority of this growth captured by broadband cable providers.

Cable operators have been bringing coaxial cable into homes for decades. Once the World Wide Web exploded into daily lives, cable operators quickly realized that they could allocate merely a small part of the bandwidth on the coaxial cable and offer an always-on connection with much higher speeds than dial-up. The only potential competitors in this market were local telephone companies who offered digital subscriber lines (DSL) with similar service to broadband Internet service offered by cable operators. However, cable operators had a much easier time implementing their service than the phone companies had with DSL service.

Phone companies currently are required to market DSL as a common carrier (meaning their lines are open to other competitors). Cable operators are not common carriers. As a result, even as phone companies have recently announced price discounts for DSL, cable now overwhelmingly leads the broadband Internet market. Cable franchises either provide Internet connectivity themselves or select a proprietary Internet service provider (ISP) pursuant to contract to offer service over their networks, such as EarthLink or AOL.[281] However, most of the cable industry charges extra for using an ISP other than the provider of the cable modem service.[282]

Both cable and phone companies (particularly the Bell companies) are vigorously advocating deregulation of their broadband services. The regulatory status of cable modems is currently unsettled, with the FCC having ruled them to be an interstate "information service"[283] – and hence subject to virtually no regulation – but various federal courts have taken a different view.[284] The FCC's ruling is now being reviewed by a federal appellate court, and a decision in the matter is imminent.[285] Because cable's broadband services are essentially deregulated, the Bell companies are demanding similar treatment and release from their common carrier obligations.[286] But *de*regulation of broadband Internet services is precisely the wrong answer and would result in no less deleterious consequences than has deregulation of cable's video offerings. Phone companies should continue to be required to offer DSL on a common carrier basis as a telecommunications service, and cable modem service should also be defined as a telecommunications service and thus available to all requesting customers on a common carrier basis.

Moreover, cable can promote tie-in arrangements that offer video and broadband Internet service together in packages, while DSL providers cannot. Recently, Consumers Union and Consumer Federation of America asked the Federal Trade Commission and the Justice Department to investigate such tie-in arrangements as a potential antitrust violation. Mark Cooper, research director of CFA stated, "[I]f there was ever a candidate for an investigation of predatory pricing under the anti-trust laws, this would be it. Even if the government concludes that the price is not predatory in the classic sense, it must be deeply concerned about anti-competitive tie-in."[287]

Cable's first attempt, in 1995, to dominate the broadband Internet sector with Excite@Home ended in bankruptcy (see below). However, the broadband Internet business is now surging, and cable operator are currently estimated to control almost 60 percent of the business. The largest cable operators are expected to see their Internet subscriber growth double by 2005.[288] Cable moved quickly into this area after upgrading much of its service to fiber optics, initially as a means of distinguishing itself from DBS. DBS hasn't perfected its broadband technology as of yet and to date only offers limited forms of the service.[289] Cable now has more than twice as many residential subscribers as DSL, with about 10.4 percent of residences using cable modems and 4.6 percent using DSL.[290] The FCC's latest broadband data shows cable modems with 11.4 million subscribers (57.3 percent) versus 6.5 million subscribers (32.7 percent) for DSL.[291]

Comcast, the largest cable company in the nation, has become the largest provider of broadband services. Comcast Chief Executive Officer Brian Roberts stated that he predicts that by the end of 2003, his company will have five million broadband Internet customers. That would make it the third largest Internet provider in the country of any kind – tied with EarthLink, following AOL and MSN. As Roberts stated, "High-speed data is now the hottest property we have," with the product growing by 40 percent a year.[292] On May 8, 2003, Comcast announced that it added 417,000 broadband Internet subscribers in the first quarter of 2003 alone, and that "it expects to add 1.6 million high-speed Internet subscribers this year, a 33 percent increase from the number in 2002."[293] Comcast's dominance was further confirmed when it released its second quarter results on July 31. In the second quarter, Comcast added another 350,900 broadband Internet subscribers, for a current total of 4.4 million subscribers, and reaffirmed its target of 1.6 million additions in 2003.[294] From a financial perspective, Comcast's revenue from these services increased 56.6 percent (to $548 million) from second quarter 2002.[295]

As regulators and cable operators have both recognized, video services can now be distributed via broadband digital connections to the Internet. Cable's dominance in broadband has created concern that it may stifle development of competing streaming video technologies, limit access to Internet sites and other content, or steer home shopping activities in favor of their proprietary interests.

The hardware and software to deliver streaming video over the Internet are already available, and every advance in bandwidth and compression technology makes video distribution over the Internet more feasible. A growing number of TV and radio stations are already being widely distributed over the Internet, albeit slowly and with variable quality.

On March 17, 2003, Yahoo! Inc. "unveiled its newest subscription service, Yahoo! Platinum, a premium online video and audio service featuring branded programming from leading entertainment, sports and news providers for both broadband and narrowband consumers. The new subscription service provides premium video and audio content from CBS' Survivor Insider, Fox's 'American Idol,' NASCAR.com, CBS Sports' coverage of the NCAA Division I Men's Basketball Championship through its Internet rights holder SportsLine.com, ABC News, CBS MarketWatch and The Weather Channel, among other providers. In coming weeks, Yahoo! Platinum plans to add programming from CNBC Dow Jones Business Video, National Geographic, Warren Miller Entertainment and much more. With the launch of Yahoo! Platinum, Yahoo! continues to deliver on its strategy to be the most compelling entertainment, sports and news destination on the Web."[296]

Countless other providers are now providing broadcast-like audio and video services via the Web. One study reports that 35 percent of Americans, more than 80 million people, have tried streaming audio or video, up from 30 percent in 2000.[297]

These developments threaten the cable incumbents at two levels. They lose control over creators of video content because it is so easy to link servers of digital video content to the Web. And they lose subscriber fees, pay-per-view revenues and general market share as a cornucopia of new video content comes on line. Advertising and pay-per-view revenues are directly threatened by Internet capabilities. Cable operators are also potentially threatened as the broadband Internet creates new content and potentially competing distribution outlets. Economists have noted, "…the Internet is the next potential source of widespread competition to cable television in the distribution of video programming."[298]

The cable industry initially responded by deliberately crippling the software that makes Internet-delivered streaming video possible – the industry boldly announced a limit on the technical capabilities of streaming video software used over cable facilities. At that time, major cable operators were joint owners of a company called @Home, to which they had assigned the power to administer the delivery of all broadband digital data services over the cable networks owned by those operators. @Home simply told its cable subscribers that they were not permitted to stream more than 10 minutes of video through their cable modems. Time Warner imposed an identical restriction on companies seeking to provide content over its Road Runner service.[299]

This was too brazen even for cable, and the 10-minute restrictions have since been dropped. Time Warner abandoned its limit as part of its Memorandum of Understanding when it merged with AOL.[300] AT&T committed to allow video streaming in the MediaOne merger proceeding.[301]

This has not stopped cable, however, from attempting to undermine the migration of competing programming content to the Internet. *See* Table 15. Several cable operators have once again "started adding language to their programming contracts that limits the amount of streaming a network can offer via the Internet."[302] Other cable companies have apparently opted instead to condition the carriage of a video channel on the provider's agreement not to distribute the same content over the Internet at all.[303] Yet another approach now under active consideration, according to the trade press, is to impose "speed tiers" and "bandwidth-usage" fees "because of the potential threat posed by providers of Internet-based telephony and video-on-demand services that want to distribute their offerings over high-speed cable connections. MSOs fear that broadband service providers might end up competing with them by using cable's very own fat pipes."[304] AT&T Broadband introduced tiered pricing to serve "power users" who "set up home networks, send or receive large files, such as when downloading software, or enjoy other bandwidth-intensive applications."[305]

Table 15. Maintaining the Monopoly by Preventing Broadband Internet Distribution of Programming	
1996 - present	Cable operators begin providing broadband service over cable lines but severely limit the amount of bandwidth available for the broadband service. Economists have noted that the "typical cable system has a capacity of 744 MHz but only 6 MHz goes to broadband."
1998	Cable operators, through their broadband subsidiaries (Road Runner and @Home), impose a 10-minute limit on streaming video over cable broadband connections.
2001	Charter and other cable operators attempt to condition the carriage of non-affiliated programming on their systems through the programmer's consent not to distribute the same content over the Internet.
2002	Press reports indicate that the incumbents have once again "started adding language to their programming contracts that limits the amount of streaming a network can offer via the Internet."
2002	AT&T Broadband introduces tiered pricing to serve "power users" who "set up home networks, send or receive large files such as when downloading software, or enjoy other bandwidth-intensive applications."
2002	Other cable operators are considering imposing consumption or bandwidth-usage fees because of the threat of distribution of video programming content over high-speed cable connections.
Sources*: See* Table Notes. (AT&T purchased by Comcast Dec. 2002)	

The concern that cable will deny consumers access to competitively supplied Internet-delivered content has become so acute in recent months that a broad coalition of content providers – including Amazon, Yahoo!, Walt Disney, eBay, Microsoft and Apple – have asked the FCC to take steps to ensure that cable operators do not "encumber the relationships . . . between their customers and destinations on the network."[306] As Amazon has explained, the reason for the rising concern is that the broadband world is "much more hospitable than the present environment to discriminatory behavior."[307] The cable industry has responded by offering subscribers unrestricted access to Internet content but refusing to agree to any rules that would enforce such practices.[308]

Finally, there has been cable operators' straightforward decision to limit digital bandwidth altogether. Cable operators have been deploying coaxial cable for as long as they have been offering cable service. Coaxial has *much* more capacity than the twisted-pair copper wires that phone companies have traditionally deployed to carry voice, yet cable's broadband Internet service is, for the most part, no faster than telephone-company DSL service. This is because though coaxial cable can carry more than a hundred video channels, cable operators have opted to use only two of those channels (one for downstream traffic, another for upstream) for cable modem service.[309] Upgraded cable systems – *i.e.*, those that are capable of providing cable Internet service – typically have a bandwidth of between 550 and 750 MHz. Most systems are now at the higher level. As economists George Bittlingmayer and Tom Hazlett have noted, "cable systems could increase broadband access speeds by allocating more spectrum."[310] In fact, overbuilders "effectively under-price monopoly systems by allotting users substantially higher system capacity for broadband."[311]

UNDERMINING COMPETITIVE ACCESS TO VITAL CONTENT, EQUIPMENT AND SERVICES

Cable operators enter into agreements with unaffiliated programming providers for the exclusive rights to deliver the programmer's content. Cable operators are now adapting that practice to the next battleground for subscribers – VOD services. As was stated in *The New York Times*, "[t]he most prominent addition to the panoply of digital services is video on demand."[312] Cable operators have also denied potential competitors access to VOD content indirectly by forming exclusive agreements with equipment suppliers that expressly deny rivals the technology (equipment, software, etc.) necessary to deliver VOD programming.[313]

Several large cable operators –Time Warner, Advance/Newhouse Partnership, Comcast and Cox Communications – are partners in a consortium called iN DEMAND. This venture has already signed content distribution deals with major entertainment producers (Artisan, Universal, DreamWorks, Sony, Twentieth Century Fox, ESPN and Hallmark) and sports leagues (hockey, basketball, tennis, and NASCAR, among others).[314] While the content developer contracts do not appear to be exclusive, the iN DEMAND service, according to wireline competitors, is offered only to cable customers that subscribe to the services of iN DEMAND's owners.[315] *See* Table 16.

