VIDEO COMPETITION IN A DIGITAL AGE

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY, AND THE INTERNET

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

OCTOBER 22, 2009

Serial No. 111–76

Printed for the use of the Committee on Energy and Commerce

energycommerce.house.gov

U.S. GOVERNMENT PRINTING OFFICE

74–847 WASHINGTON : 2012

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
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THURSDAY, OCTOBER 22, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY, AND THE INTERNET,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:06 a.m., in Room 2123 of the Rayburn House Office Building, Hon. Rick Boucher [Chairman of the Subcommittee] presiding.

Members present: Representatives Boucher, Markey, Stupak, Doyle, Inslee, Weiner, Castor, Murphy, Space, McNerney, Welch, Dingell, Waxman (ex officio), Stearns, Upton, Deal, Bono Mack, Terry, Blackburn, and Barton (ex officio).

Staff present: Roger Sherman, Chief Counsel, Communications, Technology, and the Internet; Tim Powderly, Counsel; Amy Levine, Counsel; Shawn Chang, Counsel; Sarah Fisher, Special Assistant; Greg Guice, FCC Detailee; Amy Bender, Minority FCC Detailee; Will Carty, Minority Professional Staff; and Garrett Golding, Minority Legislative Analyst.

OPENING STATEMENT OF HON. RICK BOUCHER, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF VIRGINIA

Mr. BOUCHER. The Subcommittee will come to order and good morning to everyone.

Today we will examine the state of competition for video programming. In 1992, Congress recognized that the cable industry which then dominated the market for the delivery of multi-channel video programming could use its control over that programming in order to stifle competition. In order to enable competition in multichannel video delivery, Congress enacted program access requirements in 1992 to prevent cable operators with ownership interest in video programming from refusing to sell their programs to the emerging satellite providers. That requirement is broadly acknowledged as being essential to the birth of the DVS industry and to the competition to cable that direct broadcast satellite has brought.

Congress also in 1992, enacted program carriage requirements that prevent cable operators from discriminating against unaffiliated programming in favor of their affiliated networks. The rules have been broadly successful. Without them, neither satellite television nor multi-channel video delivered by telephone companies such as Verizon's FiO service or AT&T's U-verse service could have entered the market. The rules have also been instrumental to the success of independent cable networks like the Food Network and Bravo.

But at the time the program access provision was approved by Congress in 1992, it applied only to programs that were delivered by satellite to multi-channel video distributors. Today, what is commonly known as the terrestrial loophole has arisen as vertically integrated cable operators use fiber optics more and more frequently in order to deliver some of their programming to cable headends. Fiber-based terrestrial networks have become economical alternatives to satellite delivery particularly for regional sports and for new programming controlled by regionally clustered cable operators. Cable operators which deliver programming terrestrially can block competing multi-channel providers access to their highly popular program offerings. These arrangements are understandably troubling for some sports fans who may have to choose between subscribing to the video programming provider of their choice or accessing the games of their favorite regional sports teams.

In 2007, the Federal Communications Commission found that subscribership to direct broadcast satellite was 40 percent below what otherwise would be expected in Philadelphia where a cable operator's regional sports network has a lock on the Phillies, the Flyers and 76ers' games. In San Diego, the commission determined that lack of access to the regional sports network provided by the programming by the Padres' games resulted in a 33 percent reduction in the households subscribing to direct broadcast satellite in the San Diego area.

The problem of the unavailability of terrestrially-delivered programming on DVS systems is even worse for some rural residents for whom switching to cable service may not even be an option because a cable operator may not serve the area in which the rural resident lives. If direct broadcast satellite companies and phone companies are precluded from carrying regional sports programming, that effectively bars many rural fans from viewing their favorite teams.

We are interested in hearing from today's witnesses about the terrestrial loophole as it currently exists and the consequences of it. What benefits does continued use of the terrestrial loophole offer to the providers of multi-channel video and to consumers and what are its harms, and we have knowledgeable witnesses who will speak to us on that subject from a range of different perspectives this morning.

We are also interested in other matters. The FCC has recently considered a number of program carriage complaints by independent programmers that a multi-channel video programming distributor favored its own programming over the unaffiliated programming with respect to the terms and conditions of carriage. Does the FCC's program carriage complaint process work as Congress intended or should we consider modifications?

Finally, an increasing amount of video content is now available by means of the Internet. Some programming web use generated such as YouTube is user generated and available without regard to the identity of the originating entity and its vertically-integrated nature. Other Internet-based services like Hulu and the Web sites of the major television networks offer full episodes of programming that aired on television as recently as the previous day. The more such programming migrates to the Internet, the less consumers may need to subscribe to a multi-channel video programming distributor at all. At the same time some Web sites that offer video content such as ESPN 360 are only available to subscribers of particular multi-channel video programming distributors. What are the implications of these emerging business models for consumers and for competition in video distribution?

I expect that our knowledgeable witnesses today will offer a thoughtful analysis of these and other matters regarding video distribution in this digital era and we thank them for their presence here and look forward very much to their testimony.

That concludes my remarks and I am pleased to recognize the gentleman from Florida, the ranking Republican member of the subcommittee, Mr. Stearns.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. Good morning and thank you, Mr. Chairman. Thank you for holding this very interesting hearing. The issues surrounding video competition obviously are very important. I look forward to hearing from our witnesses and thank them for taking their time to be here.

Competition in the video marketplace has been robust. Twenty years ago cable commanded almost 100 percent of the multi-channel television market. Today because of fierce competition, cable's market share has dropped to about 63 percent of multi-channel video households. As we know, consumers can choose from a variety of multi-channel video providers including direct broadcast satellite. In fact, as of June 2009, DirecTV with 18.3 million subscribers was larger than all the cable companies in the United States except Comcast. EchoStar with almost 14 million subscribers was the third largest multi-channel video provider in the United States. Competition from the phone companies such as Verizon and AT&T and Web sites offering everything from home videos to full-length movies have brought even more choice to the consumers. As a result of this competition, 37.8 million consumers, over one of every three video subscribers can now obtain multichannel video programming from some company other than local cable operator. It is a truly amazing thing how far have we come in such a short amount of time.

Even the FCC has acknowledged the competition in the video market. The FCC's 2009 annual report on video competition reinforced the trend line of previous reports confirming growth and entrenchment of competition in the video marketplace, the decline of vertical integration between cable operators and program networks, and the emergence of a new video competition from programming that is distributed on the Internet.

Innovations and new products are still being created all the time. The next frontier is Internet-based video which now competes with cable, satellite and telephone providers giving consumers even more choice. Applications such as Hulu, which the Chairman mentioned, which provides longer network television programs continue to experience explosive growth. With 373 million video streams per month, overall online video usage has grown almost 25 percent to an average of 9.5 billion streams a month.

Yet despite all this competition, we still operate under regulatory regimes stemming from the radio broadcast provisions of the 1934 Communications Act and the multi-channel video programming distributor provisions of the 1992 Cable and 1996 Telecommunications Act. And as much as we are finding in the broadband context, regulatory policies can hinder rather than help investment in the rollout of video services to consumers when competing platforms are present in the market. The growth in digital video programming is requiring significant investment in the Internet and beyond. Cable and satellite providers and now telephone companies are making large investments in equipment and capacity to accommodate next generation video content. Broadcaster and other programmers are incurring large cost to create and transmit digital programming. In a competitive environment, network neutrality mandates and regulations in general deter investments, at least put a chill on them. Any discrimination in openness mandates limit companies' ability to differentiate themselves from the competitors and provide their customers with the unique products and high level of service they demand.

As the video industry competes in a digital world where the winning business models are not clear yet, it becomes even more important to rely on market forces and not on regulation. In such a competitive environment and absent any evidence that consumers are being harmed, it makes little sense to create a new regulatory environment that would only freeze investment and stunt innovation.

When Congress adopted the program access rules in the 1992 Cable Act, Congress wanted to ensure that the infant satellite television industry and other independent pay television providers simply had access to content. Thus, section 628 prohibits a cable operator from unfairly hindering the ability of other pay television providers to gain access to programming in which the cable operator has an ownership interest. Congress did however include an exception for terrestrial-delivered programming as opposed to programming delivered to providers using a satellite network. Congress wanted to give providers an incentive to invest in local programming. That incentive would be diminished if providers were forced to share the content they develop with their competitors, especially since they would need to spread their cost over less than a national audience. Moreover, when providers launch unique offerings to differentiate themselves from their competitors, consumers benefit from a greater selection and a quality of programming.

As I have said, the video market is very competitive and at this point, consumers have many choices.

So I look forward to this hearing, Mr. Chairman, and I appreciate again the witnesses coming here to testify.

Mr. BOUCHER. Thank you very much, Mr. Stearns.

The Chairman of the Energy and Commerce Committee, the gentleman from California, Mr. Waxman, is recognized for 5 minutes.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you very much, Mr. Chairman. I want to thank you for holding this hearing and I want to thank all of our witnesses for appearing today.

We are in the midst of one of the most profound technological revolutions since the invention of the wireless. It heralds great abundance in the generation and delivery of content which is all to the good. We need to ensure, however, that we have an architecture of policy and technology that ensures diversity, competition, choice and access. As always the interests to be served first are those of viewers and users, the interest of competition and not any specific competitor. This hearing will help frame these issues.

I especially want to recognize and welcome Ronald Moore, who is testifying on behalf of the Writers' Guild of America West. Mr. Moore is an Emmy Award-winning writer and producer of some of the most popular science fiction programs in history and I welcome your participation today, and I look forward to hearing your insights on the consolidation on program ownership. It is very important that those who create video programming are not left out of this debate.

The market for distribution of video programming is changing. Many consumers have the option to subscribe to at least two paid television services delivered by a cable, satellite or fiber optic line. In addition, the transition to digital over-the-air broadcast has given tradition broadcasters the opportunity to deploy more channels with new and innovative programming. Meanwhile, more and more consumers are relying on their broadband connections to access web-based video services, and these new web-based distribution models offer great hope for many in the creative community.

As I have indicated, all of these changes are creating both opportunities and challenges. For example, program carriage and program access issues remain particularly when a distributor owns programming that is comparable to or competes with independently-owned programming. In this case, it may be difficult for competitors to field the types of products and services that consumers want. As with other areas of telecommunications policy, the advantages of historic incumbency can be difficult for new entrants to overcome absence government intervention, and I am pleased that even the Nation's largest telecommunications companies recognize this fact.

I look forward to reviewing all of our witnesses' testimony. I thank you, Mr. Chairman, for holding this hearing and I yield back the balance of my time.

Mr. BOUCHER. Thank you very much, Chairman Waxman.

The gentleman from Michigan, Mr. Upton, is recognized for 2 minutes.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Well, thank you, Mr. Chairman.

And with all due respect I don't think that this is necessarily the appropriate hearing that we ought to be having today. We should be putting closer scrutiny on the proposals pending before the FCC and why these proposed regulations carve out certain companies and how regulation may stifle much needed private investment.

We are entering a new digital age and a new age of entertainment and more than ever the consumer is king. Consumers don't want their entertainment options dictated to them. They want greater control over not only what they watch but also where and when they watch it, and these new consumer expectations will continue to fuel investment, innovation and competition. But let us not forget, without investment in the physical network, there won't be much room for innovation or competition.

It is my view that public policy must focus on enabling network operators to secure and utilize the investment capital to meet that demand, and to build out the vast network necessary to allow for the deployment of new services while still ensuring that services remain affordable for all consumers. And I have stated in the past, proposed network neutrality rules seek to alleviate a problem that doesn't exist and threatens to deter the investment necessary to enable consumers to enjoy additional exciting new features that the Internet could offer.

Unnecessary new regs, such as those proposed by the FCC Chair will stifle future broadband investment and have broad economic implications. How does the FCC think that the U.S. will achieve ubiquitous broadband deployment after the agency imposes onerous regulations that will drive investment out of the broadband sector? The U.S. desperately needs broadband investment to help lift the Nation out of economic malaise and the FCC must not undermine that investment.

Both the Post and the Wall Street Journal editorial pages agree that the Chairman's proposal would harm broadband investment. The Post concluded that the FCC's proposal would "stifle further investments by ISPs with attempts to micromanage what has been a vibrant and well-functioning marketplace." And the Journal concluded that threatening to limit what telco companies could charge and to whom net neutrality rules would discourage broadband investments.

Yesterday's Reuter's report, and I quote, here says, "Verizon Communications, Inc., Chief Ivan Seidenberg said that the debate around the proposal is extremely troubling and could halt progress in U.S. broadband investment. From '01 to '08, communication systems invested tens of billions of dollars." The bottom line is this, in the conclusion, that without a regulatory touch, video has flourished in content and volume for all consumers. The same can happen with Internet access.

Mr. BOUCHER. The gentleman's time has expired.

The gentleman from Michigan, Mr. Dingell, Chairman Emeritus, of the full committee is recognized for 5 minutes.

OPENING STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. DINGELL. Mr. Chairman, thank you. I commend you for your initiative in overseeing the state of competition in video programming.

I would note with no mean degree of dissatisfaction that the committee's understanding of this important issue would have been much better informed and much more solidly based had the Federal Communications Commission under the chairmanship of former Chairman Kevin Martin not advocated its duty to complete annual studies on video programming competition. I want to commend Chairman Genachowski for acting to correct this disregard to responsibility and in particular extend my thanks and appreciation to Commissioner Copps who is acting chairman of the Commission first set out to deal with this matter.

Since passage of the Cable Act in 1992, the market for video programming has changed significantly. While 20 years ago a majority of the subscribers received video content from cable providers, they now enjoy a greater choice as evidenced by the robust participation of fiber optic and satellite providers in the marketplace. As the committee once again takes up this matter, it is my hope that our witnesses will provide us with a sense of how competition in the video programming market has evolved and what issues remain to be addressed including their candid suggestions for how to do so.

In closing, it remains my desire to ensure that all people regardless of income are able to view free, over-the-air television with local programming. This belief will inform my participation in the debate we once again begin today.

Mr. Chairman, I thank you for your courtesy and for your foresight, and I yield back the balance of my time.

Mr. BOUCHER. Thank you very much, Chairman Dingell.

The gentlelady from Tennessee, Ms. Blackburn, is recognized for 2 minutes.

Mrs. BLACKBURN. Thank you, Mr. Chairman.

I will submit my full statement. I know we are anxious to get to the hearing and I do have questions for some of you, believe it or not.

As you all can imagine video competition is something important to me and my constituents in Tennessee. We have a lot of content producers there and they are certainly watching what is happening. So welcome to all of you who are our witnesses today.

Mr. Chairman, I will tell you that it is always of concern to me when I see government insert itself into a private sector issue where there is no compelling reason to do so, and I think that is what we find ourselves facing right now. We know that increased regulation is going to give you less of what you want, and what people want to see is good, solid, aggressive competition in this marketplace. They want to see it spur innovation. They want to see it spur investment. They want to see it spur job creation and I think Congress mandating how these companies are going to market their products and services will end up being counterproductive.

Now, there are some things I do hope we talk a little bit more about. Mr. Moore, I am going to want to talk with you a little bit about the '92 Cable Act. I know that you reference in your testimony what has happened to production over the past 10 years, and sometimes that strong hand of Congress or government inserting itself can be counterproductive so I look forward to visiting with you. Mr. Knorr, I am going to want to talk with you about what we see happening to small businesses and those that are entrepreneurial and innovative as we look at the expansion of broadband and the opportunity to expand access to the content that our creative community does put out there for everyone. I know that, Mr. Pine, you are going to have a little bit to say about having consumers access that. So welcome to you all. We look forward to the hearing.

I yield back.

Mr. BOUCHER. Thank you, Ms. Blackburn.

The gentleman from Michigan, Mr. Stupak, is recognized for 2 minutes.

OPENING STATEMENT OF HON. BART STUPAK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. STUPAK. Thank you, Chairman Boucher, for holding today's hearing on the status of Video Competition in a Digital Age.

Last year we held a similar hearing on competition in the sports and programming market. At that time, I voiced my concerns that the NFL Network was removed from the basic tier by Comcast and moved to a more expensive sports tier. Hoping to resolve the issue after it appeared to have hit a stalemate and all options were explored, I wrote to the FCC and requested that an arbitrator be appointed to serve as an independent third-party. However, the FCC did not have to weigh in to end the dispute and the parties negotiated a neutrally beneficial private agreement. I want to express my appreciation to Comcast for working with the NFL Network to ensure that sports fans were not denied access to content they demand. In the end, the dispute serves as an example of how these issues can be resolved for the benefit of consumers without direct government intervention.

Today we will hear from our witnesses on challenges they have encountered in providing content to their consumers as well as their suggestive solutions to the problem. We should tread carefully when discussing legislative fixes when private solutions have not been exhausted. That is not to say that we should not act to ensure fair competition in the video marketplace. It is only to say that we should act as a last resort. Ultimately, we have the responsibility to ensure that consumers have access to the content they pay for and that the market power is not abused to their detriment.

Thank you, Mr. Chairman, for holding today's hearing and I look forward to discussing with our witnesses how we can ensure that we have fair competition in the video marketplace.

Mr. BOUCHER. Thank you very much, Mr. Stupak.

The gentleman from Nebraska, Mr. Terry, is recognized for 2 minutes.

Mr. TERRY. Thank you, Mr. Chairman.

My opening statement would be simply repetitive of Mr. Upton's opening statement so I will say that I will associate myself with his remarks and thank you all for being here and yield back.

Mr. BOUCHER. Thank you very much.

The gentleman from Pennsylvania, Mr. Doyle, is recognized for 2 minutes.

Mr. DOYLE. Thank you, Mr. Chairman.

I just want to welcome the witnesses and I will waive opening statement for time on questions.

Mr. BOUCHER. Thank you very much, Mr. Doyle.

The gentleman from Connecticut, Mr. Murphy, is recognized for 2 minutes.

OPENING STATEMENT OF HON. CHRISTOPHER S. MURPHY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CONNECTICUT

Mr. MURPHY. Thank you, Mr. Chairman, for today's hearing.

Having looked at the testimony to be presented today, I know that our hearing is going to be especially relevant to parts of my district in southwestern Connecticut. And much of our witness testimony deals with the issue of competition in the New York metropolitan market between competitors that are also present there and are undergoing the same competition in my district and the district of my colleague, Mr. Himes, so I am interested to hear specifically about some of the issues relevant to that market. I also look forward to hearing from our witnesses today to get a better understanding of how current market dynamics and what if anything this Congress needs to do to ensure that our constituents have opportunities to receive the programming they desire at a fair price, while ensuring that we don't stifle the development of innovative and new programming.

I am especially interested to the extent that this hearing treads into the emerging new technologies which allow our constituents to receive programming online. Part of this hearing may focus on some of the emerging technologies like Hulu and Zillion TV which I think have some very interesting and potentially transformative impacts on our constituents. But this Congress needs to be mindful while we want to set a foundation that allows for that innovation, to be very careful about not allowing for the type of Internet piracy of and copyright violation that has hampered many of our efforts to try to promote the expansion of new and unique programming into the online space.

So, Mr. Chairman, I thank you for the hearing and I look forward to the testimony of our witnesses.

Mr. BOUCHER. Thank you very much, Mr. Murphy.

The gentleman from Georgia, Mr. Deal, is recognized for 2 minutes.

OPENING STATEMENT OF HON. NATHAN DEAL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. DEAL. Thank you, Mr. Chairman.

I think we all understand that we are in an evolutionary change in media and that evolutionary change has of course informed us better and we are better connected but the growth has come in the emergence of trying to protect the rights of copyright owners, compensating those who own the signals and on which the copyrighted program will travel in meeting the demand of consumers who want unfettered access to programming. Certainly, the marketplace is more competitive than ever. I think the question we have to answer is how can we make this marketplace completely free so that everyone from the programming owner to the programming provider to the programming consumer will be benefited.

Last week this committee dealt with the Satellite Home Viewers Reauthorization Act. At that time, the committee adopted an amendment that was passed requiring the Dish Network to carry the Public Broadcasting Service in high definition sooner than the parties involved were able to reach an agreement. Under the intention of providing public airwaves to all consumers, the government forced a satellite carrier to carry a station without permitting Dish to choose whether or not they wanted to carry it. This illustrates the problem with retransmission consent is broadcasters are able to use their government-given marketplace leverage to force carriers of their programming on the distributor in unbalanced negotiations. The practice of retransmission consent is nothing but a government-regulated monopoly as Congress has given authority to broadcasters to negotiate on their terms.

It is my hope that this witness panel will be able to discuss a solution to the problems of retransmission consent in an honest and fair manner. In the end, it is the consumer that drives competition. Competition fosters innovation and innovation is what we try for for the future. Today I hope we will be able to work towards solutions that help promote a free and fair market, one in which broadcasters, distributors and consumers are afforded flexibility, transparency and more importantly, choice.

I yield back my time.

Mr. BOUCHER. The gentleman from Ohio, Mr. Space, is recognized for 2 minutes.

OPENING STATEMENT OF HON. ZACHARY T. SPACE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. SPACE. Thank you, Mr. Chairman.

Today we examine video competition in the digital age, a topic with relevance to all Americans who watch TV and that is a lot of Americans. The status of competition in the video market affects all of those viewers whether they are actively aware of it or not.

Mr. Chairman, in my district, my caseworkers and by the way, I have a very rural district pretty much like your own. We receive a steady stream of phone calls from my constituents complaining that they cannot get the video services they desire. The cable company doesn't come out far enough to reach their homes which are some distance back from the main thoroughfares. Two of the five DMAs covering Ohio's 18 Congressional districts have only one of the two major satellite providers offering service, not to mention that one of the markets lacks local-into-local programming. And I have spoken repeatedly about the lack of broadband access in the Appalachian terrain of southeastern Ohio. A sad state of affairs that continues to limit content availability on countless fronts. So I think my constituents might disagree with some of the testimony that is going to be offered today that competition is alive and well. While that certainly may be the case in more urban and suburban areas of our country, my constituents generally have just one choice for paid television services from a multi-channel video programming distributor and one choice isn't really any choice at all. I worry that once again that rural America is being left behind.

I thank you, Mr. Chairman, for calling this hearing and certainly for your tireless devotion to meeting the needs of rural America. And I look forward to the testimony of our witnesses and thank them for their appearance.

Mr. BOUCHER. Thank you very much, Mr. Space.

The gentleman from California, Mr. McNerney, is recognized for 2 minutes.

Mr. MCNERNEY. Thank you, Mr. Chairman.

The only thing I really want to say is that I understand clearly how important legislation and regulation is going to be in terms of enhancing the competitiveness of video broadcasting. The wrong ideas are going to make the market a lot less competitive and select winners rather than let the market select the winners. So I am looking forward to what your testimony is and to learn as much as we can before we actually start marking up ideas onto paper.

So thank you very much, Mr. Chairman, and I yield back.

Mr. BOUCHER. Thank you very much, Mr. Space.

The gentlelady from Florida, Ms. Castor, is recognized for 2 minutes.

Ms. CASTOR. Thank you, Chairman Boucher, very much for calling this hearing.

It is an exciting new world and I am very interested in your opinions, your expert advice on where we should be going forward. Thank you all for being here today.

And I yield back.

Mr. BOUCHER. Thank you, Ms. Castor.

The gentleman from Vermont, Mr. Welch, just joined us and is going to waive his statement and both Ms. Castor and Mr. Welch as well as Mr. McNerney will have 2 minutes added to their question time for witnesses as will Mr. Doyle. Are other members seeking recognition? That concludes opening statements and we welcome now our panel of witnesses and express thanks to each of you for taking part in our hearing this morning. I will say a brief word of introduction about each of our witnesses.

Mr. Thomas Rutledge is the Chief Operating Officer of Cablevision Systems Corporation, one of the Nation's major cable companies. Mr. Benjamin Pyne is President of Global Distributions for Disney Media Networks. Mr. Patrick Knorr is the Chief Operating Officer of Sunflower Broadband. Mr. Ronald Moore is a writer and executive producer testifying on behalf of the Writers' Guild of America West previously introduced by Chairman Waxman. Mr. Terrence Denson is Vice President of Corporate Marketing for Verizon and Mr. Adam Thierer is President of The Progress & Freedom Foundation. We welcome each of you and without objection your prepared witness statement will be made a part of our record. We would welcome your oral summaries of your testimony and ask that you try to keep those oral summaries to approximately 5 minutes, that way we will have ample time for questions and we will proceed from the left and proceed to the right. That is not a philosophical comment but it does coincide with philosophical positioning at least for the last witness to some extent.

Mr. Rutledge, we will be pleased to begin with you and if you could pull that microphone a bit closer and make sure that it is on and we can hear you better.

STATEMENTS OF THOMAS RUTLEDGE, CHIEF OPERATING OFFICER, CABLEVISION SYSTEMS CORPORATION; BENJAMIN PYNE, PRESIDENT, GLOBAL DISTRIBUTION, DISNEY MEDIA NETWORKS; PATRICK KNORR, CHIEF OPERATING OFFICER, SUNFLOWER BROADBAND; RONALD D. MOORE, WRITER, EXECUTIVE PRODUCER; TERRENCE K. DENSON, VICE PRESIDENT, CORPORATE MARKETING, VERIZON; AND ADAM THIERER, PRESIDENT, THE PROGRESS & FREEDOM FOUNDATION

STATEMENT OF THOMAS RUTLEDGE

Mr. RUTLEDGE. Good morning.

Mr. BOUCHER. That's better.

Mr. RUTLEDGE. Chairman Boucher, Ranking Member Stearns and members of the subcommittee.

My name is Tom Rutledge and I am the Chief Operating Officer of Cablevision Systems Corporation. I also serve as Chairman of the Board of Directors of the National Cable Television Association.

Mr. Chairman, the state of video competition is very healthy, especially in Cablevision's area, the most competitive market in the country. We face competitors many times our size by any metric and consumers have been the primary beneficiaries of this competition. After the 1996 Act, Cablevision invested more than $5 billion to build the most advanced communications network in the country. Cablevision offers all, not some but every household in our service area an array of new digital video voice and high-speed Internet services at significant savings to what our customers use to pay our competitors.

As the Congress recognizes competition breeds innovation and investment. In competitive markets like New York, the rules designed to jumpstart competition where there was less multi-channel video competition 17 years ago, the program access rules are no longer appropriate. Attempts to use the regulatory framework for competitive advantage such as by expanding the satellite delivered program access rules should be dismissed out of hand. Companies should continue to have incentives to compete in the marketplace not in the regulatory arena.

For years, Cablevision has faced vigorous competition from Dish and DirecTV, currently the second and third largest video distributors, and Verizon and AT&T, the Nation's largest telecommunications companies, and currently the eighth and tenth largest video distributors. These phone companies are significantly larger than Cablevision, more than 10 times our size. Cablevision has always competed by investing and innovating to create products that meaningful differentiate our service. Cablevision was the first cable company to launch digital video service throughout its footprint including high-definition offerings free of charge with our customers' packages. We launched the Nation's fastest Internet service Optimum Online Ultra and are now building the country's largest WiFi network to provide our customers free access to the Internet service and public spaces in our marketplace.

Similar groundbreaking investments have been made with regard to content to ensure that Cablevision continues to provide unique value for customers, examples include News 12. In 1986, Cablevision launched News 12, the Nation's first 24-hour hyper-local news channel and now offers seven individual local news channels and five traffic and weather channels.

Madison Square Garden high definition, in 1998, Cablevision became the Nation's first regular provider of sports coverage in high definition. Cablevision's investment was a gamble. It required a sizeable investment at a time when very few people had high definition televisions. Recently, Cablevision launched Madison Square Garden Varsity, a new multi-platform suite of television and interactive services dedicated to local high school sports, academics and activities of interest to our local communities.

Our investments in local and regional programming have been both risky and substantial. The program access rule adopted in 1992 to ensure that new competitors like DirecTV and Dish could launch with key programming is now at odds with this kind of innovation. In fact, Congress recognizes potential negative impact and allowed for a periodic review and sunset of the program access rules. The implications of keeping these rules in effect is clear, if you take the risk to develop creative and often costly new programming and you fail, you alone bear that cost but if you succeed, you must share the fruits of your risk and innovation with your competitors.

To jumpstart competition on the multi-channel video distribution market in 1992, Congress required that all satellite-delivered cable programming be given to new satellite competitors. However, Congress also wisely established new opportunity for an innovation in programming where a cable operator could create new programming, deliver it terrestrially and not be forced to share it with its competitors. To reverse this policy, it would undermine competition by discouraging that investment for new content and services. If a company is facing vigorous competition, why would that company invest in untested and expensive services if it had to share those services with its competitors? In the interest of investment, innovation and competition, we strongly urge that efforts to expand the program access regulations be rejected.

Thank you very much.

[The prepared statement of Mr. Rutledge follows:]

TESTIMONY OF THOMAS RUTLEDGE
CHIEF OPERATING OFFICER
CABLEVISION SYSTEMS CORPORATION

on

Video Competition in a Digital Age

before the

Committee on Energy and Commerce
Subcommittee on Communications, Technology and the Internet

UNITED STATES HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

October 22, 2009

TESTIMONY OF THOMAS RUTLEDGE

CHIEF OPERATING OFFICER, CABLEVISION SYSTEMS CORPORATION

Good morning, Chairman Boucher, Ranking Member Stearns, and Members of the Subcommittee. My name is Tom Rutledge and I am the Chief Operating Officer of Cablevision Systems Corporation. I also currently serve as the Chairman of the Board of Directors of the National Cable & Telecommunications Association, the principal trade association of the cable industry.

First, I want to acknowledge this Subcommittee's role in shepherding an era of increased competition and innovation in the media, broadband and telecommunications markets. The 1996 Telecommunications Act and successive legislation have enhanced the ability of companies like Cablevision, to provide a host of new services – especially voice services -- to customers with capabilities unheard of only a decade ago, and at prices that are a fraction of what they were when only the Bell companies offered phone service. Cablevision itself has invested more than $5 billion to provide more than 5 million households and businesses passed by our network with access to the most advanced communications network in the country.

I appreciate the opportunity to talk with you today about "video competition in a digital age," for it is a topic we at Cablevision live and breathe every day. We face the most robust competition in the nation from companies many times our size – including Verizon, AT&T, DirecTV, and DISH. To succeed against these significantly larger competitors, Cablevision has chosen to compete through investment and innovation, as opposed to regulatory forum shopping. As a result, consumers in the New York market have benefited substantially from the cost savings and new choices in services and features, none of which would have been possible if the regulatory environment for these products undercut those investments. We believe that customers will benefit from the Subcommittee's continued support of a regulatory environment that creates incentives for investment and innovation resulting in new, groundbreaking products by encouraging risk-taking and rewarding risk takers. In particular, any mandates that force video providers to share the fruits of their investments with their competitors should be rejected – especially in the nation's most competitive markets.

I will first discuss the state of competition, both nationally and in our markets, and then touch on Cablevision's efforts to differentiate itself from its competitors through innovation and investment.

Video Competition Continues to Grow

Today, video competition is irrevocably entrenched and new forms of competition are upending the landscape. The two national DBS companies, DirecTV and DISH – which in their infancy, more than 15 years ago, were the genesis of the program access rules that exist today – rank second and third in customers among all multichannel video programming distributors ("MVPDs"). Meanwhile, while the two largest telephone companies, which launched their video service only four or fewer years ago, have already risen to be part of the list of the ten largest MVPDs in the country.

Growth of Non-Cable Video Competition

Provider	2Q 2009 Growth	2Q 2009 Total Subscribers
DirecTV	460,000	18.3 million
DISH Network	26,000	13.6 million
Verizon FiOS	300,000	2.5 million
AT&T U-verse TV	248,000	1.6 million

Video competition is also emerging from programming distributed using the Internet, taking advantage of the hundreds of billions of dollars of investment in broadband by cable companies and others. Robust high-speed Internet service essentially invented by cable operators and their competitors – with ever-increasing speeds – has made possible the delivery of an enormous variety of video content. YouTube, which was only launched in December 2005, is now nearly ubiquitously used for posting and viewing Internet content of all sorts. In July 2009, 158 million U.S. Internet users watched online video, the largest audience ever recorded. The number of online videos that were viewed reached another all-time high in July with a total of 21.4 billion videos viewed during the month, or more than twice as many videos as were viewed in February 2008.

Video Competition in the New York Marketplace

Cablevision operates in the most competitive market in the country – New York City and the surrounding tri-state area. We have faced strong DBS competition from both DISH and DirecTV for years. Moreover, the telephone companies – now the eighth and tenth largest MVPDs – have focused their launches in our service area. Since launching in New York in 2006, Verizon FiOS has more than 400,000 customers in New York and New Jersey and expects to double that number by year-end. We face similarly strong competition in Connecticut from AT&T, which covers nearly 100 percent of our service area.

Cablevision is Far Outsized by its Principal Competitors. Cablevision's chief competitors – Verizon, AT&T, DirecTV and DISH – are all significantly larger than Cablevision. In particular, as the nation's largest communications companies, AT&T and Verizon dwarf Cablevision in terms of the resources they bring to bear.

Comparative Size of Cablevision Competitors

Provider	Market Capitalization October 2009	2008 Revenues
AT&T	$151 billion	$124 billion
Verizon	$82 billion	$97 billion
DirecTV	$27 billion	$20 billion
DISH	$8 billion	$12 billion
Cablevision	$7 billion	$7 billion

Cablevision's Track Record of Innovation

Innovation is the driving force behind employment, revenue growth, and sustainable leadership in our industry. The history of Cablevision offers many examples of the type of innovation that generates value for consumers, and a few examples of where outdated rules are undermining and jeopardizing investment.

Cablevision has a long history of being the industry leader in adopting and deploying new technologies and creating new service opportunities for consumers, and the growth of competition has further spurred our activity. In 1971, Cablevision's founder and Chairman, Charles F. Dolan, created HBO, and then, in 1976, rolled out SportsChannel, one of the nation's first regional sports services. In 1986, Cablevision pioneered the first 24-hour local news channel, News12 Long Island. Cablevision was also the nation's first regular provider of sports coverage in high definition ("HD") – more than 10 years ago, when few households owned HD sets.

In response to the intense competition we face in the New York marketplace, we have built on this legacy of innovation. Let me outline some of our latest developments.

MSG Varsity. Last month, Cablevision launched MSG Varsity, a multi-platform suite of services comprised of a 24/7 television network, a comprehensive online destination, and a groundbreaking interactive service -- all dedicated to local high school sports, academics and activities. More than 600 high schools throughout Cablevision's footprint have the opportunity to participate and will receive money for equipment and scholarships as well as extraordinary access to curriculum and training in multimedia creation and distribution if they choose to participate. This significant undertaking requires an overall investment by Cablevision of tens of millions of dollars and has resulted in more than 100 new jobs.

Digital Video. Cablevision was the first cable operator to launch a robust digital video offering, which included video on demand ("VOD") and interactivity for every customer. Long before HD sets were common in the marketplace, we designed and upgraded our network with the belief that HD programming and interactivity would dominate the future. We were the first cable company to offer all of our customers HD VOD, and today, we offer more than 100 HD channels – and unlike the majority of our competitors, we offer HD free of charge with our customers' service packages.

We are a leader in the cable industry in the transition to an "all-digital" network. As of the end of this year, we will no longer sell an analog video product to new customers and soon will stop providing analog cable in New York City completely. Our principal competitors -- DirecTV, DISH, Verizon FiOS and AT&T -- already operate an "all-digital" network. Going all-digital will enable us to use our bandwidth more efficiently and offer more HD and interactive services. In addition, if the Federal Communications Commission permits us to encrypt our basic tier, we will be able to turn on and off our service remotely, eliminating the need for service appointments, which can be difficult for working families, and reducing emissions caused by trucks when traveling to service appointments.

We were the first major cable operator to develop and implement an open-standard, downloadable security solution to comply with the Commission's separate security requirement, and we have committed to the FCC to deploy it throughout our footprint.

Revolutionary Triple Play Offer and First Wide Scale Deployment of Voice. In 2004, Cablevision was the first communications company to offer the "Triple Play" – the revolutionary bundling of video, voice over IP, and data services that has led to significant savings for our customers and prompted similar offers by others. This innovative offering was made possible after Cablevision became the first cable operator, in 2003, to deploy a VoIP phone product across its entire service area. We delivered a voice service with more features at approximately half the price of the comparable offering by the incumbent telephone company. Today, 41% of the homes we pass choose our voice service.

Fastest Broadband. Launched in 2009, our Optimum Online Ultra service offers up to 101 Megabits per second -- the fastest download speed in the country. Consistent with our approach of offering every household access to the best services, Ultra is available to every home Cablevision passes. More than 52 percent of homes passed by our network take a broadband service from Cablevision, including almost 48 percent of homes in the Bronx, and we have a broadband market share in the communities we serve of approximately 75 percent. Our recent introduction of our Optimum Online Ultra service was a result of Cablevision being the first cable provider to deploy the DOCSIS 3.0 standard across its entire service area.

WiFi. In 2008, we began deploying what is now the country's largest WiFi mesh network at an investment of more than $300 million. Our WiFi network offers speeds of up to

3.0 Mbps downstream – up to twice as fast as cellular 3G networks – and access to the network is free to our Optimum Online customers. This is part of our commitment to respond to our customers' demands and deliver the services they want when they want and where they want. Since its launch in September 2008, Optimum Online customers have accessed the Internet more than five million times using Optimum WiFi and are averaging more than two million minutes online every day over the WiFi network.

RS-DVR. In 2007 we were the first to develop a remote, network-based digital video recorder ("RS-DVR"). The RS-DVR provides consumers with all the functionality of a traditional DVR without having to have a DVR attached to the television. It also allows customers to record remotely, to view recorded programs on multiple TVs, and to have larger storage capacity at a lower cost.

Interactive Television. We also enhance the value of our digital television service by offering interactive television applications, such as "telescoping," which allows a viewer to navigate directly from a 30-second commercial to a dedicated advertiser channel or content they select. And we are always looking for ideas that further add value to our service. For instance, this year, we partnered with the New York Yankees and the YES Network to allow Cablevision customers to be the first in the nation to watch Yankees games live online.

Original Local Programming. Cablevision is committed to serving its local communities and has spent significant resources creating its own original local content. In addition to our recent launch of MSG Varsity, Cablevision has invested widely in local programming.

- **News 12.** In 1986, Cablevision launched News 12 Long Island, the nation's first 24-hour, hyper-local news channel, as a terrestrially delivered programming channel unique to its customers. Today, our award-winning News 12 Networks include seven individual local news channels and five traffic and weather channels serving Long Island, New Jersey, Southwestern Connecticut, Westchester County, the Hudson Valley, Brooklyn, and the Bronx. It is the country's largest and most watched 24-hour local television news network. To differentiate itself and deliver value to customers, Cablevision is now rolling out innovations like "News 12 To Go," a traffic and weather service delivered to customers' mobile phones.