In apparent response, at least one overbuilder, RCN, has recently started a service called RCN Impulse On-Demand, now available in Philadelphia, New York City, Boston, and Lehigh Valley, Pa.[316]

Overbuilders find it difficult or impossible to obtain the content that is essential to make their cable, wireless or IP distribution alternatives competitive. Intertainer, a competing provider of Internet-based VOD service, recently filed an antitrust suit "against AOL Time

Warner, Sony, Universal and Movielink . . . who control more than 50 percent of the theatrical motion picture business and more than 60 percent of the music business,"[317] for "attempt[ing] to hinder and delay the emergence and expansion of IP VOD services . . . in order to protect and control their revenues."[318]

Table 16. Maintaining the Monopoly by Controlling Video-on-Demand Services

VOD Provider	Cable Affiliation	Exclusion of Competitors
iN DEMAND (service)	Joint venture of four cable operators –Time Warner, Advance/Newhouse, Comcast and Cox	"[iN DEMAND] indicated that they could not do business with Everest because they had exclusive agreements with their owners, who are large cable operators." WideOpenWest, another overbuilder, was informed that VOD servers were "unavailable in any market where WideOpenWest competes with a named incumbent cable operator."
Concurrent (equipment)	N/A	RCN: "Seachange and Concurrent, have shown an affinity for the largest cable providers that have impeded RCN's efforts to negotiate acceptable contracts for the deployment of their technology . . . [Time Warner Cable] has exerted its monopsony buying power to negotiate exclusive noncompete clauses in its contracts with both companies that prevent RCN from deploying technology provided by either Seachange or Concurrent in any market in which Time Warner operates"
SeaChange (equipment)	Comcast has an Equity Investment in SeaChange and a Video-on-Demand Purchase Agreement	*See Concurrent above*
Sources*: See* Table Notes.		

Another recent attempt by cable to curtail competition by limiting access to content has centered on electronic programming guides (EPG). These guides provide customers with on-screen listings of the available cable channels and programs, together with interactive features that enable customers to do things such as program favorite channels, search for shows by subject, set reminders for when programs are on, and block channels from children. These guides have become increasingly important as digital cable has rapidly expanded the number of available channels.

At least one overbuilder has been informed that it might not be permitted to use an interactive programming guide in any market where it competed directly against an unspecified incumbent.[319] RCN was told that it couldn't license TV Gateway in any market where RCN competes against that guide's owners, Comcast, Charter, Adelphia and Cox.[320] And the incumbents have also taken anti-competitive actions against the only interactive EPG that competes against their own. Time Warner has “invaded broadcast signals transiting its systems . . . to remove Gemstar’s EPG data” in the past and has threatened to do so again in the future.[321]

At the other end of the distribution line, cable operators have contrived to limit the use of cable converter boxes located on customer premises to decode content delivered by other providers. The 1996 Act required open standards for set-top boxes.[322] But consumer groups have complained in the past that cable operators have effectively evaded these requirements “[b]y slow-rolling the technical standard and forcing would-be set-top box competitors to sign an egregious licensing agreement whereby the company signing the agreement would have to virtually forfeit their intellectual property. The cable companies have killed any near-term possibility of an open set-top market.”[323] This has allowed cable operators to continue charging above-cost prices on the set-top boxes themselves and to lower the threat that DBS or overbuilders could break into the market at a lower cost by inviting consumers to use the set-top box they already own to decode another provider’s signal. Several cable operators have even negotiated deals with set-top box manufacturers that forbid sales of the same equipment to competing wireline providers.[324]

Overbuilders have also complained that cable incumbents have hindered their ability to build-out systems, interfering with the process of hiring contractors.[325] Some cable operators have apparently required contractors to sign non-compete clauses in their contracts and have threatened any contractors found working for overbuilders with reprisals.[326]

CONCLUSION

DEREGULATION OF THE CABLE INDUSTRY HAS FAILED

Cable television has become the primary means for Americans to receive entertainment, news and information. Additionally, large cable operators have become the vital link in our nation's ability to access broadband Internet, which will continue to grow as a virtual "town square" for American discourse. As with many other vital industries that have developed in America, e.g., railroads, petroleum, telephone service, when a handful of companies dominate the market, consumers are gouged, competitors are stifled, and regulators are stymied.

This report documents the continuing trend of large cable operators to raise prices since deregulation. The FCC has once again confirmed this trend with the July 2003 release of its 2002 Report on Cable Prices. Moreover, the GAO has confirmed the same. Both agencies have agreed that only the presence of a wireline competitor has an effect on prices. DBS has not yet had any such impact. The problem is that overbuilders serve only a tiny fraction of homes in America. In effect, there is no price competition for cable service. And it remains clear that incumbent cable operators have not and, at least for the foreseeable future, will not ever compete against one another. To the contrary, they work hard through joint ventures and industry trade associations to coordinate various marketing and technology programs.

Large cable operators remain vertically integrated. They own or control much of the decisional programming in America, including critical regional sports programming. This enables them to decrease their programming costs; however, it has not inspired them to decrease the consumers' bills. It has enabled vertically integrated cable operators to discriminate against cable competitors when such programming is delivered terrestrially, denying competitors the opportunity to air critical programming.

The cable industry has become enormously concentrated in a few large operators. Three incumbents control 56 percent of the market. These large operators are also geographically clustered, becoming the main providers of video services in a community. This allows a cable operator to dominate the news, information and entertainment choices for their subscribers. The concentration and clustering of the cable market has not prevented price increases for consumers. This is not what Congress intended when the cable industry was deregulated.

Cable operators are now the largest providers of broadband Internet service. This is a huge new profit center for cable operators, but these profits have not led to price decreases for consumers either. What is of great concern, but cannot be entirely predicted at this time, is what impact the dominance of broadband will have on the future development of the nation's virtual town square. Will content be limited? Will competitors be allowed to access cable operator's bandwidth? Will low-income consumers be locked out of broadband communications? These and many other questions must be examined as broadband grows.

Just as over-the-air broadcast for radio and television were dominant providers of information in an earlier era, and as cable television is now, certainly broadband Internet is likely to reach that level of influence. Given the anti-competitive history of cable operators, policy makers and consumers should monitor these developments very closely.

Since its inception and growth throughout the second half of the 20th century, cable television service has brought an enormous amount of popular news and entertainment programming into the living rooms of America. The cable industry has used public rights of ways to access those homes, and in turn, made huge profits. This report has made it clear that the cable industry has not lived up to its public and civic responsibilities as holders of valuable public franchises and licenses.

The failure of the Federal Communications Commission and other federal agencies to recognize, admit and take effective steps to prevent the pervasive pattern of anti-consumer and anticompetitive behavior of the cable companies is shocking. Evidence of the abuse of market power abounds in both the video and high-speed Internet markets, yet the FCC insists that competition is vigorous in the industry.

The time has come for Congress and state and local governments, to take action. Responsibility for oversight of the industry must be moved out of Washington, where regulators have demonstrated an inability to recognize or address the pervasive anti-competitive, anti-consumer practices of the powerful cable corporations. The problems documented in this report demand action to restore and create competition in the multichannel video market and an environment in which consumer choice drives corporate decisions and the public interest is promoted.

MOVE DECISION MAKING OUT OF WASHINGTON AND CREATE CONSUMER CHOICE

Congress must empower state public utility commissions (PUC) to regulate all cable rates and charges for video services until meaningful competition emerges.

Congress should allow state public utility commissions the authority to regulate all cable rates and charges and to combat anti-competitive predatory-pricing business practices. With the 1996 Act's deregulation, rates for the cable programming tier to which the vast majority of consumers subscribe have inflated without restraint. Consumer rate protections at the state level are needed, but state PUC rate regulation is only necessary and desirable until robust competition that actually disciplines cable prices emerges.

Return authority to local communities.

Preemptive provisions of the Act have thwarted attempts by local communities to protect cable subscribers from the worst of the industry's depredations. These preemptive provisions must be abolished so that policy control may be returned to community leaders who are closest to consumers and who are most committed to ensuring that their communities have access to multiple providers of competitively priced video services.

***Introduce* à la carte *programming requirement to expand consumer choices*.**

Consumers should be able to choose their own suite of programming, rather than being force-fed the programming tiers that cable operator want them to purchase. Consumers must be given the right to purchase every individual channel on an *á la carte* basis at fair, reasonable and nondiscriminatory prices.

Ensure consumer input with a public board member.

A public member representing subscribers should be placed on the board of directors of any cable operator with a greater than four percent market share of cable households as a condition of franchise or FCC approval. Such a public member should have no current or prior affiliation with a cable, broadcast or DBS distributor or programmer, or any of their industry trade associations, and should be barred from joining such a board as a public member for five years after serving in any such affiliation. Public members should be selected by a committee of outside directors and approved by the shareholders. This would ensure better consumer input and assist in preventing insider dealing and financial mismanagement, as has occurred with some of the nation's leading cable operators.

Empower the viewers and citizens. Citizen-viewers should have a direct voice in the process of cable regulation and the opportunity to use that voice to create their own well-funded news and public affairs channels. When cities negotiate franchise agreements with cable companies, they should require that cable operators include billing inserts that invite consumers to join a local Cable Action Group that would operate a local Audience Channel, well-funded and equipped by the cable company. Such a group would serve a dual purpose: operating the local channel and organizing consumers into a mobilized interest group to advocate for pro-consumer and pro-democracy media policy. Alternatively, local or state governments could assist in fundraising for the Cable Action Group, by collecting membership dues through inserts in tax or license renewal mailings. Illinois Citizen Utility Board (CUB) is funded in this manner and represents the interests of Illinois gas, electric, phone and other utility ratepayers.

CREATE CONDITIONS THAT PROMOTE REAL COMPETITION

Ensure access to vital programming.

Newly formed competitors cannot survive, let alone thrive, if cable operators are allowed to continue their anti-competitive practices of locking up must-have programming, such as sports and other regional channels. The existing federal program-access law must be modified to eliminate loopholes that have allowed the cable industry to continue these anti-competitive practices and undermine the emergence of wireline competitors. Additionally, cable operators should be prohibited from entering into exclusive contracts for equipment or other technical services that prevent competitor access to such programming.

Adopt reasonably priced leased-access rates.

Cable operators have negated their obligation to lease channel capacity to independent programmers by setting the prices so high that no competing provider could possibly pay current fees and remain commercially viable. In order to promote competition with diverse and independent programming, reasonably priced leased access must be adopted. This pro-competitive pricing should be based upon the FCC's existing rate-setting methodology, which was designed to promote competition in the telecommunications market.

Prohibit cable broadband content restrictions to allow consumers full use of the Internet.

Cable operators have a long history of restricting consumer access to content that cable operators disfavor. With the cable industry's ongoing dominance of the broadband market, they must be prohibited from restricting consumer access to Internet content or application based on the source or nature of the consumer's request.

GLOSSARY OF TERMS

1934 Communications Act – The Communications Act of 1934, 47 U.S.C. §151 *et seq*. The 1984 Cable Act, the 1992 Cable Act and the 1996 Telecommunications Act are all amendments to the 1934 Communications Act. The cable provisions of the statute appear in Title VI of the Communications Act, 47 U.S.C. §521 *et seq*.

1984 Cable Act – The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

1992 Cable Act – The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

1996 Telecommunications Act – The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

American Cable Association – Association of independent cable television businesses and owners of smaller cable systems that work together to ensure the future competitiveness and viability of their businesses. Association members primarily serve customers in small towns and rural areas across America. For more information, see web site: www.americancable.org.

American Customer Satisfaction Index (ACSI) – The Voice of the Nation's Consumer™, the ACSI is a uniform and independent measure of household consumption experience. A powerful economic indicator, the ACSI tracks trends in customer satisfaction and provides valuable benchmarking insights of the consumer economy for companies, industry trade associations, and government agencies. For more information, see web site: www.theacsi.org.

Bandwidth – The width of a communications channel and an expression of capacity of a communication link.*

Broadband – A transmission facility providing bandwidth greater than 45 MBPS, generally fiber optic in nature.*

Broadband Service Provider Association (BSPA) – An overbuilder trade association.

Bundling – A marketing term used by a variety of customer service providers, including local, long-distance companies and cable operators, whereby several services are offered to consumers combined in one package with a discount from the aggregate per-service price or some other benefit attendant the package.

Cable operator – A statutory definition, *see* 47 U.S.C. §522(5). Generally, one who provides and owns or controls a cable service over a cable system.

Cable service – A statutory definition, *see* 47 U.S.C. §522(6). Generally, the transmission to subscribers of video programming, or other programming services, and any subscriber interaction required for the selection or use of such programming.

Cable system – A statutory definition, *see* 47 U.S.C. §522(7). Generally, a facility and equipment designed to provides cable service which includes video programming and which is provided to multiple subscribers within a community over any public right-of-way.

Churn rates – Monthly cancellation rate of subscribers as a percentage of total subscribers. This is a metric used for service companies as an indication of how successful they are at retaining customers.*

Community Antenna Television (CATV) – Originally, signals from distant TV stations are picked up by a large antenna, typically located on a hill, then amplified and piped all over the community below on coaxial cable.* This term is now largely in disuse, having been supplanted by either "cable service" – when referring to the video programming offering being made to consumers – or "cable system" – when referring to the facilities utilized to provide such service.