- Cablevision's investment in News 12 has in turn spurred investments by its competitors in local programming. Verizon recently announced the launch of its own exclusive regional channels, FiOS One Long Island and FiOS One New Jersey, that will feature news, sports, weather and local information, and entertainment programming to compete with News 12 Network.

- **MSG HD/MSG+ HD.** In 1998, Cablevision's MSG network was the nation's first regular provider of sports coverage in HD. In 2003, MSG and its sister network, MSG+, launched their HD counterparts. Cablevision's investment in these HD networks was particularly risky and innovative because it required a sizable, ongoing investment at a time when HDTV sets were very expensive and very few people had them. Indeed, no other provider asked to carry these HD networks for almost six years. As HD has matured, MSG HD and MSG+ HD – terrestrially delivered services – have enabled Cablevision to differentiate its cable service from other providers. Those other providers (including Verizon and AT&T) can and do offer the satellite-delivered MSG and MSG+ services, which contains every live game carried on MSG HD and MSG+ HD, so Verizon and AT&T subscribers don't miss a single game.

These investments in local and regional programming were risky and substantial. Our competitors did not share these risks, and we would have been far less likely to commit the necessary resources to these projects if we were compelled to share the benefits with them. Fortunately, Congress limited the program access requirements to satellite-delivered programming – creating a terrestrial "safe harbor" within which a cable operator could distinguish itself from its rivals by expanding the program choices available to its customers. And that is exactly what we have seen in the New York market.

Notably, our competitors have programming that is not available to us, such as the NFL "Sunday Ticket" package that the NFL makes available only to DirecTV subscribers. DISH Network has exclusive distribution rights to numerous foreign language programming services. Verizon has been touting in advertisements that its new regional FiOS1 services "won't be found on cable TV." As these promotions make clear, programming line-ups give MVPDs an opportunity to distinguish themselves from their competitors. In a marketplace like New York, characterized by high levels of innovation on all sides, this is the best possible result for consumers.

In such a competitive marketplace, the forced sharing of programming, even satellite delivered programming, is unnecessary as well as counterproductive. The FCC and the courts have both recognized that sharing requirements reduce incentives for innovation and investment, and so should be sparingly applied. Congress enacted the program access rules in 1992 to jumpstart competition; in 2009, especially in markets where competition has firmly taken hold, the costs (in terms of investment incentives and innovation) of forcing cable operators to share programming vastly outweigh their benefits. Consumers are best-served by having MVPDs compete through product differentiation strategies – not by compelling rivals to offer copycat versions of the same product so that video service becomes a commodity where the company with the deepest pockets wins. Removing the exclusivity ban in any local market with robust competition would promote consumer welfare by encouraging innovation and investment in programming and allowing for product differentiation among distributors, providing consumers with more choice and more competition.

Thank you, and I am happy to answer any questions you might have.

Mr. BOUCHER. Thank you, Mr. Rutledge.
Mr. Pyne.

STATEMENT OF BENJAMIN PYNE

Mr. PYNE. Thank you, Chairman Boucher, Ranking Member Stearns and members of the subcommittee.

My name is Ben Pyne and I am President, Global Distribution, Disney Media Networks. I truly appreciate the invitation to talk with you today about video competition.

There has never been a more competitive video marketplace, never. Thanks to Congress and the FCC, consumers today have more choices and more video content available to them then at any time in history. Most consumers now have the choice of three, four or more competitive options to receive multi-channel video. While cable once was feared to be a monopoly, today 36 million customers subscribe to non-cable MPVDs. On the programming side, competition for eyeballs has never been more fierce. Over the last 30 years, the number of programming services literally has exploded. According to the FCC, there are now approximately 565 national satellite-delivered cable programming networks and cable and satellite's most popular services now reach nearly 100 million households.

At the same time, vertical integration among programmers has decreased. Of course, the exponential expansion of content on the Internet whether video streams or social networking has created even more competition.

Today's subscribers to multi-channel video get great value for their money. For about $50 per month, subscribers get thousands of hours of entertainment, news, sports, documentaries, lifestyle, children's and family-friendly programming. In fact, with all the great content on multi-channel television, consumers spend much more per hour on movies, home video, mobile phones, print media and video games than for cable television.

Disney realizes that as a result of all the competition that Congress has helped unleash, some cable operators are facing competitive pressure from satellite, telco and other new video entrants. In an effort to provide some relief to the smallest cable operator that is most impacted by this increase in competition, Disney and ABC have granted many small cable operators free retransmission consent for the current 3-year cycle for the 10 ABC stations owned by Disney. Specifically, Disney granted free retransmission consent to 90 small cable operators out of a total of 113 operators with whom we deal in our markets. With respect to our non-broadcast channels, Disney and ESPN have deals with the NCTC, the small cable operator cooperative for all of our cable channels. This provides NCTC members with buying power equal to the Nation's fifth multi-channel video provider. Given these and similar efforts, the subcommittee should not get involved in the private negotiations between programmers and distributors.

Technology has empowered the consumer more than ever before and at our company we create and use technology to deliver content to reach our fans and viewers. In doing so Disney has been a pioneer through video downloads and I-tunes, video streaming on ABC.com, video on Hulu, video over broadband on ESPN360.com, video on demand, video on mobile devices and a production of high definition video content across broadcast, cable, satellite and of course, DVD. These are just some examples of ways we have developed to serve consumers in this new age of media technology and we always will continue to find new ways to get our content to our consumers.

Turning to broadband, Disney and ESPN distribute content on the Internet through various models. ESPN360.com is our sports event broadband product and it features an online video player and access to a broad array of game telecasts and long form sports content. ESPN360.com is available to any and all ISPs for a fee. It is currently available to over 50 million households representing approximately two-thirds of broadband subscribers in the United States. It provides fans with access to more than 3,500 live, full-game telecasts every year, many of which would not otherwise be available on any other domestic outlet. Nobody in the marketplace is currently delivering this volume of multi-sport coverage online.

I want to be clear on one point though. Contrary to what you may hear ESPN360.com has nothing to do with net neutrality. The entire debate over net neutrality involves network management issues and the relationship of an ISP to its subscribers. In contrast, the business model of ESPN360 has nothing to do with the actions taken by any ISP such as network management or retail pricing.

Now and in the future getting the balance right between convenience and pricing is a challenge facing all of us who create and distribute digital content. Adding to that challenge is the problem of piracy. We believe the best place to start to fight piracy is to bring content to market on a well-timed and well-priced basis. Disney is working to do just that, however piracy is a growing threat to our ability to deliver great content. We are looking to increase broadband deployment and adoption and we at Disney believe that it will be high quality sports and entertainment video that will help drive that adoption, but unless that content is protected as it flows over broadband it will be pirated and ultimately our ability to produce that very content will be undermined. We believe that ISPs should be encouraged to use the most effective and commercially reasonable technologies and processes to help curb the tidal wave of stolen content present on our networks today.

In closing, thanks to Congress' pro-competitive policies, video competition is thriving. In our view, no additional government regulation of this dynamic and competitive marketplace is necessary or appropriate.

Thank you very much.

[The prepared statement of Mr. Pyne follows:]

Testimony of Benjamin N. Pyne
President, Global Distribution, Disney Media Networks
October 22, 2009

Thank you, Chairman Boucher, Ranking Member Stearns and Members of the Subcommittee, my name is Ben Pyne and I am President, Global Distribution, Disney Media Networks. I appreciate the invitation to talk with you today about video competition.

Video Competition is Thriving.

There has never been a more competitive video marketplace. Never. Thanks to Congress and the FCC, consumers today have more choices and more video content available to them than at any time in history. Most consumers now have the choice of three, four, or more competitive options to receive multi-channel video. While cable once was feared to be a monopoly, today 36 million customers subscribe to non-cable MVPDs. The available multichannel video offerings provide tremendous variety for consumers including in most cases HD content, video-on-demand (VOD), DVRs, telephony, broadband and, of course, diverse and high-quality programming like that produced by Disney, ESPN and ABC.

Looking into the future, as video consumption continues to migrate from traditional cable and satellite distribution to broadband, we need to make sure that consumers and programmers will continue to have access to multiple distributors that are competitive and equivalent.

On the programming side, competition for eyeballs has never been more fierce. Over the last thirty years, the number of programming services literally has exploded. According to the FCC's 2009 Annual Assessment of the Status of Competition in the

Market for the Delivery of Video Programming, there are now approximately 565 national satellite delivered cable programming networks. And, cable's and satellite's most popular services now reach nearly 100 million households. At the same time, vertical integration among programmers has *decreased*. The DVR now reaches over 40 million households, bringing with it new options for consumers and new challenges for all programmers. Of course, the exponential expansion of content on the Internet, whether video streams or social networking, has created additional competition for eyeballs.

As an overall matter, the trend in the media marketplace over the last few years has been one of *deconsolidation*, not consolidation. Just a few examples of this deconsolidation include Time Warner's split of its cable and content assets, News Corp's divestiture of DirecTV, and the major broadcast network station groups selling some of their television stations.

Today's subscribers to multichannel video get a great value for their money, especially compared to other entertainment options like live sporting events, theatrical productions, or video games. For about $50 per month, subscribers get thousands of hours of entertainment, news, sports, documentaries, lifestyle, childrens and family-friendly programming. For that same amount of money, families can barely buy a single ticket for many other entertainment options. In comparison, with their monthly subscription fee, families have an entire month's worth of first-row seats for the best sports and entertainment available anywhere. In fact, with all the great content on multi-channel television, consumers spend more per hour on movies, home video, mobile phones, newspapers/magazines and video games than for cable television.

Disney realizes that as a result of all the competition that Congress has helped unleash, some of our distributors – namely some small cable operators – are facing competitive pressure from satellite, telco and other new video entrants. Because of this competitive pressure, Disney works very closely with each of our distributors to strike individualized and appropriate business deals. Most recently, in an effort to provide some relief to the smallest cable operators most impacted by this increase in competition, Disney went so far as to actually grant many small cable operators *free* retransmission consent for the current three-year retransmission consent cycle for the 10 ABC Stations owned by Disney. Specifically, Disney granted free retransmission consent to more than 90 small cable operators (out of a total of 113 operators located in our 10 markets). These cable operators account for approximately 80 percent of the operators with which Disney negotiates for retransmission consent. With respect to our non-broadcast channels, Disney and ESPN have deals with the NCTC (the cable purchasing co-operative) for all of our cable channels. This provides NCTC members with buying power equal to the nation's 5th largest cable company. Given these and similar efforts, the Subcommittee should not get involved in the private negotiations between programmers and distributors, which are benefiting not only distributors and programmers of every type and size, but most importantly, consumers throughout the country, of every demographic group, no matter what kind of TV content they enjoy. Indeed, we submit that this Subcommittee is wise to continue its policy – and the long-standing foundation of our laws -- of promoting competition, *not* competitors.

We at Disney take great pride that our content is wildly popular with viewers. It goes without saying that ESPN is hugely popular with sports fans and, on average, 85%

of US cable households watch ESPN each quarter of the year. Likewise, Disney Channel's popularity has reached new levels as we continue to invest in fresh new family-friendly content. Over the last few years, Disney Channel has aired upwards of 20 original movies and has introduced any number of award-winning series and movies for tweens, kids and preschoolers, including Wizards of Waverly Place, High School Musical, Hannah Montana, and Handy Manny. ESPN has continued its tradition of investing in more sports programming to better serve sports fans, including carriage of the NFL, the NBA, Major League Baseball, NASCAR and hundreds of college football and basketball telecasts. In fact, two of the most-watched cable telecasts for 2009 were on ESPN and Disney Channel: ESPN's Monday Night Football telecast on October 5th (cable's highest rated program of all time) and Disney's telecast of Wizards Of Waverly Place The Movie on August 28th. On the broadcast side of our business, ABC invests almost $3 billion a year on programming, including our prime-time entertainment like Lost, Grey's Anatomy and Dancing With The Stars, as well as our ABC News programming and coverage.

Notwithstanding our popularity, you may hear claims that Disney "forces" distributors to carry our programming services. These claims simply are not true. I myself have executed three affidavits clearly setting forth the facts and I will enter those affidavits into the record of this hearing. We are not involved in any way in controlling the retail price of cable or satellite television and our wholesale license fees reflect the value of our services as evidenced by thirty years of arm's length negotiations and a demonstrated record of producing quality content that viewers want to see again and again. We submit that the Subcommittee should reject any isolated calls to regulate the programming marketplace recognizing they are simply requests to have the government advantage one competitor over another in a business negotiation.

One area of the video marketplace that does cry out for reform is compulsory copyright licensing. Today, the government takes the private property that is all of the programming on broadcast television and compels the owners of those programs to license them to cable and satellite operators at below market prices. In the summer of 2008, in response to a request from Congress, the U.S. Copyright Office issued a Report concluding that cable and satellite were no longer nascent industries in need of a subsidy from program creators. The Copyright Office called on Congress to phase out the compulsory licenses. We urge the Congress to move forward on that recommendation.

New Media, Broadband and Piracy

Technology has empowered the consumer more than ever before, and at our Company we create and use technology to deliver quality content. Consumers today want to access content from Disney, ABC, and ESPN in many different ways, and we have made responding to that demand in new and innovative ways one of the highest priorities in our company. In doing so, Disney has been a pioneer – through video downloads on iTunes, video streaming on ABC.com and our other media players, video on Hulu, video-over-broadband on ESPN360.com, video-on-demand, video-on-mobile devices, and our production of high definition video content on broadcast, cable, satellite and Blu-Ray and DVD.

Piracy.

Now, and in the future, getting the balance right between convenience and pricing is a challenge facing all of us who create and distribute digital content. Adding to that challenge is the problem of piracy. We believe the best place to start to fight piracy is to bring content to market on a well-timed and well-priced basis. Disney is working to do just that. However, piracy is a growing threat to our ability to deliver great content. We all are looking forward to increased broadband deployment and adoption, and we at Disney believe that it will be high quality entertainment video that will drive broadband adoption. But, unless that content is protected as it flows over broadband, it will be pirated, and ultimately our ability to produce that very content will be undermined. We believe that ISP's should be encouraged to use the most effective and commercially reasonable technologies and processes to help curb the tidal wave of stolen content present on their networks today.

Video Downloads and Streaming

Today's consumers want their content to be available anytime and anywhere, on devices ranging from TVs to cell phones. Disney led all video producers in moving this "on demand" digital era from theory to reality with our agreement to make television content available for video downloading from iTunes. Today, the variety of Disney video content available on "newer" media platforms continues to expand: movies, TV shows, sports, and news. Here's an update of our video streaming and downloads:

- Over 60 million episodes from The Walt Disney Company have been downloaded on iTunes, including many of our most popular shows – everything from ABC's Grey's Anatomy and Lost to Disney Channel's Hannah Montana. In addition to Disney and ABC content, ESPN offers full game replays of games, podcasts and other sports content on iTunes.

- In addition to iTunes, Disney is making its content available on a number of new platforms, including Netflix, Hulu, and XBOX LIVE.
- Disney continues to make our most popular content – including much of ABC's prime time schedule and original programming from the Disney Channel and ABC Family – available on our own websites -- in HD streaming format on our Emmy-Award winning media player. Since September 2008, the ABC.com media player alone has served over 215 million episode requests. This summer alone, over 280 million Disney Channel videos were streamed on Disney.com.

Content on ABC.com is free to viewers, but it includes limited commercial breaks. Viewers cannot download and save the episode – but are able to pause, fast-forward or rewind. Notably, we have worked with the local ABC broadcast affiliates to design a version of the media player for ABC content in which both the network and the affiliates are able to participate. Affiliates can brand the player with their station's channel number and call letters, include local advertising, and provide links to local news and public information that broadcasters provide their communities. To date, ABC affiliates covering 93% of the country, including major affiliate groups as well as the ten ABC owned television stations, have launched the player on their own websites and affiliates covering 64% of the country are taking advantage of the opportunity to incorporate local advertising into the programming.

Disney manages decisions about making its content available online very carefully, balancing a number of factors. Overall, our online offerings – although significant – still represent only a portion of the content that our networks put on the air every day. And, non-traditional viewing through the Internet and mobile still is responsible only for approximately 2% of total viewing. At the same time, our research shows that overall television viewing continues to increase. Our research also shows that online viewing is largely supplemental, and serves as a convenient way for viewers to access additional episodes of their favorite shows.

Broadband

Disney and ESPN distribute content on the Internet through various models. ESPN360.com is our sports event broadband product, and it features an online video player and access to a broad array of game telecasts and long-form sports content. ESPN360.com is available to any and all ISP's for a fee. ESPN360.com's popularity has soared over this past year, doubling its distribution, and its usage year-over-year has more than tripled. ESPN360.com is currently available to over 50 million households, representing approximately *two-thirds* of broadband subscribers in the United States. It provides fans with access to more than 3,500 live, full game telecasts every year, many of which would not otherwise be available on any other domestic outlet. Nobody in the marketplace is currently delivering this volume of multi-sport live coverage online. In contrast, ESPN's premier sports site, ESPN.com, is primarily an advertising-supported site, and yet it offers more sports video online (primarily highlights and analysis) than any free site and accounts for nearly 30 percent of all minutes spent with sports video online.

ESPN360.com is helping to drive broadband adoption. ISPs that distribute ESPN360.com work collaboratively with ESPN to help acquire new high-speed data subscribers as well as retain and upgrade existing high-speed data and video customers in a competitive marketplace. So many small cable operators who are NCTC members -- many of which are also ACA members -- carry ESPN360.com that they collectively constitute ESPN's 4th largest distributor of ESPN360.com in aggregate. In the latest Beta research study of cable operators (released in February 2009), ESPN was rated *first* in driving broadband subscriptions.

I want to be clear on one point. ESPN360.com has nothing to do with net neutrality. The entire debate over net neutrality involves actions taken by an ISP vis-à-vis its subscribers. In contrast, the structure of the business model for ESPN360.com has *nothing* to do with actions taken by an ISP vis-à-vis its customers. ESPN is engaged in dealing directly with its distributors but once a deal is reached between ESPN360.com and an ISP, ESPN actually *requires* ISPs to deliver ESPN360.com to all of the ISP's subscribers.

Conclusion

Thanks to Congress' pro-competitive policies, video competition is thriving. In our view, no additional government regulation of this dynamic and competitive marketplace is necessary or appropriate.

Mr. BOUCHER. Mr. Knorr.

STATEMENT OF PATRICK KNORR

Mr. KNORR. Thank you, Mr. Chairman and members of the committee.

The American Cable Association represents nearly 1,000 independent cable operators that primarily invest in small and rural communities where the big guys find it unattractive to provide service. Our members don't own or control national or major regional programming. Access to video content is tightly controlled by large media companies that have built their business models on top of decades-old regulation. As a result, our costs for this content have grown exponentially over the past few years and this is why your cable bill goes up every year.

As an entrepreneur from Kansas, there is one message I hope you take away from my testimony. Do not believe those that say the sky will fall if you seek to improve the market for consumers by changing the status quo. I would like to remind you that Congress changed the cable laws in 1992 because it thought the marketplace could be better for consumers. In 1996 you updated communications law because you thought consumers could get better, more innovative service. And you did it with the Satellite Home Viewer Act and most recently with the DTV transition. Embracing change needs to be your philosophy once again.

For instance, Congress needs to confront Federal rules that grant broadcasters exclusivity and insulate them from competition. A recent study shows that retransmission consent fees will increase from $500 million in 2008 to $1.2 billion by 2011, and a disproportionate amount of this revenue will come from consumers served by small and rural cable operators. To be clear, what happens today is not a negotiation. For most ACA members, a retransmission consent negotiation is a take it or leave it deal between an operator and a government-sanctioned monopoly. Networks use affiliation agreements to extend and ensure this monopoly status across every corner of a DMA. This artificially raises the price and keeps consumers from receiving relevant programming like sports and weather from neighboring markets.

Video providers should have the option to offer consumers the most relevant and affordable broadcast content available. This is best accomplished by giving video providers the option of bringing in broadcast signals from adjacent markets. Today robust competition exists. In some rural markets, satellite has become the dominant provider. In the area of retransmission consent, DBS providers have the option to place broadcasters on a separate tier as an optional purchase. This gives DBS both a negotiating and pricing advantage over small cable operators who could not offer this option to their price conscious consumers. Therefore, small cable operators must have parity with satellite to remain competitive. They must have the same option to tier broadcasters. Moreover, smaller operators and their consumers face significantly higher programming rates, not only for retransmission consent broadcast channels but also cable and sports programming just because they are small businesses with minimal market power to negotiate fair terms from dominant media providers.

There is an additional extremely important issue for you to consider regarding how programming is being delivered via the Internet. ESPN is pioneering a closed Internet business model with its ESPN360 offering where broadband service providers are required to pay a per-subscriber fee for every consumer they serve. If a provider does not pay this fee ESPN blocks access to ESPN360 and does not provide any options to consumers to access that content at any price.

There are multiple problems with this situation. First, a person that is out of work and needs the Internet only to apply for a job must now subsidize those who want to access ESPN360 on a regular basis. Second, it would establish a precedent that content companies can restrict consumer choices in the exact way that net neutrality was designed to prevent ISPs from doing. Wall Street loves this kind of business model and is encouraging others to follow ESPN's lead so this will not be a unique situation. Because ESPN embraces this model, you can expect Hulu, YouTube and others to follow suit. How much will they charge? If this model proliferates with millions of Internet content sites, consumers will ultimately pay exponentially higher rates for broadband service at a time when Congress is working to make broadband more affordable.

ACA believes that consumers should be given a choice and a chance to access any legal content on the Internet regardless of their ISP. Therefore, we would request that if you are to proceed in addressing net neutrality legislation that you do not solely focus just on network service providers but address content providers that intend to limit consumer choice.

So what can be done to create a better video market? There are many suggestions detailed in my testimony but I will focus on four here. First, prohibit any party including a network from providing a broadcast station outside of the local market area from granting retransmission consent to a smaller cable company outside of the broadcasters protected zone. Second, provide parity with DBS that would permit small cable operators from offering local broadcast programming on its own tier as an optional purchase. Third, direct the FCC to review all programming contracts to empirically determine the level of programming price discrimination and take necessary corrective action. Finally, providers of content services and applications should not be allowed to block consumers' access to their products regardless of their ISP.

Thank you for this opportunity to testify today and I look forward to your questions.

[The prepared statement of Mr. Knorr follows:]

United States House of Representatives
Before the Subcommittee on Communications, Technology and the Internet
Committee on Energy and Commerce
Thursday, October 22, 2009

Hearing on Competition in the Video Marketplace

TESTIMONY OF PATRICK KNORR

Chief Operating Office – SUNFLOWER BROADBAND
LAWRENCE, KANSAS
IMMEDIATE PAST CHAIRMAN – AMERICAN CABLE ASSOCIATION
PITTSBURGH, PENNSYLVANIA

INTRODUCTION

Thank you, Mr. Chairman and members of the Committee. My name is Patrick Knorr, and I am the Chief Operating Office of Sunflower Broadband and immediate past Chairman of the American Cable Association (ACA). ACA represents nearly 1,000 smaller and medium-sized cable companies providing advanced video, high-speed Internet access and telephone service in predominantly rural and smaller markets in every state.

As small and medium-sized independent cable operators, we represent a unique perspective on the pay-television marketplace. Our members often invest in communities where the 'big guys' find it unattractive to provide service, whether that is in rural communities such as Onaway, Michigan, and Stowe, Vermont, or in more urban markets such as Springfield, Illinois, and Boise, Idaho. ACA members have built these networks in the most rural areas of our country without any direct federal subsidy and in the face of federal rules that make negotiations for select services extremely difficult.

KEY ISSUES

But what should concern you today as you look forward is the following. First, while all of our costs to expand our service offerings continue to grow, one cost has grown exponentially over the past few years, and that's the cost of programming. It is also the primary reason that the cost for video services has risen over the past 10 years. Consumers are unaware of the underlying cost of programming, and they do not understand why they have so few options in how programming is packaged.

Right now there is no way for you as Members of this Committee, or for the Federal Communications Commission -- or even the public for that matter, to see what we pay for the content we carry. That, too, is a problem. The non-disclosure terms of our contracts, added at the behest of the programmers, prohibit that information from being shared. This veil of secrecy ensures consumers are confused, policymakers are left in the dark and programmers are free to charge whatever they like with little regard or fear from competition. You would be shocked to know what we have to bill our consumers for some channels; and the discrepancy in cost of carriage between small and large operators would be more alarming.

The most illuminating example of this is sports programming. The amount our customers pay for sports programming, whether they watch it or not, is a significant percentage of their overall cable bill. For this reason, I think you should require transparency for the cost of carriage on a per-channel basis of sports programming channels so consumers are aware of what they are paying for these channels and to expose disparities between small and large distributors. We also believe some competition needs to be injected into the marketplace. Currently, there are no market forces that set the rate for content.

Second, flaws in the subscriber-television model are being transferred to the Internet and will be too difficult to undo if they are hard-baked into the building blocks of that distribution environment as well.

The best example of how the marketplace has evolved in distributing content involves following the trail of a single show. In this case, I would highlight ABC's "Lost." This popular program is distributed a number of ways: (1) via cable and satellite distributors whose consumers have paid a subscription for service; (2) via iTunes where consumers can purchase an episode or an entire season uninterrupted by advertisements and "own" the programming; and (3) via the Internet where they can watch it over a streaming service on ABC's Web site. The Communications Act was developed to address the first scenario, but has yet to be updated to address the issues raised by the collision of these new distribution models.

What confronts us is the basic public policy discussion of what happens now? As consumers watch more and more video via iPods and the Internet, should I as a cable operator have to pay non-market-based rates for a product that was originally supposed to be exclusively distributed by my local broadcaster and is protected by federal laws because of that exclusivity? What happens to localism when my local broadcaster is also being by-passed by the network that is now offering that valuable prime time signal directly to consumers at any time of the day and ensuring that they will not see the local advertisements that the local broadcaster depends upon to stay viable?

Should I care about whether someone has watched the show as a cable stream versus as a Web stream or should I just bill them for whatever amount of bits they have used to view that program? In short, I believe that the rules created in 1992 and 1996 to govern the television market are antiquated and long overdue for reform. They are inadequate and do not reflect the realities of the

Internet and the impact of pervasive consolidation in the media industry that has occurred since those rules were put in place.

As you can see, there are profound issues at play. Congress needs to consider how to protect and promote localism, expand the varieties of television offerings consumers can purchase, increase transparency in the process, and help companies like mine understand how to stay in business in order to offer the cable and broadband service in rural America that Congress so desperately wants deployed.

UNIQUE CHALLENGES

As small operators with systems that typically serve fewer than 5,000 subscribers, we face challenges that just don't affect our larger brethren. Over the years, we have discussed our concerns regarding the rules governing retransmission consent, and I will touch on that again today. Current retransmission consent rules fail to reflect the overwhelming market power small operators face when dealing with the media cartels. In fact, since we typical bring service to areas that would not otherwise receive the broadcast signal over the air, it galls many of us that today's negotiations completely ignore the value provided by smaller cable operators to rural America to expand the reach of broadcasters' signals and the high cost of delivering service in hard-to-reach areas.

Adding insult to injury, this system typically results in broadcasters charging us, and therefore your constituents, far more than the larger service providers, just to receive the same signal. This leaves consumers of smaller cable systems paying more for the same content that urban viewers get at a lower rate even though it costs the same amount to deliver the signal to a large or small operation. To be clear: what happens today is not a "negotiation."

A typical ACA member has only a few thousand subscribers, which is relatively inconsequential to a broadcaster's bottom line. Often, our systems will not affect Nielsen ratings whether we are or are not included in its viewership totals. As a result, ACA members often do not even get calls back to negotiate retransmission consent when we seek to discuss rates. Instead, we receive take-it-or-leave-it offers. This is not what one thinks of as a competitive marketplace. In the end, the rural consumer is harmed by having to pay higher rates. This anti-competitive structure makes it nearly impossible to price our service offerings at a competitive rate when we are paying in some cases ten times more than the competition is paying – FOR THE SAME CONTENT.

It's a broadcaster-to-MVPD negotiation, and that is limited to the one broadcaster per network with whom I am allowed to negotiate. If broadcasters name a price I find outrageous, I do not have the luxury of going elsewhere in search of better options for my customers. Instead, I have the option to take the channel and raise my rates or drop the channel and risk upsetting subscribers who prefer to have the channel.

In a media market dominated by consolidated conglomerates, there is no way for a small cable operator to have any leverage in negotiations. Providing a vital service for the areas they serve, small cable operators should not be discriminated against because of their size. Because small operators face such unique challenges under the regulatory regime in place, perhaps it would just make more sense to treat such systems differently from larger companies. Earlier this year, a Clarus Research Group survey of ACA members found that cash retransmission consent costs shot up 271% from 2008 to 2009, and that small systems with 1,000 subscribers or fewer got hit with increases that were 200% higher than the increases experienced by systems with 25,000 subscribers or more.

MVPD's should have at least some right to shop for retransmission consent in neighboring markets to see what kind of rate they can get for their customers. If they do not like the channel we have chosen to carry, they have the option to go to another MVPD that is still carrying the network assigned to the Designated Market Area and pay whatever price has been set. All I really want is to be able to make decisions to offer a suite of programming for my customers that is tailored by my knowledge of what they like to view and what price I believe they are willing to pay. Therefore, give me the tools that you give most every other businessman in America: the right to respond correctly to the desires of my customers and succeed at business while fearing the reality of responding incorrectly and watching my customers flock to my competitors.

REGULATIONS FAVOR BROADCASTING

Let me back up and remind you how the government has enabled this anti-competitive behavior. The retransmission consent/must-carry regime was established in the Cable Act in 1992. Retransmission consent allows a broadcaster to demand payment for retransmission of his signal that is broadcast on public airwaves, and is freely available to over-the-air consumers. A cable operator cannot carry the signal until it has successfully negotiated a retransmission consent deal. On the other side of the fulcrum is must-carry. Should the broadcaster decide he doesn't want to demand a fee but rather demand carriage, he can do that too.

So Congress has put the broadcaster in a position that guarantees both profit and carriage. In addition, broadcasters have market exclusivity, meaning they are the only game in town in their DMA. This creates a monopoly for the broadcaster because a cable operator cannot go outside of his DMA to get a less expensive station (and in many cases a "more local" in-state signal). Cable operators must adhere to the terms of carriage for their in-market signal or not offer the channel at all. On top of that rule is another called network non-duplication, which prohibits two of the same networks being carried in the same market. All of this regulation is in place to protect the broadcaster's exclusive control in its DMA and is not designed to protect consumers, control costs, or create competition.

ESPN360'S INTERNET BUSINESS MODEL

Let's also fast forward from the 1992 Cable Act to study how programming is migrating from the cable platform to the Internet and what ramifications that can have for consumers. I would state that unless the rules evolve, programmers will find ways to profit from this arcane cable regulatory model by hiding the costs of service from consumers behind artificial walls. Take ESPN360 for example. According to its own statements, ESPN360, owned by the Walt Disney Co., is pioneering a closed Internet business model, under which broadband service providers must pay ESPN fees based on their total number of broadband subscribers, forcing those who have no interest in viewing sporting contests over the Internet to subsidize those who actually want to access ESPN360 on a regular basis.

Despite the technological ability to provide this content directly to subscribers for a fee, ESPN has elected to block access to this Web content unless a provider agrees to place this burden on all its broadband customers. ESPN, the largest and most dominant sports programming business in the country, uses its leverage in the satellite and cable marketplace and its control over unique sports programming to coerce broadband service providers into giving ESPN360 preferential treatment on their networks at the expense of consumers on the one hand and other Web-based services and applications that might seek to compete against them on the other. How can a Web-based sports site fairly compete against ESPN on the Internet when ESPN has secured for itself a substantial per-subscriber fee from every broadband customer in the country?

We believe that content distributors should live under the same Net Neutrality rules as broadband service providers. Therefore, we would request that if you are to proceed in addressing Net Neutrality legislation that you do not focus just on network service providers, but ensure that restrictions also pertain to content providers that limit consumer access to content on a network level as well. Consumers should be given a choice and a chance to access any legal content on the Internet. We don't oppose subscription-based Web sites as long as the consumer has the choice to pay for that subscription. But we do believe that attempts to 'cable-ize' the Internet by making everyone pay for access to a Web site that only a few will visit is contrary to the public interest.

In discussing the responsibilities of ISPs going forward, ACA believes a fair balance allows broadband providers to manage their networks effectively while permitting consumers to access legal content of their choice. If regulators continue to let media conglomerates increase their control of content, retail price problems that we've seen in the cable industry will be exacerbated on the Internet.

SOLUTIONS

1. The current retransmission consent and broadcast exclusivity laws and regulations limit consumer choice and impede smaller, independent cable operators' ability to compete in smaller markets and rural America by permitting distant media conglomerates to charge monopoly prices for programming. This situation must not be carried forward into the post-DTV transition world and there are some specific solutions you should adopt: Prohibit any party, including a network, from preventing a broadcast station outside of the local market from granting retransmission consent to a smaller cable company outside of the protected zone.

2. In order to combat the problems of vertical integration, apply Fox/DirecTV merger conditions to retransmission consent, including (i) a streamlined arbitration process; (ii) the ability to carry signals pending dispute resolution; and (iii) automatic retransmission consent for smaller cable.

3. Address the challenge of providing local digital signals for rural markets by granting cable access to local-into-local DBS television signals on non-discriminatory rates, terms and conditions.

4. Congress should ensure programming pricing fairness for smaller cable companies. Because of the unique value of programming and inherent monopolistic market power that content holders have for programming and retransmission consent, Congress should ensure that all programming should be provided to all small cable operators with non-exclusive, standardized rates, terms and conditions.

5. Authorize a confidential review of retransmission consent and cable programming rates, terms and conditions and release aggregate data and trends yearly, similar to what is done on overall cable rates by the FCC.

6. All sports programming prices, terms and conditions charged to cable operators should be publicly available to Congress, the FCC and consumers.

7. Provide parity with DBS that would permit small cable operators to offer local broadcast programming in its own tier as an optional purchase.

8. In discussing the responsibilities of ISPs going forward, ACA believes a fair balance allows broadband providers to manage their networks effectively while permitting consumers to access legal content of their choice. If regulators continue to let media conglomerates increase their control of content, retail price problems that we've seen in the cable industry will be exacerbated on the Internet. Providers of Internet content, services and applications should not be allowed to block consumer's access to their products simply because ISPs have not signed contracts with these companies.

9. Allowing ISPs to pursue consumption billing will promote affordable broadband access for every American. Flat-rate pricing plans wrongly allow the network's heaviest users to transfer their costs to light and moderate users, and they also require network upgrade costs to be recovered from all subscribers equally. As economists Kevin Hassett and Robert Shapiro explained in a recent paper released in association with Georgetown University, reliance on flat-rate plans drives up the cost of broadband for everyone and makes it harder for the most price-sensitive consumers on the lower end of the income scale to buy a broadband subscription. Customers using the Internet just to find a job and to e-mail a resume should not have to pay higher rates so other customers can watch the latest blockbuster in HD.

In closing we hope you will take advantage of this unique moment in time to consider how to improve the rules that govern our marketplace that are nearly two decades old and pre-date the emergence of the Internet. Consumers deserve better services than can be provided under today's regulatory regime. We are also concerned about the future of a free and open Internet that is being threatened by the emerging business model that compels consolidated and dominant content providers to leverage their video content in anti-consumer ways.

Thank you for this opportunity to testify today.

Mr. BOUCHER. Thank you very much, Mr. Knorr.

Mr. Moore.

STATEMENT OF RONALD D. MOORE

Mr. MOORE. Thank you, Chairman Boucher, Chairman Waxman, Ranking Member Stearns and the other esteemed members of the committee.

It is an honor to testify before you today. My name is Ron Moore and I am the executive producer and creator of Battlestar Galactica. I was also a writer/producer on the TV series Star Trek: The Next Generation, Deep Space Nine, Roswell and Carnivale, and I am currently working on my next project, Caprica, a TV series for the Syfy Network.

I have been a working writer in the entertainment business for over two decades and in that time the television marketplace has fundamentally changed and in my opinion, not for the better. There are actually fewer places to sell ideas both in terms of the numbers of studios available to buy programming and the numbers of independent networks available to deliver it. While this might seem counterintuitive in an environment where the number of cable and satellite channels routinely runs into the hundreds, a closer look reveals that the media consolidation has resulted in a vast majority of television shows being produced by a handful of conglomerates and a vast majority of cable channels are also owned by only a small number of companies.

This environment is a direct result of the repeal of financial interests and syndication rules in the mid-1990s. The challenge now is to make sure that the same thing doesn't happen again, that the future of programming on the Internet does not fall victim to the same mistakes that led to the current domination of media conglomerates and traditional television.

Let us take a moment to look at some of the raw numbers. In 1989, there were 18 production companies who were significant suppliers to the broadcast networks. In 2009, there are eight. After the repeal of the Fin-Syn rules, we went from a system where studios competed with each other for ideas and networks competed with each other for programming to a system where studios and networks are now combined into enormous entities who favor doing business with themselves.

Let us take a look at the next chart, 66 percent of the series airing on broadcast television this fall are produced by the networks' own in-house studios. These studios no longer look for the best idea. They look for the idea that best helps their corporate sibling. But further consolidation of the industry like the proposed merger of NBC with Comcast certainly demands scrutiny and investigation into its impact on competition and diversity of programming. But what is the impact on the television audience and the American public? How does squeezing how the independent studio and eliminating autonomy for the writer/producer affect content?

The answer is that fewer voices and fewer players reduces access and creates more homogenized product for the audience. Before the repeal of Fin-Syn, an independent studio like Carsey-Werner could produce a show like Roseanne which featured a working class family dealing with the struggles and conflicts common to working families all over America. Roseanne was about a contractor and his sometimes working and sometimes unemployed wife and their efforts to keep a roof over their heads. This followed in a tradition of independent programming that spoke to the same sensibility of All in the Family where Archie Bunker worked on the loading dock or the Honeymooners where Ralph Kramden drove a bus and his best friend worked in a sewer. That sensibility, the voice of the broad American working class has vanished from television. These voices, these independent voices are missing and they are missing because a mono-culture has been allowed to be nurtured in TV where new ideas and new players face virtually impossible odds of getting their shows on the air.