Consumer Federation of America (CFA) – CFA is first and foremost an advocacy organization, working to advance pro-consumer policy on a variety of issues before Congress, the White House, federal and state regulatory agencies, and the courts. Its staff works with public officials to promote beneficial policies, to oppose harmful policies, and to ensure a balanced debate on important issues in which consumers have a stake. For more information, see web site: www.consumerfed.org

Consumer Price Index (CPI) - Defined by U.S. Department of Labor. The CPI is a measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services. It is one of the most widely used measure of inflation. For more information, see web site: www.bls.gov/cpi/home.htm.

Consumers Union – Publisher of Consumer Reports, CU is an independent, nonprofit testing and information organization serving only consumers. Consumers Union's advocates tackle consumer issues that are regional, national, and even international in. They testify before Federal and state legislative and regulatory bodies, petition government agencies, and file lawsuits on behalf of the consumer interest. For more information, see web site: www.consumersunion.org/aboutcu/about.html.

Coaxial Cable - Coaxial cable is the capacious wire used to transmit data between end-user homes and a cable company's headend facilities.

Digital Subscriber Line (DSL) – A generic name for a family of digital lines being provided by competitive local exchange carriers and local telephone companies to their local subscribers.*

Direct Broadcast Satellite (DBS) – Refers to satellite television systems in which the subscribers receive signals directly from geostationary satellites via small and relatively inexpensive dish antennas typically mounted on either the roofs or sides of houses.* The principal providers of DBS in the United States are DIRECTV and EchoStar.

DMA – Designated Market Area. The Designated Market Area is A. C. Nielsen's geographic market design, which defines each television market. DMAs are composed of counties (and possibly also split counties) and are updated annually by the A. C. Nielsen Company based on historical television viewing patterns. There are currently 210 DMAs in the US.

EBITDA – An acronym for "earnings before interest, taxes, depreciation and amortization."*

Federal Communication Commission (FCC) – The federal agency established by the Communications Act of 1934 with authority to regulate interstate communications. The FCC is an independent agency and not a part of the Executive Branch although the five commissioners are presidential appointees.

Franchise – The right, granted by a government entity, or local franchise authority, (*i.e.*, a municipality, city government, etc.), to a cable operator to provide service to a given area using public right of ways.

General Accounting Office (GAO) – an administrative arm of Congress that frequently responds to requests from U.S. Senator or Representative for information and analysis.

Internet Service Provider (ISP) – A vendor who provides access for customers to the Internet and the World Wide Web.*

Local Franchising Authority (LFA) – The governmental entity empowered to grant a cable franchise. *See* 47 U.S.C. §522(10).

MMDS – Multichannel Multipoint Distribution System. MMDS systems use wireless technology, such as microwave, to transmit cable television signals, (actually data packets - audio, video or data) from a single transmitting point to multiple receiving points.

Monopsony – A situation in which there is one purchaser of a good for which there are multiple suppliers. In this situation, the purchaser has significant negotiating leverage over the competing suppliers.

MSO – Multiple System Operator. A cable company that operates more than one cable system. The principal MSOs, by current market share, are Comcast, Time Warner Cable (a division of AOL Time Warner), Charter, Cox Communications, Adelphia Communications, Cablevision, Advance/Newhouse, Mediacom Communications, Insight Communications and CableOne.

Multichannel Video Programming Distributors (MVPD) – statutory definition, *see* 47 U.S.C. §522(13). This definition includes both cable operators (including cable overbuilders), DBS, SMATV, and MMDS providers.

Multiple Dwelling Unit (MDU) – Any housing structure that is broken into more than one living area to accommodate multiple family units, e.g., apartments.*

Must Carry – The provisions of the Cable Act that require carriage of certain local channels without charge to the channel provider. *See* 47 U.S.C. § 534. Local channels that have must carry rights opt either for free carriage or "retransmission consent," by which they grant consent to be carried usually in exchange for a fee (and oftentimes other consideration). See 47 C.F.R. Part 76, Subpart D, §76.51 *et seq.* Disputes have broken out between cable operators and popular channels when negotiations for retransmission consent have broken down, sometimes resulting in cable operators removing a particular channel from their offerings in one or more communities.

National Cable Television Association (NCTA) – The NCTA, formerly the National Cable Television Association, is the principal trade association of the cable television industry in the United States. For more information, see web site: www.ncta.com

Overbuilders – Usually refers to emerging *wireline* cable providers that build their own facilities – hence *over*builders – in communities in order to compete with the established or incumbent cable operator (which is usually an MSO).

Program access – A provision of the 1992 Cable Act designed to prohibit (among other things) the establishment of exclusive arrangements in most circumstances between a cable operator and an affiliated video programming vendor if such programming is delivered via satellite. *See* 47 U.S.C. §548. This provision is often referred to as "Section 628" because it was adopted as Section 628 of the 1992 Cable Act.

Public Utility Commission (PUC) – Administrative agencies generally established by state legislatures to regulate certain specified industries usually including intrastate telecommunications (*e.g.*, local phone service) and occasionally including cable services. The actual title of an agency in a particular state may be somewhat different – *e.g.*, in New York: Public Service Commission; in Massachusetts: Department of Public Utility Control; in Illinois: Illinois Commerce Commission; in Iowa: Iowa Utilities Board. Commissioners may be appointed or elected as provided by state law.

Satellite Broadcasting & Communications Association (SBCA) – The principal trade association of DBS providers, see web site: www.sbca.com.

Satellite Master Antenna Television (SMATV) – A distribution system that feeds satellite signals to hotels, apartments, etc., in which facilities (*e.g.*, wires) do not cross the public rights of way. Sometimes referred to as "private cable" since the service is not subject to local franchising requirements.

Spectrum – Radio frequency spectrum. Spectrum is assigned by the FCC and is used to provide various services by transmitting data over radio waves.

Streaming – With streaming, a user can watch or listen to audio or video without downloading the whole file onto their computer (*i.e.*, the file will start playing immediately upon the start of downloading) delivered using Internet Protocol (IP).

Terrestrial Delivery – Programming delivered from land via microwave, coaxial cable, or fiber optic cables in the ground as opposed to delivery via satellite, which has been the dominant method of delivery.

Vertically Integrated – A firm is vertically integrated when it has an ownership interest in or controls a firm in an upstream or downstream market. FCC rules define when a cable operator and a video programming vendor are vertically integrated, *i.e.*, when the programming vendor is deemed "affiliated with" the cable operator for regulatory purposes, such as being subject to the program access provision (Section 628) of the 1992 Cable Act.

Video-On-Demand (VOD) – A pay-per-view subscription-based service provided by cable and satellite operators which allows consumers to order and watch movies, concerts, and other events at any time through their television's graphic user interface.

Video Programming – A statutory definition, *see* 47 U.S.C. §522(20).

Wireline competitor – A video service provider that uses hybrid fiber/coax networks or similar networks that are right-of-way enabled and are much easier to add interactive and two-way services to – as opposed to satellite or MVDS service. This term usually refers to a wireline overbuilder, but may also include providers that already have facilities in place (*e.g.*, local telephone companies) that do not require new build outs.

** As defined by Newton's Telecom Dictionary, 19th edition (copyright 2003 Harry Newton, www.TechnologyInvestor.com).*

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J.D. Power and Associates News Release. *J.D. Power and Associates Reports: Satellite TV Grows in Consumer Popularity, Cable Service Sees Slight Decline* (Sept. 5. 2002)

Figure 5. Cable Faces Very Little Overbuild Competition
NCTA, Cable Developments 2002 at 26 (2002).

Figure 6. Large Cable Companies Charge More
2001 Report on Cable Prices at Attachment B-3 (noncompetitive markets).

ENDNOTES

[1] U.S. Government Accounting Office (GAO), *Telecommunications: The Changing Status of Competition to Cable Television* (July 1999), at 5; http//www.cablecenter.org/history (accessed April 13, 2003).
[2]*See*, Copyright Revision Act of 1976, 17 U.S.C. §§ 101-118.
[3] Amendment to the Communications Act of 1934, the *Cable Communications Policy Act*, Pub. L. No. 98-549, 98 Stat. 2779 (1984) .
[4] *See Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460, § 623(b) (1992).
[5] *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996)**,** S. Rept. No. 230, 104th Cong. 2nd Sess. (1996).
[6]Report on Cable Industry Prices, 17 FCC Rcd 6301, 6302 n. 9 (2002) ("*2001 Report on Cable Prices*").
[7] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, 17 FCC Rcd 26901 (released December 31, 2002) ("*Ninth Video Competition Report"*) at ¶ 115.
[8] There often is confusion in the citing of statistics for wireline competition. Using the FCC's "effective competition" test, 671 -- or approximately 2 percent -- of the 33,246 cable community units nationwide have been found to meet this test. *Id.* From the perspective of the actual number of subscribers that choose an overbuilder as their service provider, there are approximately 1 million such subscribers -- 1.3 percent -- out of a base of 89.9 households that subscribe to multichannel video programming services. *See Ninth Video Competition Report* at ¶¶5, 105.
[9] *Telecommunications Act of 1996*, Pub. L. No. 104-104, § 302(b), 110 Stat. 124, *repealing* 47 U.S.C. §533(b).
[10] *Telecommunications Act of 1996*, Pub. L. 104-104, 110 Stat. 121, § 302(a), *adding* 47 U.S.C. §573.
[11] *Id.*, 47 U.S.C. § 573(c). *But see City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999) (preserved local franchising authority and thus made clear that an OVS certification could not be used to evade local right-of-way authority and thus obviate the need for reaching agreement with local communities for the use of their property).
[12] Pub. L. No. 106-113, 113 Stat. 1501 (1999).
[13] National Cable and Telecommunications Association, http://www.ncta.com/industry_overview/top50mso.cfm, (accessed April13, 2003) (NCTA)
[14] *Ninth Video Competition Report* at ¶ 14.
[15] *See* NCTA, *Top 25 MSOs*, http://www.ncta.com/industry_overview/top50mso.cfm (accessed Jan. 27, 2003) (top 25 MSOs as of September 2002); NCTA, *Industry Statistics*, http://www.ncta.com/industry_overview/indStat.cfm?indOverviewID=2 (accessed Jan. 27, 2003) (basic cable households as of July 2002).
[16] American Cable Association, http://www.americancable.org, (accessed April13, 2003).
[17] *See* GAO, *Telecommunications: The Changing Status of Competition to Cable Television*, at 6.
[18] *Ninth Video Competition Report* at ¶¶5, 105.
[19] *Id.* at ¶¶ 103, 104.
[20] *Id. at* ¶ 105.
[21] *Id. at* ¶ 53.
[22] *See* NCTA, *Top 25 MSOs*, http://www.ncta.com/industry_overview/top50mso.cfm (accessed July 17, 2003)
[23] *See*, *Cablevision's New Venture With Satellite Stirs Skeptics*, New York Times at C6 (July 17, 2003).
[24] *See Ninth Video Competition Report* at ¶58.
[25] *See 2001 Report on Cable Prices* at ¶ 10.
[26] *See News Corp. Adds to Empire With Control of DirectTV*, New York Times, at C1 (April 10, 2003).
[27] *See EchoStar Deal Lets SBC Offer Satellite TV On Phone Bill*, New York Times, at C1 (July 23, 2003).
[28] *See* D. Brenner, M. Price & M. Meyerson, *Cable Television and Other Nonbroadcast Video*, at 2-37 (2002).
[29] *See*, *e.g.*, *Television Consumer Reports* at 576 (Sept. 1991); Nat'l League of Cities, *The State of America's Cities Ninth Annual Opinion Survey of Municipal Elected Officials* at 9 (Jan. 1993).
[30] *See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, Report, 5 FCC Rcd 4962, at ¶¶ 19-34 (1990) ("*Cable Competition Report*").