So what can be done? If this committee supports competition in video programming, there are many things you can do. First, across town today the Federal Communications Commission is taking the first steps to codify Internet freedom. An open Internet promises to be an extremely competitive marketplace where small entrepreneurs can be matched up against the media giants of today and thrive. Supporting a free, open and nondiscriminatory Internet will allow the next generation of creators and innovators to distribute their own content and compete for the hearts, and minds and eyeballs of the audience.

Second, we must remember that traditional media still has by far the broadest reach into America's homes. While broadcast networks complain of declining ratings, overall television viewership is actually increasing. Cable viewership is growing steadily and so the relationship between major cable distributors and programmers needs closer scrutiny. The practice of tying and bundling channels is one practice worthy of examination. When you learn that some of these bundled channels offer nothing more than a static weather map with national viewing levels in the tens of thousands, you realize that this is actually filler content whose only purpose is to block other programmers from gaining access to the cable satellite channels. Whether a la carte cable channel selection will eliminate those barriers is an open question but it is certainly worthy of further analysis by the FCC and this committee.

In conclusion, I would like to point out that I have worked for major studios and networks my entire career. From Paramount to HBO to NBC Universal where Caprica is being shot this very day, I have found success in the corporate structure. These companies are not evil. They are not populated by modern-day robber barons intent on stealing the bread from my children's mouths. These companies are only doing what makes sense to them financially. However, what makes financial sense to a handful of corporations may not be in the best interests of the audience, the television industry itself or the American people. These companies are run by and large by good and decent people who are simply working within the regulatory environment that they have been given and therein lies the rub. By setting up a regulatory environment in which there are no barriers to continual corporate consolidation and huge incentives to both centralize power and squeeze out smaller players, even good and decent people will participate in and promote a system that ends up weakening competition, monopolizing power and corrupting the free flow of ideas and opportunities for all. The danger we face is not that we work for bad men and women, it is that good men and women can produce bad results in the absence of a law.

I thank you for the opportunity to appear before you today.

[The prepared statement of Mr. Moore follows:]

Testimony of Ronald D. Moore
On behalf of the Writers Guild of America, West
Thursday, October 22, 2009
United States House of Representatives
Subcommittee on Communications, Technology and the Internet
Video Competition in a Digital Age

Thank you Chairman Boucher, Ranking Member Stearns, and the other esteemed members of the Committee.

It is an honor to testify before you today. My name is Ron Moore, and I am the creator and executive producer of *Battlestar Galactica.* I was also a writer/producer on the TV series *Star Trek: The Next Generation*, *Deep Space Nine, Roswell,* and *Carnivale* and I am currently working on my next project, *Caprica*, a TV series for the SyFy Network.

I've been a working writer in the entertainment business for over two decades, and in that time, the television marketplace has fundamentally changed and in my opinion, not for the better. There are actually fewer places to sell ideas both in terms of the numbers of studios able to buy programming and the numbers of networks available to deliver it. While this might seem counter-intuitive in an environment where the number of cable and satellite channels routinely runs into the hundreds, a closer look reveals that media consolidation has resulted in the vast majority of television shows being produced by a handful of conglomerates and the vast majority of cable channels are also owned by only a small number of companies.

Let's take a moment to look at the raw numbers:

CHART:

Broadcast Network Primetime Fall TV Series

	1989	1999	2009
Independently Produced Series	78%	28%	16%
Media Conglomerate Produced Series	22%	72%	84%

Source: WGAW Analysis

In 1989, the amount of independently produced content on the broadcast primetime networks was nearly 80%. Today it's 16%.

CHART:

Percent Independent	1989	1999	2009
ABC	81%	22%	29%
CBS	83%	27%	4%
CW	--	--	11%
Fox	50%	37%	25%
NBC	84%	32%	10%
UPN	--	50%	--
WB	--	7%	--
Total	78%	28%	16%

Source: WGAW Analysis

A closer look at the individual networks makes the point even more sharply: independent programming on the major networks is disappearing. In the next chart you can see that in the most extreme case independent programming accounts for only 4% of the current CBS fall schedule.

CHART

Significant Program Suppliers	
1989	**2009**
ABC	ABC/Disney
CBS	CBS/Paramount TV
NBC	NBC/Universal
Disney	Warner
Paramount	20th Century Fox
Universal	Sony/Columbia Pictures TV
Warner	Mark Burnett Productions
20th Century Fox	19 Entertainment/Fremantle
Columbia Pictures TV	
Carsey-Werner	
Witt-Thomas-Harris	
Steven Bochco Productions	
Stephen Cannell Productions	

Lorimar Television	
New World	
MGM	
MTM	
Cosgrove-Meurer	

In 1989, there were 18 production companies who where significant suppliers to the broadcast networks. (In terms of this analysis, we define "significant" as having multiple series on the air.) In 2009 there are 8 suppliers. From 18 to 8. And who are those eight? They consist of one true independent – Sony/Columbia Pictures; two producers of reality series based out of the UK – Mark Burnett Productions, and 19/Fremantle; and five major media conglomerates.

The catalyst for this change was the repeal of the Financial Interest and Syndication rules in the 1990's which resulted in a wave of industry consolidation. We went from a system where studios competed with each other for ideas and networks competed with each other for programming to a system where studios and networks are now combined into enormous entities who favor doing business with themselves. Take a look at this chart:

CHART:

2009 Broadcast Network Fall Lineup: Series from In-House Production Studio

Network	% In-House
ABC	48%
CBS	57%
CW	89%
FOX	63%
NBC	86%
Total	**66%**

Source: WGAW Analysis

66% of the series airing on broadcast television this fall are produced by the network's own in-house studio.

While the repeal of Fin-Syn opened the way for the consolidation, the unrestrained acquisition of cable and satellite channels by the incumbent entertainment conglomerates, using their market power as a coercive motivator, is an important, additional factor.

While cable initially brought new voices into the television medium, the early independent channels have gradually been bought by or merged into the conglomerates, or forced out of business.

Of the 68 most successful cable channels on the dial, we find that 61 of them or 90 percent are owned, either in part or entirely, by a media conglomerate or cable distributor. And on cable's 68 most successful channels, only the Hallmark Channel, C-SPAN, NFL Network, HGTV, Food Network, TV Guide Network, and WGN America are not affiliated with a major cable distributor or media conglomerate. The web of ownership extends to Pay TV networks, such as HBO or Showtime -- all are owned by major media entities.

What the data further reveals is the dominance of media conglomerates in the launching of channels, with 66% of channels launched by these companies. In addition, independently-launched channels had a much worse fate than those that started with or succumbed to ownership by an incumbent television conglomerate. We consider successful entrants in the cable market to be channels that can currently reach at least 30 million households. Failed channels are no longer on the air and channels in question are currently on the air but have yet to reach 30 million households.

CHART:

Cable Networks Launched Since 1994					
Successful Entrants		Failed Channels		Channels in Question	
Media Conglomerate Owned	Independently Owned	Media Conglomerate Owned	Independently Owned	Media Conglomerate Owned	Independently Owned
65	12	5	18	20	16

I do want to separate out Cablevision in this discussion. Cablevision actually owns part or the entirety of AMC, the Independent Film Channel and the Sundance Channel. AMC airs the independently produced hit, *Mad Men*, and of course the Independent Film and Sundance channels present mostly independent fare. Of all the channels on the cable dial, they represent a breath of fresh air in the otherwise closed world of corporate control, and they should be commended.

I deal with this reality everyday. There are tremendous pressures on each of the studios to develop programming for their own sister network. Studios are no longer looking for the "best" idea; they are now looking for the idea that best helps their corporate siblings.

For writers, this consolidation has had severe and financial and creative repercussions. As little as ten years ago the writer-producer was an entrepreneur; now they're an employee. Before the repeal of Fin-Syn, writer-producers owned the show, including the syndication rights. In those days, in the event of creative differences with the network, the writer could sell the series elsewhere. For example, when ABC insisted that Norman Lear water down the content of "All in the Family" he decided to take the show to CBS, and the rest is television history. But he was only able to do so because he owned the program. Now, the writer simply gets replaced when creative differences arise. This happened on the CBS series *The Education of Max Bickford* in 2002 when the network replaced the series creators because of their resistance to the network's demand to change the scripts on their own show.

This was the very thing that that triggered the Fin-Syn rules during the Nixon Administration in the first place. The networks at that time had begun extracting ownership positions – complete or partial – in most series on their schedules and Congress at that time saw the dangers of allowing networks to own both the pipe and content it delivered to American homes. President Reagan, himself a member of the entertainment community, later argued against the repeal of the Fin Syn rules, saying it would lead to the very concentration of power we currently see in our country's media landscape.

So. What can be done? If this Committee supports competition in video programming, there are many things you can do.

First, across town today the Federal Communications Commission is taking the first steps to codify Internet Freedom. An open Internet promises to be an extremely competitive marketplace, where small entrepreneurs can be matched up against the media giants of today and thrive. Supporting a free, open and non-discriminatory Internet will allow the next generation of creators and innovators to distribute their own content, and compete for hearts and minds and eyeballs.

Second, we must remember that traditional media still has, by far, the broadest reach into American's homes – a reach that shows no signs of decline. Cable viewership is growing steadily and so the relationships between major cable distributors and programmers needs closer scrutiny. The practice of tying and bundling channels is one practice worthy of examination. Broadcasters often require cable operators, as a condition of carrying popular broadcast stations, to buy other channels – thus locking out valuable space on the dial for new entrants. Some of these bundled channels offer nothing more than a static weather map or a subgenre of music videos. When you learn that these channels have viewing levels in the tens of thousands nationally and revenue in the hundreds of thousands of dollars, you realize this is filler content, whose only purpose is to block other programmers from gaining access to the cable/satellite channels. Whether a la carte cable channel selection will eliminate these barriers is an open question, but it is certainly worthy of further analysis by the FCC and this Committee.

In conclusion, I would like to point out that I have worked for major studios and networks my entire career. From Paramount to HBO to NBC/Universal, where *Caprica* is being shot this very day, I have found success within the corporate structure. These companies are not evil. They are not populated by modern-day robber barons intent on stealing the bread from my children's mouths. These companies are only doing what makes sense to them financially. However, what makes financial sense to a handful of corporations may not be in the best interests of the audience, the television industry itself, or the American people. These companies are run by good and decent people who are simply working within the regulatory environment that they have been given. And therein lies the rub: by setting up an regulatory environment in which there are no barriers to continual corporate consolidation and huge incentives to both centralize power and squeeze out smaller players, even good and decent people will participate in and promote a system that ends up weakening competition, monopolizing power and corrupting the free flow of ideas and opportunities for all. The danger we face is not that we work for evil men and women; it is that good men and women can produce evil results in the absence of the law.

Thank you for the opportunity to appear before you today.

Mr. BOUCHER. Thank you, Mr. Moore.
Mr. Denson.

STATEMENT OF TERRENCE K. DENSON

Mr. DENSON. Good morning, Chairman Boucher, Ranking Member Stearns and other members of the subcommittee.

My name is Terry Denson and I am Vice-President of Content and Programming for Verizon.

Mr. BOUCHER. Mr. Denson, could you pull that microphone just a bit closer, please?

Mr. DENSON. Closer.

Mr. BOUCHER. That is—thank you. Even a little closer than that would be good. Thank you.

Mr. DENSON. I am responsible for obtaining access to video programming to support Verizon's consumer services including FiOS TV. Verizon and its 200,000 plus employees are leading the way with investments in both wire line and wireless broadband networks. Verizon has invested over $80 billion in capital expenditures over the last 5 years, more than any other American company during that time period. Verizon is investing $23 billion to take fiber all the way to customer's homes with our FiOS network. This enables both video competition and next-generation broadband networks and services to 18 million homes and businesses. Verizon's FiOS Internet access service currently provides consumers with maximum speeds of up to 50 megabits per second downstream and we are already testing 100 megabits per second services.

Our FiOS TV video service is an integral part of the business case for our FiOS investment. Set services provide additional choices and competition for consumers. FiOS TV brings head-to-head wire line video competition to the cable incumbents for the first time in several markets. FiOS TV has more capacity than traditional cable providers and is able to provide consumers with a wide range of video content including a robust lineup of HD programming, independent programming and international and multicultural content. FiOS TV is also designed to enable innovative and interactive services. For example, the IP functionality of Verizon's network permits the company to offer unique service called FiOS TV widgets that allow consumers to access content in an interactive manner on their television, including some content and services from the Internet such as Facebook and Twitter, and other compelling interactive services that serve their community, weather widgets, traffic widgets and widgets that provide vital information to consumers when they want it and where they want it.

While millions of customers are already enjoying our FiOS services, new entrants like Verizon face a number of challenges. For the most part, Verizon is able to deal with these challenges such as rising programming through creative negotiation. One significant challenge has proven difficult to solve with this market-based approach, access to regional sports programming controlled by cable incumbents. Regional sports is among the most popular programming to consumers, many of whom insist on the ability to see the games of their local teams. Given its very nature, this programming is unique and cannot be duplicated by new entrants who are denied access.

Some incumbent providers have exerted their control over this must have programming to handicap new entrants. In many cases, cable incumbents have sought to exploit the so-called terrestrial loophole in an effort to deny competitive providers access to this must-have programming. Cable incumbents know full well that a new entrant lacking regional sports or lacking the HD format of that programming will not provide a meaningful choice for consumers. There is a long record documenting that cable incumbents have used this loophole to handicap competitive providers including in San Diego, Philadelphia and New York.

Verizon has experienced this problem firsthand when Cablevision refused to provide access to its regional sports networks, MSG and MSG plus in the New York City and Buffalo areas. While we obtained access to the standard definition version of these channels only after filing suit at the FCC, Cablevision has steadfastly refused to even discuss providing Verizon access to MSG and MSG plus in HD on any terms whatsoever. By its refusal, Cablevision is seizing on the growing import of HD technology to consumers, particularly in the context of sports programming. A recent consumer survey conducted for Verizon found that nearly 60 percent of New York City subscribers say they are not likely at all to consider switching to a provider that does not provide their regional sports in HD.

We have urged the FCC to take action because denial of access to this programming denies any meaningful choice to the many consumers for whom local sports are critical. In order to eliminate any disputes however, Congress should adopt a targeted, legislative fix to ensure access to the unique regional sports programming that consumers demand.

Thank you.

[The prepared statement of Mr. Denson follows:]

Written Statement of Terry Denson
Vice President of Content and Programming, Verizon

Hearing on "Video Competition in a Digital Age," in the
House Committee on Energy and Commerce,
Subcommittee on Communications, Technology, and the Internet
October 22, 2009

Good morning Chairman Boucher, Ranking Member Stearns, and other members of the Subcommittee, and thank you for inviting me to address the topic of video competition. My name is Terry Denson, and I am Vice President of Content and Programming for Verizon. In that capacity, I am responsible for obtaining access to video programming to support Verizon's consumer services, including FiOS TV. I am in charge of all negotiations with content providers to secure programming, including negotiations with broadcasters, programmers affiliated with cable incumbents, and independent programmers.

As you and other policymakers here D.C. consider issues related to video competition and broadband, Verizon and its more than 200,000 employees are leading the way with investments that will ensure that American consumers will have access to world-class services – including video – over both wireline and wireless networks.

Five years ago, Verizon embarked on an ambitious and unprecedented project to construct a broadband network that takes fiber-optics all the way to our customers' homes and businesses. As the only American provider deploying fiber-to-the-premises on a large scale, we announced that we would invest approximately $23 billion to pass 18 million premises in areas throughout our service territory with this next-generation network that we call FiOS. As of the end of June, we had already passed 13.8 millions homes and business with FiOS in parts of 16 states – over 40 percent of Verizon's wireline footprint.

Consumers are reaping the rewards of our ongoing investment. Verizon's FiOS Internet access services already provide consumers the choice of services with maximum speeds ranging from 15 to 50 Mbps downstream, and 5 to 20 Mbps upstream. As consumers demand even higher speeds, Verizon's fiber network will allow us to offer them. We are already testing 100 Mbps services over FiOS in some areas, and even higher speed services will be possible in the future. More than 3 million Verizon customers already access the Internet using the FiOS network. We have also worked with our vendors to help develop innovations such and bendable fiber and new, smaller optical network terminals to ensure that the benefits of FiOS are available the millions of Americans residing in apartments and condominiums.

Verizon has also continued to invest heavily to make mobile broadband services widely available to Americans. More than 280 million Americans have access to the third-generation (3G) mobile broadband services offered using EV-DO Revision A technology, and Verizon will soon begin the commercial launch of its fourth-generation (4G) mobile broadband service using LTE technology. This 4G service has the promise of typical download speeds of 5-12 Mbps, with much higher peak speeds. These capabilities will introduce additional competition that expands the choices available for consumers, while providing a robust platform for innovative, new services and devices. Verizon Wireless plans to offer LTE in 25-30 markets with 100 million people by the end of next year, and to extend the service nationwide, reaching more than 280 million people, by the end of 2013.

Verizon's investments in FiOS and LTE drive its competitors to engage in their own deployment and upgrades. For example, cable incumbents are now widely upgrading to DOCSIS 3.0, which allows for considerably more robust cable modem services. Areas where Verizon offers FiOS were among the first areas where cable incumbents upgraded to DOCSIS

3.0, and those upgrades are now widespread. Cablevision now offers DOCSIS 3.0 throughout its service territory, for example, and Comcast has indicated that it will do the same by the end of next year.[1] Likewise, competing wireless providers are spreading the reach of their mobile broadband services. All of the national wireless providers, including Sprint, AT&T, and T-Mobile now widely offer 3G wireless broadband services, as do a number of regional carriers, and most of the national providers either are already upgrading, or have announced plans to upgrade, to 3.5 or 4G services. Moreover, Clearwire (together with Sprint and several other partners including Google and Comcast) has now begun the rollout of its 4G service using Wi-MAX technology.

Of course, deploying next-generation networks like FiOS and LTE is not cheap. In fact, Verizon has invested over $80 billion in capital expenditures over the last five years – more than any other American company over that period of time. To support a business case for this level of investment, Verizon cannot rely on Internet access revenues alone. Instead, additional services, with their potential revenue streams, are required. Importantly, such services not only help to fund networks, but they also provide consumers with new choices and innovators with new platforms for innovation.

Verizon's FiOS TV is one such service that is expanding the choices available for consumers and creating a new platform for independent programmers and other innovators. Verizon first introduced its FiOS TV service four years ago, bringing head-to-head wireline video competition to the cable incumbents for the first time in most places. FiOS TV provides consumers with a wide range of video content – including a robust line-up of high definition (HD) programming, independent programming, and international or multicultural content – in

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[1] *See* Comments of Nat'l. Cable & Telecommunications Association, GN Docket No. 09-51, at 16-17 (June 8, 2009).

addition to innovative, new interactive features enabled by Verizon's technologically-advanced network.

FiOS TV is an all-digital service that offers the best of both traditional digital cable technology and developing IPTV technology. This allows Verizon to offer more programming as well as new interactive features. Verizon uses its innovative and robust fiber network in order to provide consumers with an extremely attractive competitive alternative to traditional cable or satellite services. Verizon's current lead offer currently includes up to 290 digital video channels. FiOS TV provides subscribers with access to up to 400 digital channels, including more than 120 HD channels in all of its TV markets. FiOS TV also offers subscribers more than 17,000 video-on-demand (VOD) titles per month, more than 60 percent of which are free, and more than 2,400 HD VOD titles.

With its enhanced carrying capacity, Verizon also is able to offer unique programming packages tailored to subscribers' interests, and to carry a wide range of programming, including diverse, independent, multicultural and international channels. For example, Verizon's La Conexión package offers a combination of more than 40 popular English and 30 popular Spanish-language channels in one package. Verizon also offers customers a "movie package" that includes 47 premium movie channels, and additional premium options.