[31] *See* GAO, *Telecommunications: 1989 Survey of Cable Television Rates and Services*, Report to the Chairman, Subcomm. on Telecommunications and Finance, Comm. on Energy and Commerce, House of Representatives 47 (Aug. 1989); GAO, *Telecommunications: Follow-up National Survey of Cable Television Rates and Services,* Report to the Chairman, Subcomm. on Telecommunications and Finance, Comm. on Energy and Commerce, House of Representatives (June 1990); GAO, *Telecommunications: 1991 Survey of Cable Television Rates and Services*, Report to the Chairman, Subcomm. on Telecommunications and Finance, Comm. on Energy and Commerce, House of Representatives (July 1991).

[32] *See* GAO, *Telecommunications: 1991 Survey of Cable Television Rates and Services*, Report to the Chairman, Subcomm. on Telecommunications and Finance, Comm. on Energy and Commerce, House of Representatives, Appendix I, Table I.1 (July 1991); Department of Labor, Bureau of Labor Statistics, Consumer Price Index -- All Urban Consumers, All Items, http://www.bls.gov/cpi (accessed Jan. 27, 2003). Cable rate increase versus CPI calculated as follows: Nov. 1986 CPI = 110.4; Apr. 1991 CPI = 135.2; (135.2 – 110.4)/110.4 = 22 percent increase in CPI versus 55.7 to 60.8 percent increase in cable rates from Nov. 1986 to Apr. 1991.

[33] *See* GAO, *Telecommunications: Follow-up National Survey of Cable Television Rates and Services*, Report to the Chairman, Subcomm. on Telecommunications and Finance, Comm. on Energy and Commerce, House of Representatives, Appendix I, Table I.1 (June 13, 1990).

[34] *See Cable Television Consumer Protection and Competition Act of 1992*, Publ. L. 102-385, 106 Stat. 1460, § 623(b) (1992).

[35] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 at ¶ 213 (1993).

[36] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 at ¶¶ 115, 119 (1994).

[37] *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56**,** (1996)**,** S. Rept. No. 230, 104th Cong. 2nd Sess. (1996).

[38] *See* 47 U.S.C. § 543(c)(4); FCC News Release, *Cable Services Action; Cable Television Upper Tier Rate Regulation Ends March 31, 1999*, Report No. CS 99-4 (Mar. 29, 1999).

[39] *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, 17 FCC Rcd 6301 & n. 9 (2002) ("*2001 Report on Cable Prices*"). There are four "tiers" of service – packages of programming channels – generally referred to by regulation. The primary level of cable television service is commonly referred to as "basic service" tier ("**BST**") and must be taken by all subscribers. The content of "basic" service varies widely among cable systems but, pursuant to the Cable Act, must include all local television signals and public, educational, and governmental access channels and, at the discretion of the cable operator, may include other video programming services. One or more expanded tiers of service, known as cable programming service tiers ("**CPST**") for purposes of regulation, and often (usually) designated as "expanded basic" by cable operators, also may be offered to subscribers. These expanded tiers of service usually include programming channels delivered to the cable operator via satellite, such as TBS, CNN, USA Network, etc. **Premium** services are cable networks provided by a cable operator to subscribers on a per channel basis for an extra monthly fee, and usually include such channels as HBO, Showtime, etc. Pay-per-view ("**PPV**") services are cable networks provided on a per program basis. PPV service is a separate category from premium service. *See Ninth Annual Video Competition Report* at nn. 12, 13.

[40] *See* 47 U.S.C. § 543(k).

[41] *Compare 2001 Report on Cable Prices*, Att. B-1 *with Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Basic Rates for Basic Services, Cable Programming Services, and Equipment*, Report on Cable Industry Prices, 12 FCC Rcd 22756 at Table 1 (1997); *Ninth Video Competition Report* at ¶ 9 & n. 7; Department of Labor, Bureau of Labor Statistics, Consumer Price Index -- All Urban Consumers, All Items, http://www.bls.gov/cpi (accessed Jan. 27, 2003). *Noncompetitive* cable system rate increases calculated according to the following methodology: July 1996 rate = $26.57; July 2001 rate = $37.13; rate increase from 2001 to 2002 = 6.3 percent. June 2002 rate = $37.13*1.063 = $39.47. Increase from July 1996 to June 2002 = (39.47-26.57)/26.57 = 48.55 percent. *Noncompetitive*

programming and equipment rate increases in constant dollars calculated according to the following methodology: July 1996 CPI = 157. June 2002 CPI = 179.9. June 2002 rate in 1996 dollars = (39.47)*(157/179.9) = 34.45. Increase from July 1996 to June 2002 in constant 1996 dollars = (34.45-26.57)/26.57 = 29.64 percent. Calculations for *competitive* cable systems using the same methodology yield a 49.24 percent real rate increase and a 30.24 percent adjusted rate increase.

[42] *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices at ¶ 24 (2002) ("*2002 Report on Cable Prices*").

[43] *See 2001 Report on Cable Prices* at ¶ 10; Table 15, *infra*.

[44] *See 2001 Report on Cable Prices* at ¶ 8.

[45] *See 2002 Report on Cable Prices* at ¶ 28.

[46] GAO, *Telecommunications: Issues in Providing Cable and Satellite Television Services* (Oct. 2002), at 9.

[47] The FCC's methodology that led to "competitive differential" of only 6.2 percent, in contrast to the GAO's finding of 17 percent, has been harshly criticized. *See* Testimony of William B. Shear, Acting Director, Physical Infrastructure, General Accounting Office, before the Senate Committee on Commerce, Science and Transportation, May 6, 2003, available at http://www.senate.gov/~commerce/hearings/testimony.cfm?id=749&wit_id=2016 (accessed May 6, 2003) ("*Shear Testimony*") at 1 ("FCC's 2002 survey does not provide a reliable source of information on the cost factors underlying cable rate increases.").

[48] Consumers Union Press Release, *'Tis the Season for Higher Cable Bills* (Nov. 26, 2002).

[49] *See, e.g., id.;* K.C. Neel & S. Kramer, *Cable's Rate Hikes are Starting to Hit the Streets*, Cableworld (Dec. 2, 2002); P. Howe, *AT&T's Cable Rates Rising 7.8 percent On Average*, Boston Globe (Nov. 23, 2002).

[50] *See* H. Berkowitz, *For Most, 9.9 percent Cable Hike*, New York Newsday (Dec. 2, 2002).

[51] *See* J. Blum, *How High is Up?*, Cableworld (Dec. 2, 2002).

[52] M. Cooper, Consumer Federation of America, *The Failure of 'Intermodal' Competition in Cable Markets* (Apr. 2002), at 4 ("*2002 CFA/CU Study*").

[53] *See* Consumer's Union Press Release, *Cable Price Hikes, Broken Promises Prompt Call for New Oversight* (July 24, 2002).

[54] Consumers Union Press Release, *'Tis the Season for Higher Cable Bills* (Nov. 26, 2002).

[55] Salomon Smith Barney, *Industry Note: Cable: Healthy Rate Increases a Positive Sign for Cable, Part II* (Dec. 3, 2002), at 2 ("*SSB Cable Industry Report*").

[56] *See Ninth Video Competition Report* at ¶ 19 & Table 1.

[57] *See id.* at ¶ 4 & App. B, Table B-1.

[58] *See* NCTA, *Industry Statistics*, http://www.ncta.com/industry_overview/indStat.cfm?indOverviewID=2 (accessed July 17, 2003); *See id.* at Table B-1; NCTA, *Cable Television Developments 2002* at 4.

[59] M. Cooper, Consumers Union/Consumer Federation of America, *Cable Mergers, Monopoly Power and Price Increases* (Jan. 2003), at 3 & exhibits 2-3 ("*2003 CU/CFA Study*").

[60] Press Release, *Comcast Reports Second Quarter 2003 Results*, July 31, 2003, available at http://www.cmcsk.com/news/20030731-115180.cfm?ReleaseID=115180 (accessed August 7, 2003).

[61] B.B. Kush, *Over Rated? Residents Dissatisfied With Cable Price Hikes*, Sunday Telegram, at A1 (Feb. 10, 2002) (quoting Worcester Councilor-at-large Michael C. Perotto, a member of the Public Service and Transportation Committee).

[62] A. Gowen, *County Panel Questions Cable Switch*, Washington Post (Aug. 8, 2002), http://www.washingtonpost.com/wp-dyn/articles/A57327-2002Aug7.html (accessed on Jan. 23, 2003) (quoting Montgomery County Cable Communications Advisory Committee member Don Libes).

[63] P. Howe, *AT&T's Cable Rates Rising 7.8 percent On Average*, Boston Globe (Nov. 23, 2002).

[64] *See* Press Release of Senator John McCain (Ariz.), *McCain Requests GAO Review of Soaring Cable Rates* (Apr. 16, 2002),available at http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.Viewpressrelease&Content_id=265.

[65] *See Shear Testimony*.

[66] Press Release of Senator John McCain (Ariz.), *McCain Decries Cable Industry 8% Rate Increase* (July 8, 2003), available at http://www.senate.gov/~commerce/newsroom/printable.cfm?id=205862 (accessed August 7, 2003).
[67] TR Daily, *McCain Contemplates Cable Regulation After FCC Releases Rate Report* (July 8, 2003).
[68] *See*, *e.g.*, Comments of the National Cable & Telecommunications Association at 9, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* MB Docket No. 02-145 (FCC filed July 29, 2002).
[69] *See*, *e.g.*, Testimony of James R. Robbins, President & CEO, Cox Communications, before the U.S. Senate Committee on Commerce, Science and technology, May 6, 2006, available at http://www.senate.gov/~commerce/hearings/testimony.cfm?id=749&wit_id=2017 (accessed May 6, 2003).
[70] *See 2002 Report on Cable Prices* at Table 1;¶*See also 2001 Report on Cable Prices* at Table 1.
[71] *See* M. Scanlon, *Digital Delay Leaves Cablevision Behind,* Cable World (May 14, 2001) (citing ABN Amro cable analyst John Martin).
[72] *See* G. Fabrikant, *AT&T's Cable Deal: The Impact; Expect More Mergers, Experts Say, at Expense of Consumers*, New York Times, at C-8 (Dec. 21, 2001).
[73] *2001 Report on Cable Prices* at ¶ 47.
[74] *See id. at* ¶ 8.
[75] *Id. at* ¶ 10.
[76] *See 2000 Report on Cable Prices* at Tables 5 and 6; *2001 Report on Cable Prices* at Tables 4 and 5; *2002 Report on Cable Prices.* at Tables 4 and 5.
[77] *See*, *e.g.*, C. Stern, *Stay Tuned for Still-Higher Cable Bills*, Washington Post, at A01 (Jan. 10, 2002); D. Lieberman, *Premium Cable May Go Digital Only, Cost More*, USA Today (May 21, 2002).
[78] *2002 CFA/CU Study* at 18.
[79] *See 2001 Report on Cable Prices* at ¶ 22; Bureau of Labor Statistics, U.S. Dep't of Labor, *Consumer Price Indexes: Cable Television*, http://www.bls.gov/cpi/cpifact9.htm (accessed on Jan. 27, 2003).
[80] *2001 Report on Cable Prices* at Table 13; *2002 Report on Cable Price,* at Table 10.
[81] *See 2000 Report on Cable Prices*; *2001 Report on Cable Prices*; *2002 Report on Cable Prices.*
[82] *Report on Cable Industry Prices,* Adopted by FCC June 16,2003, *Adelstein concurrence, at p. 26* ("*2002 Report on Cable Prices*")
[83] *2003 CU/CFA* Study at 3.
[84] *See id.*
[85] *See id.*
[86] *See* D. Shapiro, Banc of America, *Broadband Brief: Is Multichannel Video Destined for a Price War?* at Figure 3 (Nov. 27, 2002) (estimating DBS' programming cost as 37-40 percent of programming revenue); D. Shapiro, *et al.*, Banc of America, *Initiating Coverage of DBS Sector* at Figures 8 & 9 (Sept. 19, 2002) (same); R. Bilotti, *et al.*, Morgan Stanley, Dean Witter, *Broadband Cable: Truth, Lies, and Truck Rolls: Understanding Product Profitability* at 27 (estimating cable's digital programming cost as 28-31 percent of digital revenue); J. Higgins, *Comcast Puts Squeeze on Programming Fees*, Broadcasting & Cable (Jan. 13, 2003) (cost of programming is 28 percent of revenue).
[87] *See* NCTA *Industry Statistics: Cable Advertising Revenue,* http://www.ncta.com/legislative/legAffairs.cfm?legRegID=17, http://ncta.com/industry_overview/indStats.cfm?statID=10 (accessed May 28, 2003).
[88] *For example:*

Time Warner Cable second quarter 2003 results highlights:

- Operating income up 6 percent
- Revenues up 9 percent
- Subscription revenues up 13 percent

See AOL Time Warner Post Second Quarter 2003 Results, available at http://www.aoltimewarner.com/investors/quarterly_earnings/2003_2q/pdf/release.pdf (accessed August 7, 2003).