Verizon also provides a platform for a wide range of diverse, independent programming. For example, from the beginning Verizon has negotiated carriage deals with numerous independent programmers such as WealthTV, The America Channel, the NFL Network, and the Hallmark Channel, in addition to a wide range of other niche programmers, even as many of these programmers have struggled to convince cable incumbents to carry their channels. In addition, Verizon offers a wide range of international and foreign-language channels, including offerings in Arabic, Armenian, Bosnian/Croatian/Serbian, Cambodian, Chinese, Farsi, Filipino, French, German, Hebrew, Hindi, Italian, Japanese, Korean, Polish, Portuguese, Punjabi, Romanian, Russian, Spanish, and Vietnamese. Verizon has a strong incentive to continue to carry a wide range of diverse programming in order to distinguish itself from its cable competitors.

Verizon also continues to improve and expand its innovative service offerings in order to attract customers to its FiOS services. With respect to our video service – FiOS TV -- we recently began offering new local programming options to subscribers in certain markets. Specifically, in June 2009, Verizon launched two new channels – FiOS1 Long Island and FiOS1 New Jersey – which give subscribers on Long Island in New York and subscribers in nine counties in northern New Jersey specialized local content that includes local news and sports, regular traffic and weather reports, and other community programming. To create this local content, we are partnering with several local institutions and entities, such as the North Shore - LIJ Health System on Long Island and The Star Ledger/NJ.com and NJN Public Television in New Jersey. These channels also provide a platform for mobile journalists – or MoJos – to produce and provide hyper-local content relevant to these communities. In addition, the FiOS 1 channels will carry selected high school sports games of interest to residents of these areas.

In addition to the platform provided by FiOS TV for a wide range of content, Verizon's advanced technological approach is also designed to enable a wide range of other innovative services. For example, the IP functionality of Verizon's network permits the company to offer a unique service called "FiOS TV Widgets" that allows consumers to access content in an interactive manner on their television, including some content and services from the Internet. Initially, Verizon offered Widgets that allowed interactive and customizable access to weather, traffic, local and national news headlines, daily national sports headlines, community news or daily horoscopes. More recently, however, Verizon introduced additional Widgets that allow consumers to access some Web content, including from Facebook and Twitter. We plan to foster a "Widget Bazaar," which is akin to an application store for FiOS that will enable third-parties to develop innovative new Widgets for FiOS customers. It is too soon to predict how this opportunity will develop, but we are optimistic that this will provide benefits both to our customers – who will have more choices and innovative, new features – and to third-party developers and content owners – who will have a new platform for innovation and for reaching consumers with their content and services.

In addition to Widgets, Verizon's IP platform also enables Verizon's Home Media DVR. This service allows up to six televisions in different rooms to access digitally recorded programs on a single server-DVR using IP as the communications medium to transmit the recorded programming. This includes viewing up to three separately recorded programs simultaneously on different TV sets, and the ability to pause recorded programming on one set and continue watching it on another. The Home Media DVR also allows Verizon to integrate the DVR with FiOS TV's innovative and interactive media guide (IMG) using IP technology, thus enabling customers to easily find and access content from TV listings, VOD catalogs, recordings on their DVR, and their personal music and photos. Other features enabled by Verizon's IP-based system include remote DVR management (allowing subscribers to remotely control their DVRs online or through certain Verizon Wireless handsets), free games, a "What's Hot on FiOS TV" feature that provides information on the most-popular programs currently being watched in the region and the most popular VODs, a feature that allows consumers to pause live programming and then return after changing channels, and several different channel sorting options.

Verizon has also introduced several innovative offerings using its video on demand platform. For example, Verizon has enabled new programmers such as WealthTV, MavTV, and Film Fest Channel . Web video providers such as Sony's Crackle and Minisodes, Blastro and Howcast are also available through the VOD menu. Verizon has also made its VOD platform available for diverse and niche programming, such as Si TV, here!, Inspiration, The Jewish Channel, Shalom TV and Catholic TV. Verizon's VOD services also offer robust parental controls that enable parents to shield their children from content to which they object. Verizon was also the first provider to enable Internet streaming video direct to the television through Media Manager, including from Veoh, Dailymotion, and blip.tv .

As with our Internet access services, FiOS TV also has spurred cable incumbents to improve their offerings and service in order to keep or attract customers. For example, competition has driven our competitors to increase their HD offerings or to carry additional independent and diverse programming in response to FiOS TV. Our competitors have also started to offer their own interactive features to their customers. Time Warner Cable, for example, rolled out its "Start Over" service – a service that allows customers to restart a show from the beginning – in parts of New York and New Jersey where FiOS was available, and also expanded its local news offerings in areas where Verizon has introduced FiOS 1. Other cable incumbents have increased the depth of their international and independent programming in response to FiOS. In other words, consumers are benefitting in numerous ways from the additional competition that FiOS TV provides.

Of course, as relatively new entrants to the video marketplace, we also necessarily face continuing challenges. For one, for historical reasons that no longer apply, many of our competitive services are subject to a variety of regulations that do not apply to the cable incumbents with whom we compete. To cite just one example, we remain subject to restrictions on our ability to provide departing voice customers with marketing materials that would allow these consumers to make truly informed choices among the various alternatives available to them, but cable companies are not subject to similar restrictions with respect to departing video customers. As we all now compete for consumers across a range of services, parity of regulatory treatment is an important issue in order to ensure that consumers receive the benefit of fair competition.

Another ongoing challenge that we face relates to programming costs. The cost of programming continues to be the most significant category of expense we incur. As relatively new entrants, we typically must pay higher rates for programming than do the incumbents.. Controlling programming costs while fielding a competitive and attractive range of offerings is a constant challenge that we and other new entrants face. At Verizon, we are doing our best to control these costs by negotiating aggressively with our content suppliers to get the best deal possible for our customers, and, as a general matter, we believe that these issues should remain the subject of commercial negotiations against the backdrop of existing rules.

There is one limited and unique type of programming where this approach has proven inadequate, however. Specifically, obtaining access to popular regional sports programming presents unique and significant problems. Regional sports is among the most popular programming to consumers, many of whom are loyal sports fans and insist on the ability to see the games of their local teams. Given its very nature, this programming is unique and cannot be duplicated by new entrants who are denied access. Whereas a new entrant may be able to create a competing entertainment or news channel if denied access to such programming – as Verizon has done in the case of its FiOS 1 channels that carry local news and events – a new entrant simply cannot create new local sports teams or substitute games from other sports or other cities. For consumers who are Knicks or Rangers fans, the games of other teams or other sports are no substitute, and a competitive provider lacking those games – or lacking them in HD – will not be meaningful alternative at all. The FCC has repeatedly recognized as much, concluding that many consumers view regional sports programming as "must have."[2]

Some incumbent providers have exploited their control over this "must have" programming – including the "HD feeds" of that programming – to handicap new entrants. Cable incumbents know full well that a new entrant lacking regional sports or lacking the HD format of that programming will have a much tougher time attracting customers and competing effectively. And because many cable incumbents acquired the rights to this vital programming long before competition was present, they often have it within their unilateral power to deny new entrants this necessary component to fielding a meaningful alternative for consumers. Of course, to the extent this programming is delivered to distributors by satellite, the current program access rules ensure that competitors can obtain access. But in many cases, cable incumbents have sought to exploit the so-called "terrestrial loophole" in an effort to deny competitive providers' access to this "must have" programming.

There is a long record documenting that cable incumbents and their programming affiliates have denied access to regional sports programming in order to handicap competitive providers. DirecTV and Echostar have long been denied access to Phillies games in Philadelphia

[2] *See, e.g.*, Report and Order and Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 17791 ¶¶ 39, 115 (2007).

and Padres games in San Diego, with significant impact on their competitiveness in those areas. AT&T has similarly been denied access to Padres games in San Diego, prompting it to require consumers to provide signed acknowledgements of this fact before installing its U-Verse service in that area so there is no confusion.

Verizon also has experienced this problem firsthand when Cablevision and its vertically integrated programming subsidiaries refused to provide access to regional sports networks – MSG and MSG Plus – in the New York City metropolitan area. This includes local coverage of the Knicks', Rangers', Islanders', and Devils' games. Verizon was unable to obtain even the standard definition format of this sports programming until it filed a complaint with the FCC. While we ultimately were able to obtain the standard-definition format of this programming after we filed our FCC complaint, Cablevision has steadfastly refused to even discuss providing Verizon access to MSG and MSG Plus in HD on any terms. Instead, Cablevision claims that the "HD feed" is not covered by the existing program access rules because it is not satellite-delivered, and flatly refuses to provide access on any terms. Remarkably, Cablevision even refuses to provide sports programming to Verizon in HD format in Buffalo, even though Cablevision itself is not a cable operator in that area and should have every reason to want to maximize distribution of its programming there.

By refusing to provide access to regional sports programming in HD, Cablevision is seizing on the growing importance of HD technology to consumers, particularly in the context of sports programming. A recent consumer survey conducted for Verizon confirmed the consumer impact of denying regional sports programming in HD. Large majorities of subscribers indicate their strong preference to watch regional sports channels in HD (67% in New York City, 51% in Buffalo). These preferences translate into purchasing decisions, as more than half of New York

City subscribers (57%) and nearly half of Buffalo subscribers (49%) say they are "not likely at all" to consider switching to a provider that did not provide regional sports channels in HD.

Cablevision's actions leave little doubt about its motive. Around the time Cablevision first denied HD access to Verizon, Mr. Rutledge, Cablevision's Chief Operating Officer, noted as the first of three "factors he believed would slow or reverse any subscriber flow to FiOS," that "FiOS' video product lacks key components, specifically the HD formats of *MSG* and *Fox Sports NY* [now MSG Plus], . . . "[3] Again more recently at an analyst conference, Mr. Rutledge again linked his company's refusal to provide Verizon the "unique" HD regional sports channels to Cablevision's success in forestalling competition from Verizon's FiOS. Rutledge explained Cablevision's strategy as follows:

> [W]e have things unique to us. . . . We have our sports channels in high definition. So four of the nine professional sports teams in New York. If you want to see them in HD, you have to get them from us.[4]

Similarly, Cablevision's advertisements trumpet to consumers that it is the only source for this regional sports programming in HD.

To be clear, Verizon simply seeks access on commercially reasonable, negotiated terms to this vital and unique programming so that consumers can choose for themselves among competitive options without having to give up access to their local sports teams. We do not seek access to this or any other programming at government-established, regulated rates. But when

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[3] Craig Moffett et al., Bernstein Research, Cablevision (CVC): *Management Commentary Supports Bullish View . . . Capital Intensity Falls, and Margins Rise*, 4 (Apr. 5, 2007) (quoting Mr. Rutledge).

[4] Thomson StreetEvents Final Transcript, *Cablevision Systems Corp. at UBS Global Media and Communications Conference*, at 9 (Dec. 8, 2008) (quoting Mr. Rutledge).

incumbents flatly deny access to unique regional sports programming, however, "negotiations" can never come into play.

We have urged the FCC to take actions to address the anticompetitive withholding of sports programming by cable incumbents like Cablevision. In particular, we believe that such actions are the types of unfair practices that hinder or prevent entrants from providing competing video services to consumers that Congress prohibited in Section 628(b). Indeed, denying access to this programming denies any meaningful choice at all to many consumers for whom local sports are critical. In any event, in order to eliminate any disputes and further the goal of increasing video competition and consumer choice, Congress should adopt a narrow legislative fix to address this demonstrated problem by preventing cable incumbents and their affiliates from denying competitors access to the unique regional sports programming that consumers demand.

By addressing this narrow but important roadblock to more effective video competition, policymakers could expand the range of choices available to consumers and could further national goals concerning both video competition and broadband.

I look forward to answering any questions the Committee may have. Thank you.

Mr. BOUCHER. Thank you, Mr. Denson.

Mr. Thierer.

STATEMENT OF ADAM THIERER

Mr. THIERER. Thank you, Mr. Chairman and members of the committee, and I appreciate you inviting me here today to speak about this important issue.

My name is Adam Thierer and I am the President of the Progress & Freedom Foundation, a digital economy think tank here in Washington, D.C. I have written extensively on this important subject, including two books on the topic and in my work I have argued that regardless of underlying business structures or ownership patterns, the critical question that must govern this debate about the state of the media marketplace is do citizens have more news, information and entertainment choices at their disposal today then in the past? And I am pleased to report that all of the evidence suggests that the answer to that question is unambiguously yes.

Indeed, we now live in a world of unprecedented media abundance where consumers can increasingly obtain whatever they want wherever they want however they want to. Citizens of all backgrounds and belief are benefiting from this modern media cornucopia and nowhere has this abundance been more evident then in the field of video programming. Although the provision of video services entail significant upfront investment at every step of the value chain, we have more video options and diversity at our disposal today than ever before and at generally falling prices. In sum, there is more competition for our eyes than ever before.

Consider traditional broadcasting which was once synonymous with television itself. Most of us can remember when just three or four VHF channels and a few fuzzy UHF channels were all we had at our disposal. Today we have seven nationwide broadcast networks and the number of local broadcast stations has doubled since 1970. Competition against and among traditional broadcasters is intense and the viewing audience has become remarkably fragmented. The collective audience share for broadcast networks has fallen every year for the past decade.

Competition is also intensifying among cable, telecom and satellite-based platforms. Better yet, the number of channels available on these platforms has skyrocketed from just 70 in 1990 to 565 in 2006, the last year for which we have FCC data. Resulting diversity on the dial has been truly breathtaking and almost every human interest is now covered by some sort of video network and some of the most impressive gains have been made by minority oriented, foreign language, religion and children's based programming. Importantly, the largest share of the growth in the multichannel video marketplace has actually come from independent programmers and owners. The percentage of pay-TV channels owned by cable distributors has plummeted from 50 percent in 1990, to under 15 percent today, and that percentage is now significantly lower following the split between Time Warner Cable and Time Warner Entertainment. In fact, that percentage of vertical integration is probably in the single digits now.

Thus, while the Cable Act of 1992 was motivated by fears of excessive vertical integration and gatekeeper power in the delivery of video programming, today's marketplace is actually intensely competitive and rich in its diversity. Meanwhile, new video empowerment technology such as DVRs, VOD, Blu-Ray and so on, have revolutionized the way that the public consumes visual media and given viewers unprecedented control over their preferences and timetables.

While traditional platforms like cable and satellite offer a sea of diverse programming, the Internet's digital distribution platforms offer oceans of new content. Even defining a media outlet today has become very difficult as new technologies and power average citizens to become producers of news and entertainment themselves. Thanks to personal computers, Web sites, blogs, camcorders, digital cameras, cell phones and so on, anybody can be a one-person newspaper or broadcaster. Some might call it amateur media creation but it is media creation and it certainly is competing for eyeballs.

The Internet has also empowers a growing number of consumers to cut the video cord all together by canceling their monthly video multi-channel video subscriptions and getting their video from a combination of other sources. If the committee wants a glimpse into the future, I suggest a few teenagers or 20-somethings to testify about how they consumer video today. They probably couldn't name most broadcast networks or multi-channel video providers but they would regale you with stories about how they have seen or shared video on platforms ranging from YouTube to I–Tunes, Video Views, Fusebox, Evio, Hulu, Netflix, Amazon On Demand, Sony's Playstation Store, Microsoft Xbox 360 Marketplace and so on.

While some here in town often wring our hands about the supposed gatekeeper power of old media providers and platforms, our kids are increasingly ignoring those platforms and moving on. This begs the question, instead of fretting that some traditional media providers have too much power perhaps it is time to ask if some of them actually have too little, a concern we have today in the newspaper business, for example. Indeed, the very viability of traditional media operators is increasingly in doubt as they lack the pricing power and the ability to control when, where and how their content is delivered and consumed.

Meanwhile advertising, the traditional lifeblood of the media sector is increasingly spread across multiple platforms and being subjected to new scrutiny and potential regulation here in town. And copyright infringement has also made modernization far more challenging and places serious strains on many content operators.

In sum, traditional media operators could be in serious trouble and now certainly isn't the time to be considering new rules and red tape that could hamstring their ability to respond in new competitive pressures. Regardless, America's video marketplace should be viewed as a pro-consumer success story with an abundance of choices, competition and diversity in options. The only real scarcity that is remaining today is our personal time and attention spans, not video marketplace options. That is something we are celebrating.

Thank you again for inviting me today.

[The prepared statement of Mr. Thierer follows:]

TESTIMONY OF
ADAM D. THIERER
PRESIDENT, THE PROGRESS & FREEDOM FOUNDATION
WWW.PFF.ORG

HEARING ON
"VIDEO COMPETITION IN A DIGITAL AGE"

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY, AND THE INTERNET
COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES

OCTOBER 22, 2009

Testimony of
Adam D. Thierer
President, The Progress & Freedom Foundation
www.PFF.org

Hearing on
"Video Competition in a Digital Age"

Before the
Subcommittee on Communications, Technology, and the Internet
Committee on Energy and Commerce
U.S. House of Representatives

October 22, 2009

Mr. Chairman and members of the Committee, thank you for inviting me here today. My name is Adam Thierer and I am the President of The Progress & Freedom Foundation (PFF). I have written extensively on this important subject, including two books: *Media Myths: Making Sense of the Debate over Media Ownership*[1] and *Media Metrics: The True State of the Modern Media Marketplace.*[2]

In my work, I've argued that, regardless of underlying business structures or ownership patterns, the critical question in debates about the state of the media marketplace is: "*Do citizens have more news, information, and entertainment choices at their disposal today than in the past*?" I'm pleased to report that all the evidence suggests the answer to that question is, unambiguously, "yes."

[1] Adam Thierer, *Media Myths: Making Sense of the Debate over Media Ownership* (Washington, D.C.: The Progress & Freedom Foundation, 2005), www.pff.org/issues-pubs/books/050610mediamyths.pdf

[2] Adam Thierer and Grant Eskelsen, *Media Metrics: The True State of the Modern Media Marketplace* (Washington, D.C.: The Progress & Freedom Foundation, Summer 2008), www.pff.org/mediametrics/

From Scarcity to Abundance

Indeed, although humans have lived in a state of extreme information poverty for most of history, we now live in a world of unprecedented media abundance: Increasingly, we can obtain and consume whatever media we want, wherever and whenever we want. Citizens of *all* backgrounds and beliefs benefit from this modern media cornucopia.[3]

Nowhere has this abundance been more evident than in video programming. Although the provision of video services entails significant up-front investment at every step—creation, post-production, distribution—we have more video options and diversity at our disposal today than ever before, and generally at falling prices.[4] (Exhibits 1-4) In sum, there's more competition for our eyes than ever before.

Broadcasting

Consider traditional broadcasting, which was once synonymous with television itself. Today, however, instead of just 3 or 4 VHF channels (and a few fuzzy UHF channels), there are seven nationwide broadcast networks and there are twice as many local broadcast TV stations (1,785) as there was in 1970 (875). (Exhibit 5)

Competition among and against traditional broadcasters is intense and the viewing audience has become remarkably fragmented (Exhibit 6). The collective audience share for broadcast networks has fallen every year for the past decade (Exhibits 7 & 8).

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[3] Adam Thierer, *The Media Cornucopia*, City Journal, Vol. 17, No. 2, Spring 2007, at 84-89, www.city-journal.org/html/17_2_media.html

[4] *See generally* Benjamin M. Compaine, *The Media Monopoly Myth: How New Competition is Expanding Our Sources of Information and Entertainment*, New Millennium Research Council, 2005, www.newmillenniumresearch.org/archive/Final_Compaine_Paper_050205.pdf

Multichannel Video (Cable, Satellite, Telco-Provided Service)

Competition is also intensifying among cable, telco, or satellite platforms (Exhibit 9). Better yet, the number of channels available on these platforms skyrocketed from just 70 in 1990 to 565 in 2006, the last year for which the FCC has released data. (Exhibit 10) The resulting diversity on the dial has been truly breathtaking, and almost every human interest is now covered by a video network. (Exhibit 11)[5] Some of the most impressive gains have been in minority-oriented, foreign language, religious, and children's-based programming.[6]

Importantly, the largest share of the growth in the multichannel video marketplace has come from independent programmers. The percentage of pay TV channels owned by cable distributors has plummeted from 50% in 1990 to just 14.9% in 2006 (Exhibit 10) and that percentage is now in single digits after the Time Warner Cable and Time Warner Entertainment split.

Thus, while the Cable Act of 1992 was motivated by fears about excessive vertical integration and "gatekeeper" power in the delivery of video programming, today's marketplace is intensely competitive and rich in its diversity. Meanwhile, new video empowerment technologies—such as digital video recorders (DVRs), video on demand (VOD), and DVD players—have revolutionized the way the public consumes visual media by giving viewers unprecedented control over their viewing preferences and timetables. (Exhibits 12-15)

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[5] For an up-to-date list, see National Cable & Telecommunications Association, Cable Networks, www.ncta.com/Organizations.aspx?type=orgtyp2&contentId=2907 [accessed October 19, 2009] or *List of United States Cable and Satellite Television Networks*, Wikipedia, [accessed October 19, 2009] http://en.wikipedia.org/wiki/List_of_United_States_cable_and_satellite_television_networks.

[6] Adam Thierer, The Progress & Freedom Foundation, *We Are Living in the Golden Age of Children's Programming*, Progress Snapshot 5.6, July 2009, www.pff.org/issues-pubs/ps/2009/pdf/ps5.6-childrens-television-golden-age.pdf.

The Internet & Digital Media

While traditional distribution platforms like cable and satellite offer a sea of diverse programming, the Internet's digital distribution platforms offer *oceans* of new content. Even defining a "media outlet" or owner has become difficult, as new technologies empower average citizens to become producers of news and entertainment themselves. Thanks to personal computers, websites, blogs, camcorders, digital cameras, cell phones, and so on, anybody can be a one-person newspaper or broadcaster. Some might call it "amateur" media creation, but it *is* media creation and it's clearly competing for eyeballs.[7] (Exhibits 16 & 17)

The Internet has also empowered a growing number of consumers to "cut the video cord" completely by cancelling monthly multichannel video subscriptions and getting their video from a combination of other sources. If the Committee wants a glimpse into the future, I suggest you invite a few teenagers or 20-somethings to testify about how they consume video content today. They probably couldn't name most broadcast networks or multichannel video providers,[8] but they'd regale you with stories of videos they've seen or shared on platforms such as YouTube, iTunes, Vimeo, Vuze, Joost, Boxee, Veoh, Hulu, Netflix, Amazon Video on Demand, Sony's Playstation Store, and Microsoft's Xbox 360 Marketplace. (Exhibits 18-20) While some here in Washington continue to wring their hands about the supposed "gatekeeper" power of old media providers and platforms, our kids have moved on and all but ignore the old players and worries.

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[7] Clay Shirky, *Here Comes Everybody: The Power of Organizing without Organizations* (The Penguin Press, 2008).

[8] A survey conducted in 2006 found that only one in four 12- to 34-year olds can name all four major broadcast networks: ABC, NBC, CBS and Fox. *See* Abbey Klassen, *Study: Only One in Four Teens Can Name Broadcast Networks*, Advertising Age, May 15, 2006, http://web.archive.org/web/20060823080712/http://adage.com/article?article_id=109227.

Conclusion

What these statistics and trends tell us is that, if there is a media diversity problem today, it is that *citizens suffer from "information overload," not information scarcity*. The sheer volume and diversity of media options has become so overwhelming that most of us struggle to manage all the information at our disposal on a daily basis.[9]

This all begs the question: Instead of fretting that traditional media providers have *too much* power, perhaps it's time to ask if they actually have *too little*. Indeed, the viability of traditional media operators is increasingly in doubt since they lack pricing power and the ability to control when, where, and how their content is delivered and consumed. Meanwhile, advertising—the traditional lifeblood of the media sector[10]—is increasingly spread across multiple platforms and being subjected to new scrutiny and potential regulation here in Washington.[11] (Exhibit 21) And copyright infringement has also made monetization more challenging and placed strains on many operators. In sum, traditional media operators could be

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[9] Indeed, many leading media critics and social scientists (such as Cass Sunstein, Todd Gitlin, and Barry Schwartz) are now penning books wondering what effect this abundance of choices will have on us as a society if we have less time for "shared social experiences." Isn't this a wonderful dilemma for us to be facing as a society! I'll take too much choice over too little any day. *See* Thierer, *The Media Cornucopia.*

[10] "Advertising is the mother's milk of all the mass media," *Wall Street Journal* technology columnist Walt Mossberg has noted. Walter Mossberg, *Now You See 'Em...*, SmartMoney.com, June 15, 2000, available at http://web.archive.org/web/20061124235126/http://www.smartmoney.com/mossberg/index.cfm?story=20000615; And Harold L. Vogel, author of *Entertainment Industry Economics*, the definitive textbook for media market analysts, has noted, "Advertising is the key common ingredient in the tactics and strategies of all entertainment and media company business models. Indeed, it might further be said that advertising has substantively subsidized the production and delivery of news and entertainment throughout the last century." Harold L. Vogel, *Entertainment Industry Economics* (Cambridge, MA: Cambridge University Press, 7th Edition, 2007), at 46.

[11] Berin Szoka & Adam Thierer, *Targeted Online Advertising: What's the Harm & Where Are We Heading?*, Progress on Point 16.2, April 2009, www.pff.org/issues-pubs/pops/2009/pop16.2targetonlinead.pdf; Berin Szoka & Adam Thierer, *Behavioral Advertising Industry Practices Hearing: Some Issues that Need to be Discussed*, PFF Blog, June 18, 2009, http://blog.pff.org/archives/2009/06/behavioral_advertising_industry_practices_hearing.html

in trouble, and now certainly isn't the time to impose new rules and red tape that could hamstring their ability to respond to new competitive pressures.

Regardless, America's video marketplace should be viewed as a pro-consumer success story. With an abundance of choices, competition, and diverse viewing options, the only real scarcity remaining today is our personal time and attention spans—not video options.[12] We should celebrate that fact.

Thank you again for inviting me here to testify.

[12] "Today, the scarce resource is attention, not programming," notes Ellen P. Goodman of the Rutgers-Camden School of Law. "Given the proliferation of consumer filtering and choice, these kinds of interventions are of questionable efficacy. Consumers equipped with digital selection and filtering tools are likely to avoid content they do not demand no matter what the regulatory efforts to force exposure." Ellen P. Goodman, "Proactive Media Policy in an Age of Content Abundance," in Philip M. Napoli, ed., *Media Diversity and Localism: Meaning and Metrics* (Mahwah, N.J.: LEA Publishers, 2007), at 370, 374. And there is no reason to believe this situation will ever change. Writing in 1922, famed journalist Walter Lippmann noted that, "it is possible to make a rough estimate only of the amount of attention people give each day to informing themselves about public affairs," but "the time each day is small when any of us is directly exposed to information from our unseen environment." Walter Lippmann, *Public Opinion* (1922), at 53, 57.

Exhibit 1:
A "Layered Media Model" to Analyze the State of the Media Marketplace

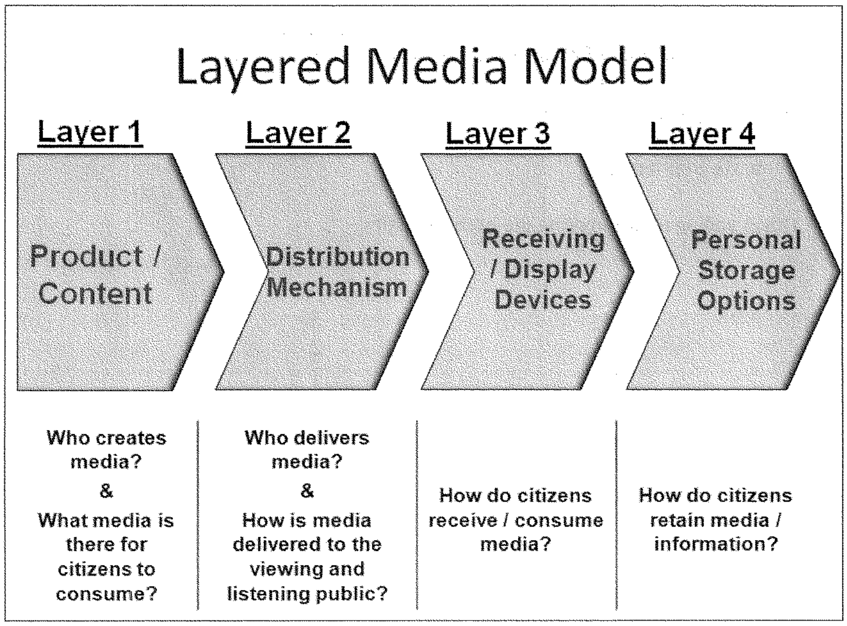


Exhibit 2: The Media Universe of Yesterday and Today

Yesterday - The Media Environment Circa 1970

Layer 1 Product or Content	Layer 2 Distribution Mechanism	Layer 3 Receiving or Display Device	Layer 4 Personal Storage Tools
Television Programming	Broadcast TV Stations	TV Sets	none
Movies	Cinemas, Broadcast TV	Movie Theater	none
Radio Programming	Broadcast Radio Stations	Radios, Stereos	none
Music	Radio, Records, Tapes	Radio, Reel-to-reel tape decks, Stereos	Records & tapes
Print News & Literature	Newspaper & Magazine Delivery	Newsprint, Books	Books, Personal Library
Advertising	TV, Radio, Mail, Magazines	All of the above	rarely stored
Telecommunications	Phone Networks	Telephones	none
Photography	Cameras	Print film	Film / Prints

Today - The Media Environment Circa 2009

Product or Content	Distribution Mechanism	Receiving or Display Device	Personal Storage Tools
Video / Television	Broadcast TV, Cable, Satellite, Internet & online stores, VHS tapes, DVD discs, VOD, PPV, P2P	TV Sets & computer monitors, Mobile devices & handheld devices (including gaming devices)	DVRs (i.e., TiVo), VCRs, DVDs, Computer discs and hard drives, Online storage
Movies	Cinemas, Broadcast networks, Cable, Satellite, Online stores, DVDs, Camcorders, PPV, VOD, mobile, P2P	Cinemas, TV Set, Computer Monitor, Personal Digital Devices	VCRs, DVDs, Computer discs and hard drives, Online storage
Audio / Music	Broadcast Radio, Satellite Radio (XM & Sirius), Internet sites & online stores, Podcasts, P2P	Home & car radios, Stereos, iPods, MP3 players & other personal digital devices , websites	CDs, Tapes, Personal digital devices, Computer discs and hard drives, Online storage
Print News & Literature	Newspaper & magazine delivery, Internet sites, Software, Mobile devices	Newsprint, Books, PCs, Internet sites, Mobile devices & PDAs	Books, Personal Library, PDAs, Computer discs and hard drives, Online storage, Printers
Advertising	TV, Radio, Mail, Magazines, Cable, Satellite, Mobile devices & PDAs, E-mail	almost anything	rarely stored
Telecommunications	Phone Networks, Mobile networks, Cable Networks, Internet Telephony (VoIP), IM	Telephones, Cell Phones, PDAs, VoIP, Online chat	Voice Mail, Online services
Online Content & Services	Phone, cable & wireless networks, IM, Portals, Blogs, Search engines, Social networking sites, RSS aggregators	Computer Monitor, PDAs, Cell Phones, TV Sets	Computer discs and hard drives, online storage, Personal digital devices
Video Games	Video game platforms, Discs, Computer software, Internet & online stores, mobile networks	TV Sets & computer monitors, Handheld gaming units, Mobile devices & PDAs	CDs / DVDs, Computer discs and hard drives
Photography	Digital cameras, Camcorders, Mobile devices & PDAs, Internet & online stores	Print film, Computers, TV set, Mobile devices & PDAs	Prints, CDs / DVDs, Memory cards, Computer discs and hard drives, Online storage, Printers

Exhibit 3: Television Value Chain circa 1975

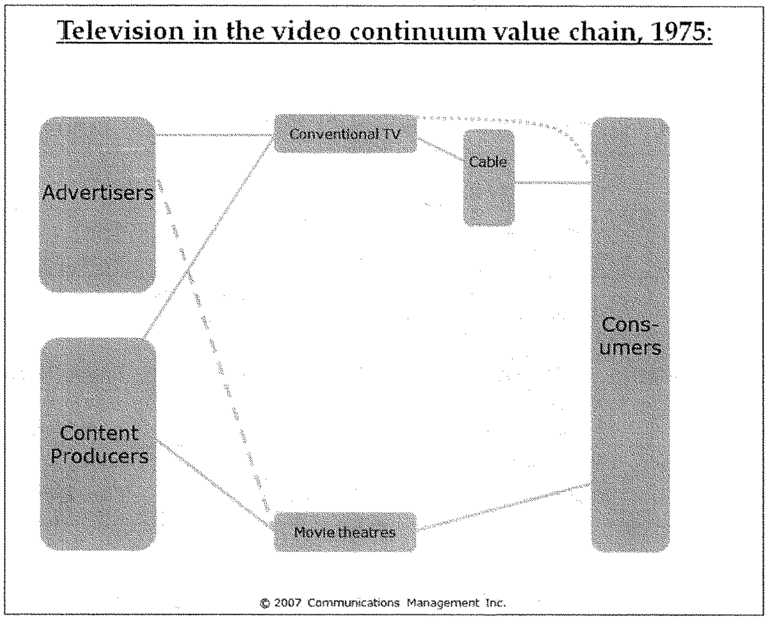
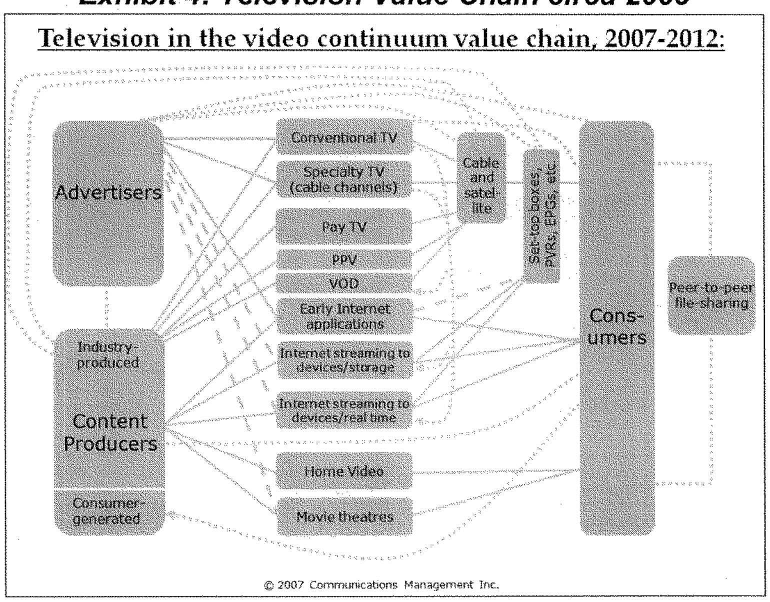


Exhibit 4: Television Value Chain circa 2009



Source: Kenneth Goldstein, Communications Management, Inc., Winnipeg, Canada

Exhibit 5: Steady Increase of Broadcast TV Stations

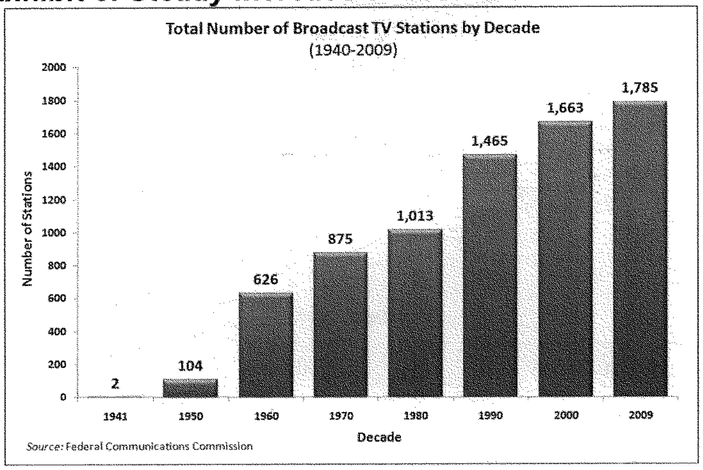


Exhibit 6: Increasing Fragmentation of TV Audience

Highest-Rated TV Shows of Each Season (1950-2005)

Season	Program	Rating	Season	Program	Rating
1950-51	*Texaco Star Theater*	**61.6**	1978-79	*Laverne & Shirley*	**30.5**
1951-52	*Godfrey's Talent Scouts*	**53.8**	1979-80	*60 Minutes*	**28.2**
1952-53	*I Love Lucy*	**67.3**	1980-81	*Dallas*	**31.2**
1953-54	*I Love Lucy*	**58.8**	1981-82	*Dallas*	**28.4**
1954-55	*I Love Lucy*	**49.3**	1982-83	*60 Minutes*	**25.5**
1955-56	*$64,000 Question*	**47.5**	1983-84	*Dallas*	**25.7**
1956-57	*I Love Lucy*	**43.7**	1984-85	*Dynasty*	**25**
1957-58	*Gunsmoke*	**43.1**	1985-86	*Cosby Show*	**33.8**
1958-59	*Gunsmoke*	**39.6**	1986-87	*Cosby Show*	**34.9**
1959-60	*Gunsmoke*	**40.3**	1987-88	*Cosby Show*	**27.8**
1960-61	*Gunsmoke*	**37.3**	1988-89	*Roseanne*	**25.5**
1961-62	*Wagon Trail*	**32.1**	1989-90	*Roseanne*	**23.4**
1962-63	*Beverly Hillbillies*	**36.0**	1990-91	*Cheers*	**21.6**
1963-64	*Beverly Hillbillies*	**39.1**	1991-92	*60 Minutes*	**21.7**
1964-65	*Bonanza*	**36.3**	1992-93	*60 Minutes*	**21.6**
1965-66	*Bonanza*	**31.8**	1993-94	*Home Improvement*	**21.9**
1966-67	*Bonanza*	**29.1**	1994-95	*Seinfeld*	**20.5**
1967-68	*Andy Griffith*	**27.6**	1995-96	*E.R.*	**22.0**
1968-69	*Rowan & Martin's Laugh-In*	**31.8**	1996-97	*E.R.*	**21.2**
1969-70	*Rowan & Martin's Laugh-In*	**26.3**	1997-98	*Seinfeld*	**22.0**
1970-71	*Marcus Welby, MD*	**29.6**	1998-99	*E.R.*	**17.8**
1971-72	*All in the Family*	**34.0**	1999-00	*Who Wants to be a Millionaire*	**18.6**
1972-73	*All in the Family*	**33.3**	2000-01	*Survivor II*	**17.4**
1973-74	*All in the Family*	**31.2**	2001-02	*Friends*	**15.3**
1974-75	*All in the Family*	**30.2**	2002-03	*CSI*	**16.1**
1975-76	*All in the Family*	**30.1**	2003-04	*CSI*	**15.9**
1976-77	*Happy Days*	**31.5**	2004-05	*CSI*	**16.3**
1977-78	*Laverne & Shirley*	**31.6**	2005-06	*American Idol*	**12.9**
			2006-07	*American Idol*	**12.3**