Cox second quarter 2003 results highlights:

- Operating cash flow up 20 percent

- Revenues up 14 percent
- 112,452 broadband Internet subscribers added, for a total of 1.7 million, reflecting 50% year-over-year growth

See Cox Communications Announces Second Quarter Financial Results for 2003, available at http://www.cox.com/PressRoom/attachments/Q2ProForma.pdf (accessed August 7, 2003).

[89] Press Release, *Comcast Reports Second Quarter 2003 Results*, July 31, 2003, available at http://www.cmcsk.com/news/20030731-115180.cfm?ReleaseID=115180 (accessed August 7, 2003).

[90] Banc of America Securities, *Analysis of Sales/Earnings, Comcast Corporation* (May 8, 2003), at 4. In the same vein, Cox Communications has issued guidance for 2003 of 14-15 percent revenue growth and 17-18 percent operating cash flow growth. *See* http://www.cox.com/PressRoom/06302003Q2Financials.asp, (accessed Aug. 7, 2003). *See* also *The Winning Strategy; Positioning Us for Future Growth,* Cox Communications, Inc., Lehman Brothers Conference (May, 2003), available at http://www.cox.com/investor (accessed May 10, 2003).

[91] Press Release, *Comcast Reports Second Quarter 2003 Results*, July 31, 2003, available at http://www.cmcsk.com/news/20030731-115180.cfm?ReleaseID=115180 (accessed August 7, 2003); *See also* Banc of America Securities, *Analysis of Sales/Earnings, Comcast Corporation* (May 8, 2003), at 2.

[92] Press Release, *Comcast Reports Second Quarter 2003 Results*, July 31, 2003, available at http://www.cmcsk.com/news/20030731-115180.cfm?ReleaseID=115180 (accessed August 7, 2003).

[93] *Comcast Says Loss Widened But Forecast Looking Up*, New York Times, at C5 (May 9, 2003). Comcast's desire to retain customers has led to some criticized practices, including the company's policy requiring presentation of a death in order to close the account of a deceased subscriber. *See* D. Oldenburg, *Comcast Can't Stand To Lose a Customer*, Washington Post, at C09 (May 20, 2003).

[94] Banc of America Securities, *Analysis of Sales/Earnings, Comcast Corporation* (May 8, 2003), at 3.

[95] J. Forkam, *Burke Talks Up Local Advertising Revenue*, Multichannel News (May 19, 2003).

[96] Banc of America Securities, *Analysis of Sales/Earnings, Comcast Corporation* (May 8, 2003), at 2.

[97] J. Forkam, *Burke Talks Up Local Advertising Revenue*, Multichannel News (May 19, 2003).

[98] With respect to DBS, *see* Banc of America Securities, *Cable Industry 1Q03 Preview and Industry Outlook* (April 29, 2003), at 28 figure 15 (showing 2002 programming expenses for Echostar and DIRECTV at 37 percent and 40 percent of monthly programming revenue, respectively) and Morgan Stanley, *Broadband Cable* (October 4, 2002), at 84 exhibit 72 (showing cable operator 2002E programming expenses at 29.4 percent of basic revenue). With respect to overbuilders, the major MSOs – Comcast, AOL Time Warner, Charter, Cox, Adelphia, Cablevision – also have a competitive advantage *vis-à-vis* smaller cable operators because of their bargaining power over programmers. *See, e.g.*, Testimony of James M. Gleason, President & COO, CableDirect, before the U.S. Senate Committee on Commerce, Science and technology, May 6, 2006, available at http://www.senate.gov/~commerce/hearings/testimony.cfm?id=749&wit_id=2020 (accessed May 6, 2003).

[99] *Id*. comparing Banc of America and Morgan Stanley programming expense analyses.

[100] *Ninth Video Competition Report*, App. C at Tables C-1, C-3.

[101] Testimony of Gene Kimmelman, Senior Director for Advocacy and Public Policy, Consumers Union, before the U.S. Senate Committee on Commerce, Science and Technology, May 6, 2006, at 6, available at http://www.senate.gov/~commerce/hearings/testimony.cfm?id=749&wit_id=2019 (accessed May 6, 2003).

[102] *2003 CU/CFA Study* at 6.

[103] *See, e.g.*, S. Beatty, *Rainbow Media Remains Optimistic Despite Low Spending by Advertisers*, Financial Express (Mar. 28, 2001), http://www.financialexpress.com/fe/daily/20010328/fst28033.html (accessed Jan. 27, 2003); Cable Television Advertising Bureau Press Release, *Advertising Revenues for National Cable Networks Rise in Third Quarter* (Nov. 14, 2002).

[104] H.R. Rep. No. 628, 102nd Cong., 2nd Sess. (1992).

[105] *Id.*

[106] *See* 47 U.S.C. § 552.

[107] *See id.*; 47 C.F.R.§ 76.309; *Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992, Consumer Protection and Customer Service,* Report and Order, 8 FCC Rcd 2892 (1993).

[108] *Cable Overseer Hounds AT&T*, Sacramento Bus. J. (May 31, 2002) (citing Wall St. J. article); http://www.theacsi.org/scores_commentaries/commentaries/Q1_02_comm.htm.

[109] *See* American Customer Satisfaction Index Q1, 2003: Transportation/Communications/Utilities & Service, May 21, 2003, http://www.theacsi.org/scores_commentaries/commentaries/Q1_03_comm.htm (accessed July 18, 2003).

[110] J.D. Power and Associates News Release, *J.D. Power and Associates Reports: Satellite TV Grows in Consumer Popularity, Cable Service Sees Slight Decline* (Sept. 5, 2002).

[111] *See, e.g.*, T. Wallack, *Rough Reception For AT&T Cable*, San Francisco Chronicle at A1 (Aug. 11, 2002).

[112] S. Brady, *Deep in the Heart of AT&T Dallas*, Cable World at 37 (Oct. 7, 2002) (quoting Lucy Noonan, vice president of customer care and sales, AT&T).

[113] B. Cravey, *Cable TV Causing Static in Green Cove; Angry Residents Say They're Tired of Poor Service*, Florida Times-Union at M1 (June 9, 2001) (quoting Bill Watson, AT&T, area director of operations for Green Cove, Florida).

[114] *Cox Officials Face Angry Fairfax Board*, Richmond Times-Dispatch at B2 (Jan. 8, 2002) (quoting Gary McCollum, Cox's regional general manager for Northern Virginia).

[115] A. Figler, *Los Angeles Reports Rapid Rise in Cable Customer Complaints*, Cable World (Mar. 4, 2002).

[116] *See, e.g.*, City and County of Denver, Office of Telecommunications, *Customer Service Standards*, http://www.denvergov.org/Telecom/template1361.asp (accessed Aug. 5, 2003).

[117] B. Martinez, *AT&T Given Three Months To Improve Cable TV Service; Council Considers Imposing Fine, Survey To Measure Customer Satisfaction*, Orange County Register (Mar. 21, 2002).

[118] C. Stern, *Cox Internet Users to See Rate Increase*, Washington Post at T03 (Apr. 11, 2002).

[119] *See, e.g.*, J. Sorentrue, *City Takes Action Against Adelphia*, Stuart News/Port St. Lucie News (Stuart, FL) at A1 (Mar. 26, 2002); H. Nedd, *Suffolk, Va., Eyes Unplugging Cable Firm over Customer Service Complaints*, Virginian-Pilot at B2 (Aug. 15, 2002).

[120] M Galnor, *Cable Rates Going Up, But Still No Deal AT&T Broadband Tells City Hike Set for Sept. 1*, Florida Times-Union at A-1 (Aug. 10, 2002).

[121] *See, e.g.*, D. Lazar, *Viewers Criticize Adelphia*, Union Leader at B1 (Apr. 30, 2002).

[122] *See American Customer Satisfaction Index Q1, 2003; See, Industry Statistics*, http://www.ncta.com/industry_overview/indStat.cfm?indOverviewID=2 (accessed July 18, 2003); *See* Letter from Robert Sachs, President & CEO, NCTA, to the Honorable Member of Congress (Feb. 8, 2002);

[123] *See* CTIA, *CTIA's Semi-Annual Wireless Industry Survey Results: June 1985 - June 2002*, http://www.wow-com.com/pdf/june2002release.pdf (accessed Jan. 27, 2003).

[124] *See, e.g.*, L. McNatt, *Suffolk Fines Cable Firm, May Revoke Its Franchise*, Virginian-Pilot at B2 (Nov. 7, 2001); L. Rein, *Fairfax to Fine Cable Firm for Upgrade Failure*, Washington Post at B1 (July 23, 2002); O. Corral, *City's Gripe with AT&T Turns Costly*, Miami Herald at 5B (Dec. 12, 2001).

[125] *See, e.g.*, L. Rein, *Fairfax to Fine Cable Firm for Upgrade Failure*, Washington Post at B1 (July 23, 2002).

[126] *See, e.g.*, *County Rejects AT&T-Comcast Cable Merger*, Monterey County Herald (July 31, 2002), http://www.bradenton.com/mld/mcherald/3770578.htm (accessed Jan. 27, 2003); L. Haugsted, *Ga. County Denies Comcast Transfer*, Multichannel News at 3 (July 22, 2002).

[127] *See, e.g.*, Comcast, *Cable Commerce Content*, presentation before the Merrill Lynch 5th Annual Media & Entertainment Conference (June 13, 2002), http://www.cmcsk.com/downloads/ML-6-12.ppt (accessed Aug. 5, 2003) ("Upgraded Network + New Services + Double-Digit [Operating Cash Flow] Growth = Significant Free Cash Flow Generation." Comcast estimated its free cash flow from the upgraded network at between $800 million and $1 billion in 2002.); Cox Press Release, *Cox Communications Surpasses Half Million Customers For Residential Digital Telephone Service* (Apr. 16, 2002) ("Already, we're seeing a significant contribution from Cox Digital Telephone. Less than five years after it was introduced, the service generated operating margins in the mid-twenty- percent range in 2001, and is expected hit margins in the mid-thirties this year.").

[128]B. Rios, *Competitor Says Comcast Unfair*, Detroit Free Press (April 2 2002), http://www.freep.com/money/business/cable2_20020402.htm (accessed Aug. 5, 2003).

[129] L. Haugsted, *Everest Piqued Over K.C. Discounts*, Multichannel News (March 25, 2002), http://www.multichannel.com/index.asp?layout=story_stocks&articleId=CA202623&pubdate=03/25/2002&stt=001&display=searchResults (accessed Aug. 5, 2003).

[130] P. McClintock, *DOJ Focused on EchoStar/DIRECTV*, Daily Variety at 8 (Sept. 20, 2002); *See also Overbuilders Ask LFAs to Deal With Predatory Pricing by MSOs*, Communications Daily (Apr. 5, 2002).

[131] *See* B. McConnell, *Has Comcast Got a Deal For You; Overbuilders Eye WOW Complaint For Direction On Pricing Competition*, Broadcasting & Cable at 18 (Dec. 2, 2002).
[132] *See id.*
[133] *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee,* MB Docket No. 02-70 (FCC released Nov. 14, 2002) at ¶ 120 ("*AT&T/Comcast Order").*
[134] *AT&T/Comcast Order* at ¶ 121; s*ee Ninth Video Competition Report* at ¶ 110, n. 377.
[135] *See 2001 Report on Cable Prices* at n.12 ("We estimate that competitive and noncompetitive operators serve, respectively, approximately 6 percent and 94 percent of cable households nationwide."); *See* 47 U.S.C. § 543(l)(1)(A-D) (defining "effective competition" standard).
[136] *See Ninth Video Competition Report* at App. B, Table B-!;*Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 17 FCC Rcd 12124 at ¶ 23 (2002).
[137] *Ninth Video Competition Report* at ¶ 115.
[138] *Id.* at ¶ 14. In contrast, in 1995 -- the year prior to enactment of the 1996 Act -- the top 10 cable operators controlled 73.22 percent of all cable subscribers. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report (*"Second Video Competition Report"*), App. G at Table 2, 11 FCC Rcd 2060, 2182 (1995).
[139] *See* NCTA, *Top 25 MSOs*, http://www.ncta.com/industry_overview/top50mso.cfm (accessed Jan. 27, 2003) (top 25 MSOs as of September 2002); NCTA, *Industry Statistics*, http://www.ncta.com/industry_overview/indStat.cfm?indOverviewID=2 (accessed Jan. 27, 2003) (basic cable households as of July 2002).
[140] *Compare Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, App. B-12 at Table 7B, CS Docket No. 97-141, FCC 97-423 (Jan. 13, 1998) (TCI, Time Warner, MediaOne) *with* NCTA, *Top 25 MSOs*, http://www.ncta.com/industry_overview/top50mso.cfm (accessed Jan. 27, 2003) (AT&T/Comcast, Time Warner Cable, Charter). *See also Second Video Competition Report*, 11 FCC Rcd at 2182, App. G at Table 2.
[141] *Ninth Video Competition Report* at ¶ 113.
[142] *See, e.g.*, Applications and Public Interest Statement at 31, *Applications for Consent to Transfer of Control of Licenses Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70 (FCC filed Feb. 28, 2002); Reply Comments of AT&T Corp. and MediaOne Group, Inc. at 7, *Applications for Consent to the Transfer of Control of Licenses MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251 (FCC filed Sept. 17, 1999).
[143] *2001 Report on Cable Prices* at ¶42.
[144] *See 2001 Report on Cable Prices* at ¶ 45 ("as the number of subscribers belonging to the MSO of which the cable operator is a part increases, the rates charged by that MSO also increase"); *2000 Report on Cable Prices* at 31 ("as clustering increased, average monthly rates also increased").
[145] *See 2002 Report on Cable Prices* at Table 4.
[146] *2002 CFA/CU Study* at 6.
[147] U.S. General Accounting Office Report to Congressional Requesters, *Telecommunications: The Effect of Competition from Satellite Providers on Cable Rates*, GAO/RCED-00-164 at 7 (July 2000). The GAO's study examined 1998 cable rates.
[148] *AT&T/Comcast Order* at ¶ 45.
[149] J. Higgins, *Comcast Puts Squeeze on Programming Fees*, Broadcasting & Cable at 1 (Jan. 13, 2003) (quoting network executive).
[150] *2001 Report on Cable Prices* at ¶ 36.
[151] *2001 Report on Cable Prices* at ¶ 24, Table 3.
[152] *2002 Report on Cable Prices* at Att. 5
[153] *2001 Report on Cable Prices* at ¶47.
[154] U.S. General Accounting Office, *Telecommunications: Issues in Providing Cable and Satellite Television Services*, Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, Committee on the Judiciary, U.S. Senate, GAI-03-130 at 9 (Oct. 2002) ("*GAO, Issues in Providing Cable and Satellite Television Services"*).

[155] *See Shear testimony* at 4.
[156] *2002 CFA/CU Study* at 4, 6.
[157] *See 2002 CFA/CU Study* at 4.
[158] *Compare* Department of Labor, Bureau of Labor Statistics, Consumer Price Index – All Urban Consumers, Cable Television (indicating an annual average increase of roughly 6 percent) *with* Department of Labor, Bureau of Labor Statistics, Consumer Price Index – All Urban Consumers, All Items (indicating an average annual increase from 1992-2001 of less than 3 percent), http://www.bls.gov/cpi (accessed Jan. 27, 2003). A nationally representative survey of direct broadcast satellite subscribers finds that the median total cost (including installation charges) of a DBS system was $300 in 1998; $195 in 1999; and $150 in 2000. Yankee Group, *DBS Subscriber Study 2000* at 17 (2000). According to AT&T's expert, DBS "routinely" offers promotions that entirely eliminate these up-front installation charges. Declaration of Janusz A. Ordover ¶ 81, *attached to* Reply to Comments and Petitions to Deny Applications for Consent to Transfer Control, *Applications for Consent to Transfer Control of Comcast Corp. and AT&T Corp. to AT&T Comcast Corp.*, MB Docket No. 02-70 (FCC filed May 21, 2002).
[159] J.P. Morgan Securities Inc., *The Cable Industry*, at 4 (Nov. 2, 2001).
[160]*Id*.
[161] Banc of America Securities, *Analysis of Sales/Earnings, Comcast Corporation*, May 8, 2003, at 2.
[162] Press Release, *Comcast Reports Second Quarter 2003 Results*, July 31, 2003, available at http://www.cmcsk.com/news/20030731-115180.cfm?ReleaseID=115180 (accessed August 7, 2003).
[163] NCTA, *Industry Statistics*, http://www.ncta.com/industry_overview/indStat.cfm?indOverviewID=2 (accessed Aug. 5, 2003).
[164] K. Downey, *Satellite Chews on Cable's Dominance*, Media Life (Dec. 18, 2002), http://209.61.190.23/news2002/dec02/dec16/3_wed/news2wednesday.html (accessed Aug. 5, 2003) (citing PwC global marketing director for entertainment and media Peter Winkler).
[165] *Id.*
[166] SalomonSmithBarney, *Industry Note*, *Cable*, at 3 (Dec.3,2002)
[167] *Stop the Satellite Tax*, *see* http://208.247.14.177/stoptax(accessed Aug. 5, 2003).
[168] *See* U.S. General Accounting Office Report to Congressional Requesters, *Telecommunications: The Effect of Competition from Satellite Providers on Cable Rates*, GAO/RCED-00-164 at 14 (July 2000); *See* GAO, *Issues in Providing Cable and Satellite Television Services* at 4. *See also* NCTA, *History of Cable Television*, http://www.ncta.com/industry_overview/aboutIND.cfm?indOverviewID=58 (accessed Aug. 5, 2003).
[169] *See* Satellite Broadcasting & Communications Association, *SBCA Media Center: Satellite Television Programming*, http://www.sbca.com/mediaguide/satprogram.htm (accessed Aug. 5, 2003).
[170] *See Application of EchoStar Communications Corporation, (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee)*, Hearing Designation Order, 17 FCC Rcd 20559 at ¶¶ 31, 256 (2002); Comments of DIRECTV, Inc. at 13, *Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, CS Docket No. 01-129 (FCC filed Aug. 3, 2001).
[171] *A Primer for New Satellite Professionals*, Satellite Broadcasting Cable Association, May 19, 2003, at 50 (in the period 2001-2002, rural share increased from 45 percent to 47 percent while urban share decreased from 23 percent to 20 percent).
[172] *See, e.g.,*; Time Warner Cable – Austin, *Digital Cable vs. Satellite Dish*, http://www.timewarneraustin.com/services/cable_services/dish_vs_cable.html (accessed Aug. 5, 2003); Cox Communications, *Cox Digital Cable*, http://www.cox.com/digitalcable/; Comcast Cable, *FAQ: What's the Difference Between Digital Cable and Satellite Services?*, http://www.comcast.com/Support/Corp1/FAQ/FaqDetail_53.html (accessed Aug. 5, 2003); Cablevision, *I.O. Digital Cable T.V. – See It*, http://www.io.tv/index.jhtml?pageType=see_it (accessed Aug. 5, 2003).
[173] Satellite Broadcasting & Communications Association, *SBCA Media Center: Frequently Asked Questions*, http://www.sbca.com/mediaguide/faq.htm (accessed Jan. 27, 2003).
[174] *See* Comments of DIRECTV, Inc. at 12, 19-20, *Annual Assessment of the Status of Competition in the Markets for Video Programming*, MB Docket No. 02-145 (FCC filed July 29, 2002); *Ninth Video Competition Report* at ¶ 118.

[175] *Ninth Video Competition Report* at ¶61.
[176] Declaration of Robert D. Willig on Behalf of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation ¶ 17, *attached to* Opposition to Petitions to Deny and Reply Comments, *Application of EchoStar Communications Corporation, General Motors Corporation, Hughes Electronics Corporation, and EchoStar Communications Corporation Transferee, for Authority to Transfer Control*, CS Docket No. 01-348 (FCC filed Feb. 25, 2002); Reply Comments of EchoStar Satellite Corporation at 5, *Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, MB Docket No. 02-145 (FCC filed Aug. 30, 2002)..
[177] Starband Press Release, *Starband Files for Chapter 11; Gilat Commits Interim Financing* (June 3, 2002).
[178] *See Hughes to Exit Terrestrial Broadband*, Sky Report (Dec. 16, 2002), http://www.skyreport.com/skyreport/dec2002/121602.shtm#two (accessed Aug. 5, 2003).
[179] *Ninth Video Competition Report* at ¶ 66.
[180] D.L. Smith, *et al.*, RBC Capital Markets, Investext Rpt. No. 8502287, Part 2 of 2: *Cable MSO Enthusiasm for VOD Continues to Expand – Industry Report* at *1 (Apr. 24, 2002).
[181] AT&T, *3Q02 Earnings Commentary*, http://www.att.com/ir/pdf/023q_cmnt.pdf (accessed Jan. 23, 2003); Cox, *Summary of Operating Statistics*, *attached to* Cox Press Release, *Cox Communications Announces Third Quarter Financial Results for 2002* (Oct. 29, 2002); M. Stump, *Comcast's Phone Forecast: Legacy Subs in Black by '02*, Multichannel News at 25 (Aug. 27, 2001); NCTA, *Industry Statistics*, http://www.ncta.com/industry_overview/indStat.cfm?indOverviewID=2 (accessed Jan. 27, 2003).
[182] *See* NCTA, http://www.ncta.com/industry_overview/indStat.cfm?indOverviewID=2 (accessed Aug.6, 2003).
[183] *See* P. Howe, *AT&T's Cable Rates Rising 7.8 percent On Average*, Boston Globe (Nov. 23, 2002).
[184] *See* Satellite Broadcasting & Communications Association, http://www.sbca.com, (accessed August. 1, 2003), *See* NCTA, http://www.ncta.com/industry_overview/indStats.cfm?statID=14. See also *Cable or Satellite? Please Stay Tuned*, New York Times at C1 (July 31, 2003).
[185] *See, e.g.*, D.L. Smith, *et al.*, RBC Capital Markets, Investext Rpt. No. 8525102, *Media Weekly Report: Earnings Season Hits Full Stride – Industry Report* at *2 (May 6, 2002); J. Shim, *et al.*, Credit Lyonnais Securities, Investext Rpt. No. 8593560, *Media: Cable-MSO Group Presents Its Good, Bad and Ugly Sides –* Industry Report at *6 (June 14, 2002); *2002 CFA/CU Study* at 9-10.
[186] D.L. Smith, *et al.*, RBC Capital Markets, Investext Rpt. No. 8525102, Media Weekly Report: Earnings Season Hits Full Stride – Industry Report at *2 (May 6, 2002).
[187] *See* J.P. Morgan Securities Inc., *The Cable Industry*, at 5-6 (Nov. 2, 2001).
[188] *See id.* at 17.
[189] *See* K. Gordon, J. Levy & R. Preece, Office of Plans and Policy, *FCC Policy on Cable Ownership* (Nov. 1981).
[190] *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *aff'd in part and remanded*, 476 U.S. 488 (1986), *aff'd on narrower grounds, on retrial*, 67 Rad. Reg. 2d (P&F) 366 (C.D. Cal. 1990); *Preferred Communications, Inc. v. City of Los Angeles*, 13 F.3d 1327, 1332 (9th Cir. 1994).
[191] Cable had emerged as "[the] Nation's dominant video distribution medium." S. Rep. No. 92, 102d Cong., 1st Sess. 3 (1991).
[192] 47 U.S.C. § 541(a)(1).
[193] *See* M. Farrell, *Overbuilder Sounds Confident But Wary*, Multichannel News at 39 (Feb. 5, 2001) (citing Charter president Jerald Kent's remarks at an industry conference).
[194] L. Landro and D. Kneale, *NBC Makes Pitch to Cable TV Operators*, Wall St. J. (May 4, 1988). *See generally* B. Klein, *The Competitive Consequences of Vertical Integration in the Cable Industry* (June 1989), *attached to* Comments of NCTA, *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, MM Docket No. 89-600 (FCC filed Mar. 1, 1990).
[195] *See* S. Rep. No. 92, 102d Cong., 1st Sess. 24, citing Testimony of Preston Padden (INTV), *Media Ownership: Diversity and Concentration* at 307, Hearings before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation (101-357) (June 14, 21, and 22, 1989).
[196] *See Cable Competition Report* at ¶ 80.
[197] *See* 138 Cong. Rec. S14603 (daily ed. Sept. 22, 1992).
[198] *See* 138 Cong. Rec. S566 (daily ed. Jan. 29, 1992).

[199] *See* Tele-Communications Inc., 1992 Annual Report at 44.
[200] 17 U.S.C. § 111(a)(4); *id.* § 119(b); *See* GAO, *Telecommunications: The Effect of Competition From Satellite Providers on Cable Rates*, Report to Congressional Requesters, at 5, 12 (July 2000).
[201] DOJ, Complaint ¶ 36, *U.S. v Primestar, et al.*, Civil No.: 1:98CV01193 (JLG) (filed May 12, 1998).
[202] *See, e.g.*, S. Rep. No. 92, 102d Cong., 1st Sess. 25-26 (1991); H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992).
[203] *See, e.g.*, 138 Cong. Rec. S566 (daily ed. Jan. 29, 1992); 138 Cong. Rec. S426-427 (daily ed. Jan. 27, 1992).
[204] *See, e.g.*, 138 Cong. Rec. S427 (daily ed. Jan. 27, 1992).
[205] *See* 47 U.S.C. § 548(c)(2)(C)-(D); 47 C.F.R. § 76.1002(c).
[206] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, et al.*, Report and Order, 17 FCC Rcd 12124, ¶ 80 (2002).
[207] *See id.* ¶ 59.
[208] *See* 47 U.S.C. § 536(a); 47 C.F.R § 76.1300 *et seq*.
[209] *Viacom Intl., Inc. v. Tele-Communications, Inc.*, No. 93 Civ. 6658 (S.D.N.Y. filed Sept. 23, 1993).
[210] P. Farhi, *Justice Probing MTV's Power*, Washington Post at E01 (Dec. 16, 1999).
[211] *Forty States Sue Cable Companies over Programming Policy*, Antitrust Report at 1 (May/June 1993); *Justice Department Files Antitrust Suit and Proposed Consent Decree Against Primestar Group for Anti-competitive Practices*, U.S. Newswire (June 9, 1993).
[212] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 3105 at ¶ 14 (1994). *See United States v. Primestar Partners*, L.P., et al., 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994) (*Primestar Federal Decree*); *State of New York v. Primestar Partners, L.P., et al.*, 1993-2 Trade Cas. (CCH) ¶ 70,403 (S.D.N.Y. 1993) (*Primestar New York Decree*).
[213] *See* Proposed Final Judgment and Competitive Impact Statement, *United States v. Tele-Communications, Inc. and Liberty Media Corp.*, No. 94-0948, 59 Fed. Reg. 24,723, 24,727 (May 12, 1994); *Primestar New York Decree*, 1993-2 Trade Cas. (CCH) ¶ 70,403, §§ IV(A)-(C); *Primestar Federal Decree*, 1994-1 Trade Cas. (CCH) ¶ 70,562, §§ IV(A), IV(C)(3); *Primestar New York* Decree, 1993-2 Trade Cas. (CCH) ¶ 70,403 § IV(E), (F); *Primestar Federal Decree*, 1994-1 Trade Cas. (CCH) ¶ 70,562 § IV(B).
[214] 47 U.S.C. § 548(b).
[215] *See EchoStar v. FCC*, 292 F.3d 749 (D.C. Cir. 2002).
[216] *Kent Touts a Program-Access End Run* , Multichannel News(April 14, 2003), (http://www.multichannel.com/index.asp?layout=print_page&articleID=CA291832 (accessed May 15, 2003).
[217]See www.broadwing.com/company/ for company background and network map.
[218] Reply Comments of RCN Telecom Services Inc. at 6 & A-6, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 01-290 (FCC filed Jan. 7, 2002).
[219] Initial Comments of RCN Corporation at 9-13, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129 (FCC filed Aug. 3, 2001).
[220] Reply Comments of WideOpenWest Holdings, LLC at 8, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129 (FCC filed Jan. 15, 2002).
[221] Initial Comments of RCN Telecom Services, Inc. at 18, *Implementation of the Cable Consumer Protection and Competition Act of 1992, et al.*, CS Docket No. 01-290 (FCC filed Dec. 3, 2001).
[222] J. Orszag, P. Orszag, and J. Gale, *An Economic Assessment of the Exclusive Contract Prohibition Between Vertically Integrated Cable Operators and Programmers* at 22-23, *attached to* EchoStar and DIRECTV Reply Comments, CS Docket No. 01-290 (Jan. 2002). *See also Ninth Video Competition Report* at ¶ 70, n.229.
[223]*Implementation of the Cable Television Consumer Protection and Competition Act of 1992, et al.*, Report and Order, 17 FCC Rcd 12124 at ¶ 47 (2002). See *AT&T/Comcast Order* at ¶ 19...
[224] See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCC Rcd 12124 at ¶ 19 (2002), citing *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd at 1364,Table D-3 (2002) ("*Eighth Video Competition Report*").
[225] *Ninth Video Competition Report*, at ¶ 141 *citing* Utilicorp Comments at 9, SBCA Comments at 17-18.

[226] *Ninth Video Competition Report*, at ¶ 145 & Table C-3.
[227] *ATT&T/Comcast Order* at ¶ 37 n.80.
[228] *See* Letter from Perry C. Parks III, President, Los Angeles Cable Operators Association, to Hon. Mark Ridley-Thomas, Chair, Information Technology and General Services Committee, October 2, 2002.
[229] *See* Letter from Jack Valenti, President, Motion Picture Association of America, to Mayor James C. Hahn and Members of the City Council, October 2, 2002.
[230] Opinion No. 2002:11, transmitted from Rockard J. Delgadillo, City Attorney, to James Hahn, Mayor.
[231] Los Angeles City Council, October 1, 2002, Agenda Item 27.
[232] *See also* Testimony of Leo J. Hindery, Jr., Chairman & CEO, YES Network, before the U.S. Senate Committee on Commerce, Science and Technology, May 6, 2006 at 2 (proposing amendments to Section 616 of the Cable Act because "'program access' must now be embedded, by legislation and by regulation, into the operating practices of the cable industry."), available at http://www.senate.gov/~commerce/hearings/testimony.cfm?id=749&wit_id=2021 (accessed May 6, 2003).
[233] http://www.ncta.com/industry_overview/top50mso.cfm (accessed on May 19, 2003).
[234] http://www.cablevision.com/company/index.html (accessed on May 19, 2003).
[235] http://www.cablevision.com/company/index.html (accessed on May 19, 2003).
[236] http://www.cablevision.com/index.jhtml?pageType=about_cablevision (accessed on Aug. 9, 2003).
[237] http://www.forbes.com/2003/05/21/cx_tm_0521video1.html (accessed on May 21, 2003).
[238] *See*, *Cablevision's New Venture With Satellite Stirs Skeptics*, New York Times at C6 (July 17, 2003).
[239] http://www.cablevision.com/company/index.html (accessed on May 19, 2003).
[240] R. Sandomir, *Cablevision Agrees to Carry the YES Network*, New York Times (March 13, 2003).
[241] J. Frasch, *YES Network and Time Warner Cable Announce Agreement*, NYYFans.com (Feb. 22, 2002), http://www.nyyfans.com/article/350/ (accessed August 5, 2003)
[242] R. Thomas Umstead, *YES Sues, While ESPN Hikes Fees*, Multichannel News (May 6, 2002)
[243] S. Donohue, *Cablevision to YES: Tier Up*, Multichannel News (March 14, 2003); M. Reynolds, *When YES Really Means No*, Multichannel News (March 28, 2003); R. Sandomir, *Cablevision and YES Reach Agreement*, New York Times (April 1, 2003).
[244] See, *Money Matters Now, So Rangers Clutch Purse Strings*, New York Times, http://www.nytimes.com/2003/07/02/sports/hockey/02hockey.html?ex=1058148930&ei=1&en=9a81b73d15804caa,(July 2,2003)
[245] *Time Warner Cable to let NYC viewers say no to YES*, Reuters News Service, (May 12, 2003, 4:39 PM ET).
[246] *YES Network says Time Warner Cable breached deal*, Reuters News Service, (June 12,2003, 7:31 PM ET), *see* http://www.forbes.com/business/services/newswire/2003/06/12/rtr998990.html (accessed Aug. 6, 2003.
[247] *Sports-Rate Fights Kick Off 2003*, Multichannel News (January 2, 2003); D. Cristodero, *Turn to 31. Yes, It's Sunshine,* St. Petersburg Times (March 14, 2003).
[248] Testimony of Charles F. Dolan, Chairman, Cablevision, before the U.S. Senate Committee on Commerce, Science and Technology, May 6, 2006 ("*Dolan Testimony*") at 2, available at http://www.senate.gov/~commerce/hearings/testimony.cfm?id=749&wit_id=2018 (accessed May 6, 2003). It remains to be seen whether Comcast is on board with this strategy, as CEO Brian Roberts told an analysts' conference on May 16, 2003 that: "I don't think there is a need for regulation or new laws. This should be something you can work out in the marketplace." M. Farrell, *Roberts: Ops*, *Programmers Are Partners*, Multichannel News (May 16, 2003).
[249] This is not to say that operators should be prohibited from offering programming packages; they should. And, of course, allowing programmers to negotiate the carriage a specific tier allows independent programmers to maintain some bargaining power with cable operators. This also is not inconsistent with giving consumers the right to purchase such programming on an *à la carte* basis.
[250] D. Mermigas, *Malone's à la Carte Menu*, Television Week (May 19, 2003), available at http://www.tvweek.com/topstorys/051903malone.html (accessed May 22, 2003).
[251] *See* Linda Moss, *Bienstock: Caution on a la Carte*, Multi Channel News, July 28, 2003.
[252] *See, e.g.*, *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1379 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001; *Central Telecommunications Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891 (W.D. Mo.

1985), *aff'd*, 800 F.2d 711, 717 (8th Cir. 1986); *Berkshire Cablevision v. Burke*, 571 F. Supp. 976, 986-987 (D.R.I. 1983).

[253] *See, e.g.*, *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 126 n.27 (7th Cir. 1982).

[254] *See* Center for Digital Democracy, Market Watch, *Comcast Sues San Jose, Illustrates Dangers of Cable Monopoly in Broadband Era* (June 24, 2003), available at http://www.democraticmedia.org/news/marketwatch/comcast.html (accessed June 26, 2003).

[255] *United States v. Western Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J. 1956); *United States v. AT&T*, 552 F. Supp. 131 (D.C. Cir. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

[256] 47 C.F.R. §§ 63.54, 63.56, *printed in Applications of Telephone Companies for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems*, Final Report and Order, 21 FCC2d at 330-331 (1970).

[257] 47 U.S.C. § 533(b), *See* 47 C.F.R. § 63.54(a) (interpreting 47 U.S.C. § 533(b)).

[258] *Telephone Company-Cable Television Cross-Ownership Rules*, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, at ¶¶ 3, 135-143 (1992).

[259] *See* Reply Comments of the United States Department of Justice at 44, *Telephone Company-Cable Television Cross-Ownership Rules Sections 63.54-63.58*, No. 87-266 (FCC filed Mar. 13, 1992); Letter from William Barr, Attorney General, and Barbara Franklin, Commerce Secretary, to Hon. Edward J. Markey, U.S. House of Representatives, at 1 (Apr. 2, 1992).

[260] *See* Comments of NTIA at 8, *Telephone Company-Cable Television Cross-Ownership Rules*, No. 87-266 (FCC filed Feb. 3, 1992); NTIA Infrastructure Report, NTIA Special Publication 91-26, Telecommunications in the Age of Information 235 (Oct. 1991).

[261] *Telecommunications Act of 1996* §302(b)(1), 110 Stat. 124 (repealing 47 U.S.C. §533(b)).

[262] *See* Thomas W. Hazlett & George S. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the 'Level Playing Field' in Cable TV Franchising Statutes*, Journal of Business and Politics, Vol. 3, No. 1, at 21 (2001).

[263] *AT&T/Comcast Order* at ¶ 123.

[264] *See* Reply Comments of WideOpenWest Holdings, LLC at 6, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 01-129 (FCC filed Jan. 15, 2002).

[265] *See Utilicorp/Everest Connections/Exop Comments* at 5-6.

[266] 47 U.S.C. §338(a)(1); *See, generally*, *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*¸ Report and Order, 16 FCC Rcd 1918 (2000).

[267] *See* Nielsen Media Research Local Universe Estimates (US), http://www.nielsenmedia.com/DMAs.html (accessed Aug. 9, 2003).

[268] *See Amendment to Parts 2 and 25 of the Commission's Rules To Permit Operations of NGSO FSS Systems Co-Frequency with GSO and Terrestrial in the Ku-Band Frequency Range, et al.*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 4096, ¶ 290 (2000).

[269] *Utilicorp/Everest Connections/Exop Comments* at 7-8.

[270] *See id.* at 8; Initial Comments of RCN Corporation at 21, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129 (FCC filed Aug. 3, 2001); Comments of Carolina Broadband, Inc. at 7-9, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129 (FCC filed Aug. 3, 2001); Initial Comments of RCN Telecom Services, Inc., Utilicom Networks LLC and Carolina BroadBand, Inc. at 5-8 & Exhibit B, *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, et al. (FCC filed Jan. 22, 2001).

[271] *See, e.g.*, Comments of Carolina Broadband, Inc. at 7-9, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129 (FCC filed Aug. 3, 2001); Initial Comments of RCN Telecom Services, Inc., Utilicom Networks LLC and Carolina BroadBand, Inc. at 5 & Affidavit of Douglas Gwaltney, *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, et al. (FCC filed Jan. 22, 2001).

[272] 47 U.S.C. §532.

[273] *Id.*, at §532(a).

[274] *See Implementation of Sections of the Cable Television Consumer protection and Competition Act of 1992: Rate Regulation; Leased Commercial Access*, Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 11933 (released March 29, 1996); *See Implementation of Sections of the Cable Television Consumer protection and Competition Act of 1992: Rate Regulation; Leased Commercial Access*, Second Report and Order and Second Order on Reconsideration of the First Report and Order, 12 FCC Rcd. 5267 (released Feb. 4, 1997); *pets. for review denied sub nom. Valuevision International, Inc. v. FCC*, 149 F.3d 1204 (D.C. Cir. 1998).

[275] *See* 47 U.S.C. §251(c)(3); 47 C.F.R. § 51.319.

[276] *See In re Internet Venture, Inc. Internet On-Ramp, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 3247 (released Feb. 18, 2000).

[277] The United States Conference of Mayors, Memorandum to Member Mayors from J. Thomas Cochran, Executive Director, May 23, 2003, Re: Resolutions for the 71st Annual Conference of Mayors, Resolution No. 60 (submitted by The Hon. Michael Guido, Mayor of Dearborn, Acting Chairman of the Transportation and Communications Committee, and The Hon. Manual Diaz, Mayor of Miami).

[278] *Id.*

[279] U.S. Department of Commerce, *A Nation on Line: How Americans are Expanding Their Use of the Internet* (Washington, D.C: 2001), p. 5, puts the figure at 50 percent in September 2001, marking the first time a majority of American households have Internet service.

[280] Federal Communications Commission, News Release, *Federal Communications Commission Looks At Data On Growth Of Broadband Subscribership In Rural Areas*,(Aug. 6, 2003), DOC-237388A1.

[281] *Ninth Video Competition Report* at ¶ 46.

[282] *How Phone Companies Lost to Cable In Consumer Broadband Battle*, Wall St. J. at A6 (March 13, 2003).

[283] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling, 17 F.C.C.R. 4798 (2002). *See also* 47 U.S.C. § 153(20) (statutory definition of an "information service").

[284] *E.g.*, *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) (defining cable modem service as a "telecommunications service" – *see* 47 U.S.C. §153(46)).

[285] *Brand X Internet Services v. FCC*, No. 02-70518 (9th Cir. argued May 8, 2003).

[286] *Id.*, Brief for Petitioners the Verizon Telephone Companies and Verizon Internet Solutions Inc. d/b/a/ Verizon.Net (filed Oct. 10, 2002).

[287] News Release of Consumer Federation of America and Consumers Union, March 26, 2003, available at http//www.consumersunion.org/telecom/cable-price-htm (accessed June 11, 2003).

[288] Federal Communications Commission Releases Data on High-Speed Services for Internet Access, June 10, 2003, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235274A1.doc (accessed June 11, 2003); B. Coffey, *Tune In To The Right Cable Stocks*, Forbes at 2 (June 9, 2003, http://www.forbes.com/2003/06/09/cz_bc_0609sf.html (accessed June 11, 2003). See also *How Phone Companies Lost to Cable In Consumer Broadband Battle*, Wall Street Journal at A1 (March 13, 2003). There remains huge upside potential for cable, as only 20 percent of current cable customers also subscribe to cable modem service. *Id.*

[289] *Trying to Close Technology Divide As Satellite Operators Battle Cable*, New York Times at C1 (April 15, 2003).

[290] *How Phone Companies Lost to cable In Consumer Broadband Battle*, Wall St. J. at A6 (March 13, 2003) (*citing* Merrill Lynch & Co.).

[291] Federal Communications Commission Releases Data on High-Speed Services for Internet Access, June 10, 2003, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235274A1.doc (accessed June 11, 2003);. See also *Betting on Speed Pure and Simple*, New York Times at C1 (March 17, 2003).

[292] *Trying to Close Technology Divide As Satellite Operators Battle Cable*, New York Times at C1, C4 (April 15, 2003).

[293] *Comcast Says Loss Widened But Forecast Looking Up*, New York Times at C5 (May 9, 2003).

[294] Comcast Corporation Press Release, *Comcast Reports Second Quarter 2003 Results*, July 31, 2003, available at http://www.cmcsk.com/news/20030731-115180.cfm?ReleaseID=115180 (accessed August 7, 2003).

[295] *Id.*

[296] Yahoo! Press Release Yahoo! Unveils Its Premium Online Video And Audio Service, Yahoo! Platinum, (March 15, 2003) available at http://yhoo.client.shareholder.com/ReleaseDetail.cfm?&ReleaseID=104618, (accessed April 15, 2003).
[297] Arbitron/Edison Media Research, *Internet 9: The Media and Entertainment World of Online Consumers* at 11 (Sept. 5, 2002).
[298] Declaration of Robert W. Crandall, at ¶ 20, *attached to* Petition to Deny of Verizon Telephone Companies and Verizon Internet Solutions d/b/a Verizon.net, *Applications for Consent to Transfer of Control of Licenses Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70 (FCC filed Apr. 29, 2002); *see also* Declaration of Janusz A. Ordover and Robert D. Willig, ¶ 117, *attached to* Reply Comments of AT&T Corp. and MediaOne Group, Inc., *Applications for Consent to Transfer Control of Licenses, MediaOne Group, Inc. Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251 (FCC filed Sept. 17, 1999).
[299] Declaration of Robert W. Crandall, at ¶ 21; *Do They Have Anything in Common?*, The Economist at 61 (Feb. 13, 1999); FCC En Banc Hearing Regarding Telecom Mergers, tr. at 27 (Oct. 22, 1998); T. Hearn, *Rivals Demand Access to AT&T-TCI Networks*, Multichannel News at 2 (Nov. 2, 1998).
[300] *See* Memorandum of Understanding between Time Warner Inc. and America Online, Inc. Regarding Open Business Practices at ¶ 6, CS Docket No. 00-30 (Feb. 29, 2000), http://www.fcc.gov/mb/aoltw/mou.doc (accessed Jan. 23, 2003).
[301] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp. Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 9816 at ¶ 121 (2000); *see also id.*, Statement of Chairman William E. Kennard at 2.
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[303] *See, e.g.*, S. Olsen, *Battle Brews over Web Streaming*, CNET News.com (May 31, 2001), http://news.com.com/2100-1023-267638.html (accessed Aug.6, 2003); *ESPN-Charter Dispute Shows Cable Fears of Video Streaming*, Comm. Daily (July 5, 2001); R. Umstead and S. Donohue, *Making Tenses Times Worse, Charter Raises 'Stream' Bar*, Multichannel News at 1 (June 4, 2001); N. Thompson, *The Future of Ideas: The Fate of the Commons in a Connected World; Review*, Washington Monthly (Nov. 1, 2001).
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[307] B. Hammond, *Amazon.com Wants Protections on Access to Info Over Broadband Networks*, TRDaily, Dec. 2002.
[308] Ex Parte Letter from Robert Sachs, President, NCTA, to Michael Powell, Chairman, FCC, and Commissioners, CS Docket No. 02-52, *et al.*, at 2-3 (Dec. 10, 2002).
[309] *See Overview of Cable Modem Technology and Services*, Cable Datacom News, http://cabledatacomnews.com/cmic/cmic1.html (accessed Aug. 6, 2003).
[310] *See* G. Bittlingmayer and T. Hazlett, *The Political Economy of Cable "Open Access,"* AEI-Brookings Joint Center for Regulatory Studies, Working Paper 01-06, at 13-17 (May 2001).
[311] *Id.*
[312] *Cable or Satellite? Please Stay Tuned*, New York Times at C1 (July 31, 2003)
[313] *See* Petition of RCN Telecom Services, Inc. to Deny Applications or Condition Consent, *Applications for Consent to the Transfer of Control of Licenses Comcast Corporation and AT&T Corporation, Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70 (FCC filed Apr. 29, 2002). *But see also*, http://www.schange.com/Customers/Customers_main.asp, where SeaChange now lists RCN as a customer along with many long time cable incumbents.
[314] iN DEMAND, *Company Background*, http://www.indemand.com/about/who.jsp (accessed Aug. 6, 2003).
[315] *See* Comments of Utilicorp Communications Services, Everest Connections Corporation and Exop of Missouri, Inc. at 8, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129 (FCC filed Aug. 2, 2001) ("*Utilicorp/Everest Connections/Exop Comments*") (iN DEMAND "indicated they could not do business with Everest because they had exclusive

arrangements with their owners."); *See* Reply Comments of WideOpenWest Holdings, LLC at 8- 9, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 01-129 (FCC filed Jan. 15, 2002)..

[316]http://www.rcn.com/corpinfo/PA/philadelphia_cable_VOD.php; http://www.rcn.com/corpinfo/press.php. (accessed April 15, 2003), http://www.rcn.com/cabletv/impulse/index.php, (accessed Aug. 6, 2003).

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[318] Complaint § LVII, *Intertainer Inc. v. AOL Time Warner Inc., et al.*, Case No. 02-CV-7406 (C.D.Cal. filed Sept. 23, 2002).

[319] *See* Reply Comments of WideOpenWest Holdings, LLC at 9, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 01-129 (FCC filed Jan. 15, 2002).

[320] Petition of RCN Telecom Services, Inc., To Deny Applications or Condition Consent, *Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation and AT&T Corporation, Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70 (FCC filed Apr. 29, 2002).

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[322] *See* Telecommunications Act of 1996, § 304; 47 U.S.C. § 549(a); *Implementation of Section 304 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 14775, ¶ 29 (1998).

[323] Statement of the Consumer Federation of America, *et al.*, on the AT&T-Comcast Merger, Submitted to the Subcommittee on Antitrust, Business Rights and Competition, Senate Judiciary Committee (Apr. 23, 2002). *See also* Comments of the Consumer Electronics Association at 2-3, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129 (FCC filed Aug. 3, 2001).

[324] *See Utilicorp/Everest Connections/Exop Comments* at 8; Reply Comments of WideOpenWest Holdings, LLC at 9, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129 (FCC filed Jan. 15, 2002); Petition of RCN Telecom Services, Inc., To Deny Applications or Condition Consent, *Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation and AT&T Corporation, Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70 (FCC filed Apr. 29, 2002).

[325] *Ninth Video Competition report* at ¶¶ 110-111.

[326] *Id.*