Source: Nielsen Media Research

Exhibit 7: Falling Audience Shares for Traditional TV

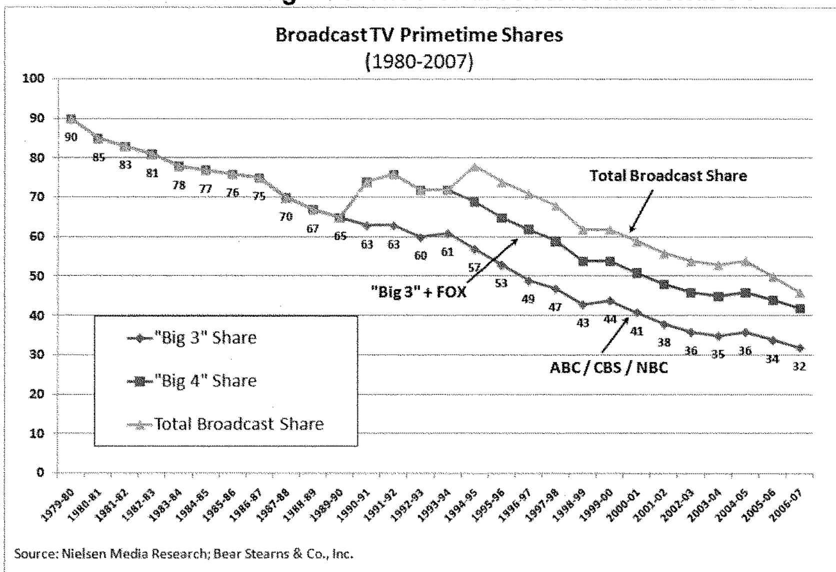


Exhibit 8: Cable TV Ratings Overtook Broadcast Years Ago

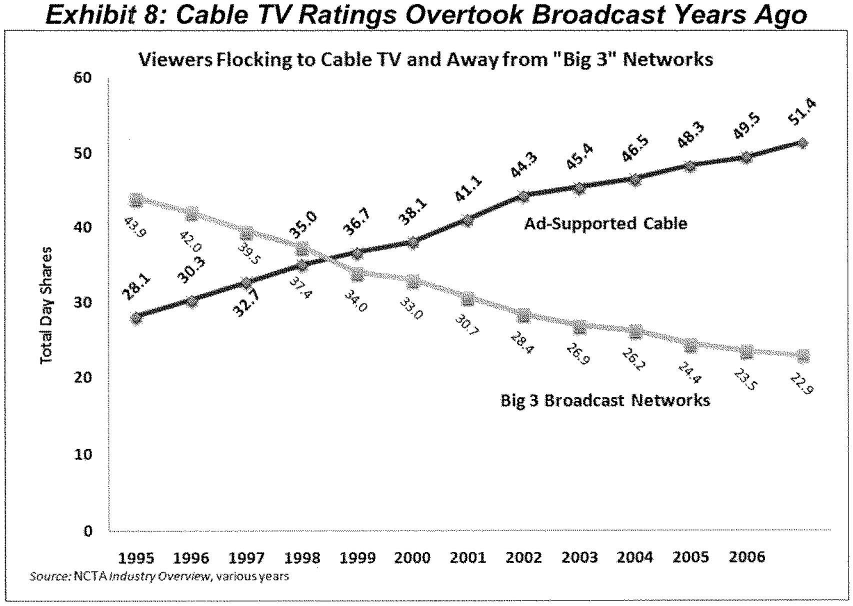


Exhibit 9: Pay TV Market Competition is Growing

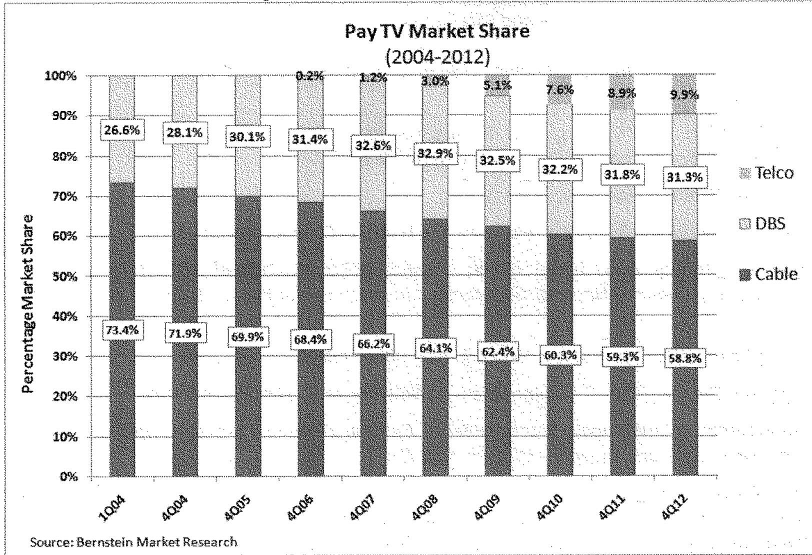
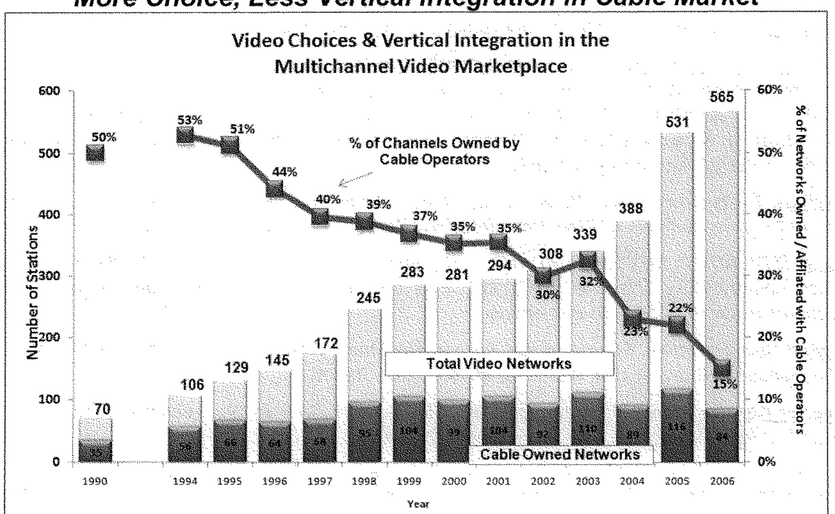


Exhibit 10:
More Choice, Less Vertical Integration in Cable Market



Source: FCC, various *Annual Video Competition Reports;* data not available for 1991-93

Exhibit 11: The Incredible Diversity of Programming on Pay TV

Cable and Satellite TV Networks by Genre

News: *CNN, Fox News, MSNBC, C-Span, C-Span 2, C-Span 3, BBC America, ABC News Now, CNN International*

Sports: *ESPN, ESPN 2, ESPN News, ESPN Classics, Fox Sports, TNT, NBA TV, NFL Network, Golf Channel, Tennis Channel, Speed Channel, Outdoor Life Network, Fuel*

Weather: *The Weather Channel, Weatherscan*

Home Renovation: *Home & Garden Television, The Learning Channel, DIY, Style*

Educational / Informational / Travel: *History Channel, Biography Channel (A&E), The Learning Channel (TLC), Discovery Channel, National Geographic Channel, Animal Planet, Science Channel, The Travel Channel*

Financial: *CNNfn, CNBC, Fox Business Network, Bloomberg Television*

Shopping: *The Shopping Channel, Home Shopping Network, QVC, Jewelry, Shop NBC*

Female-oriented: *WE (Women's Entertainment), Oxygen, Lifetime Television, Lifetime Real Women, Lifetime Movie Network, Showtime Women, SoapNet*

Family / Children-Oriented: *Animal Planet, Anime Network, ABC Family, Black Family Channel, Boomerang, Cartoon Network, Discovery Kids, Disney Channel, Familyland Television Network, FUNimation, Hallmark Channel, Hallmark Movie Channel, HBO Family, KTV – Kids and Teens Television, Nickelodeon, Nick 2, Nick Toons, Noggin (ages 2-5), The N Channel (ages 9-14), PBS Kids Sprout, Showtime Family Zone, Starz! Kids & Family, Toon Disney, Varsity TV, WAM (movies for ages 8-16), GAS, American Life TV, Family Net*

African-American: *BET, Black Starz! Black Family Channel, BET Gospel*

Foreign / Foreign Language: *Telemundo (Spanish), Univision (Spanish), Deutsche Welle (German), BBC America (British), AIT: African Independent Television, TV Asia, ZEE-TV Asia (South Asia) ART: Arab Radio and Television, CCTV-4: China Central Television, The Filipino Channel (Philippines), Saigon Broadcasting Network (Vietnam), Channel One Russian Worldwide Network, The International Channel, HBO Latino, History Channel en Espanol*

Religious: *Trinity Broadcasting Network, The Church Channel (TBN), World Harvest Television, Eternal Word Television Network (EWTN), National Jewish Television, Worship Network*

Music: *MTV, MTV 2, MTV Jams, MTV Hits, VH1, VH1 Classic, VH1 Megahits, VH1 Soul, VH1 Country, Fuse, Country Music Television (CMT), CMT Pure Country Great American Country, Great American Country, Gospel Music Television Network*

Movies: *HBO, Showtime, Cinemax, Starz, Encore, The Movie Channel, Turner Classic Movies, AMC, IFC, Flix, Sundance, Bravo (Action, Westerns, Mystery, Love Stories, etc.)*

Other or General-Interest Programming: *TBS, USA Network, TNT, FX, SciFi Channel, Spike TV, truTV, Slueth, Crime & Investigation Network, Wealth TV, TV One*

Source: Federal Communications Commission, various *Annual Video Competition Reports*

Exhibit 12: VCR & DVD Players Are Now Ubiquitous

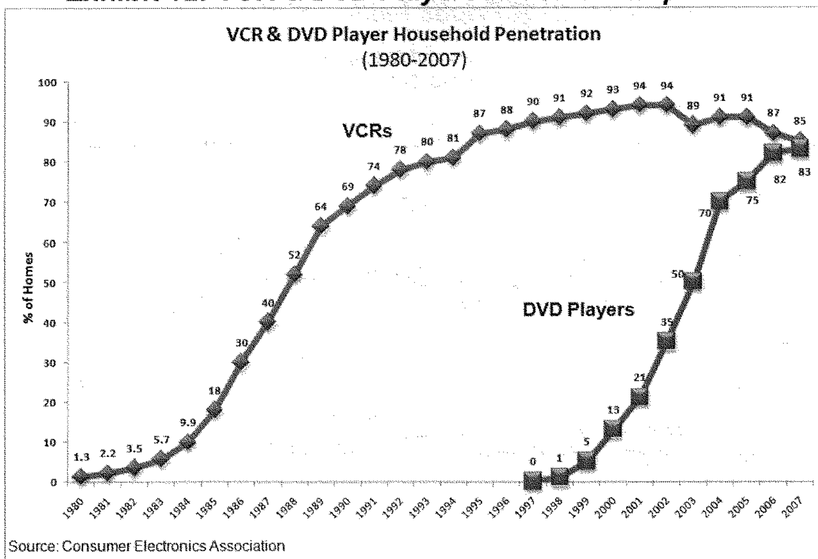


Exhibit 13: DVRs and VOD Are on the Rise

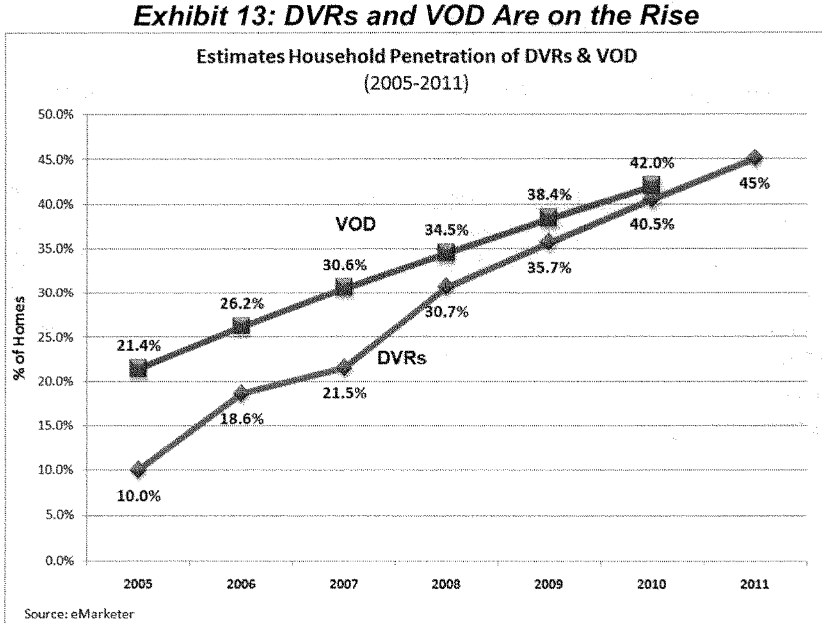
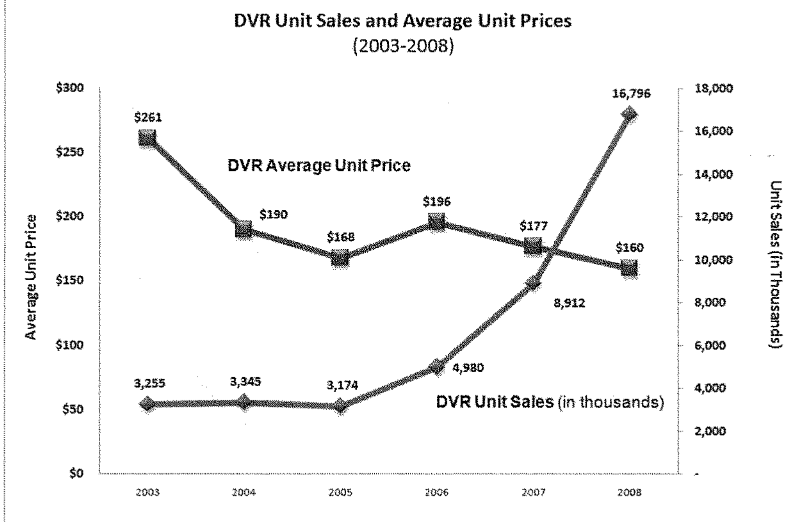


Exhibit 14: DVR Prices Falling, Sales Exploding



Source: Consumer Electronics Association

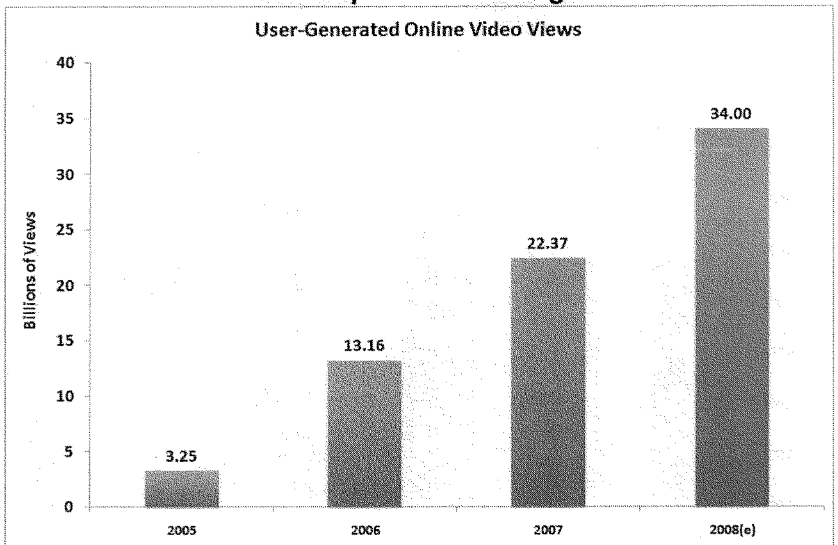
Exhibit 15: Prices for Video Hardware Are Plummeting

Average Prices for Selected Technologies (2003-2008)

	2003	2004	2005	2006	2007	2008 (est.)	% price reduction
Digital television sets	$1,571	$1,537	$1,369	$995	$954	$917	**-41.6%**
Direct Broadcast Satellite	$ 120	$ 105	$ 98	$ 92	$ 87	$ 82	**-31.7%**
VCRs	$ 63	$ 57	$ 58	$ 59	$ 48	$ 43	**-31.7%**
DVD players	$ 123	$ 109	$ 110	$ 100	$ 72	$ 69	**-43.9%**
DVD recorders		$ 271	$ 212	$ 198	$ 178	$ 159	**-41.3%**
Next-Gen DVD Players				$ 500	$ 395	$ 307	**-38.6%**
Digital Video Recorders	$ 261	$ 190	$ 168	$ 196	$ 177	$ 160	**-38.7%**
IPTV		$ 175	$ 150	$ 136	$ 127	$ 119	**-32.0%**
MP3 players	$ 140	$ 181	$ 170	$ 146	$ 118	$ 116	**-17.1%**

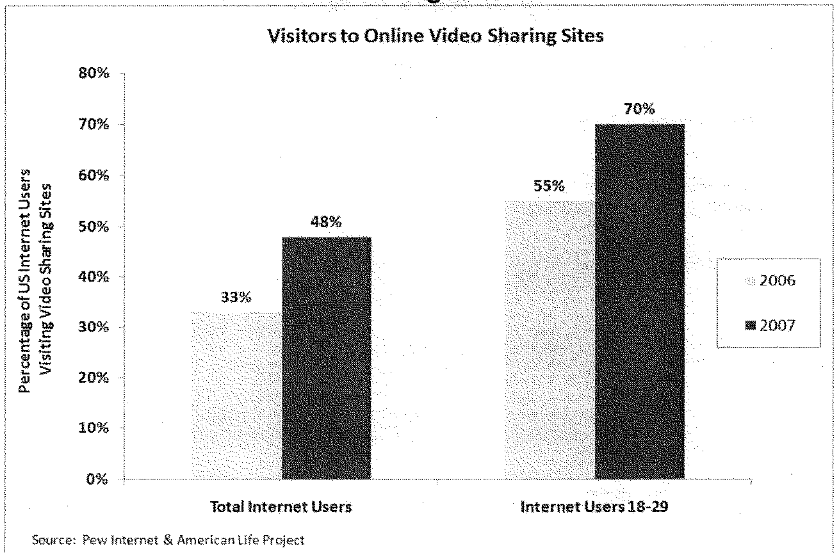
Source: Consumer Electronics Association, *U.S. Consumer Sales and Forecasts, 2003-2008.*

Exhibit 16: More People Are Posting Videos Online



Source: AccuStream; eMarketer

Exhibit 17: Video-Sharing Sites Are on the Rise



Source: Pew Internet & American Life Project

Exhibit 18: More People Are Viewing Online Video

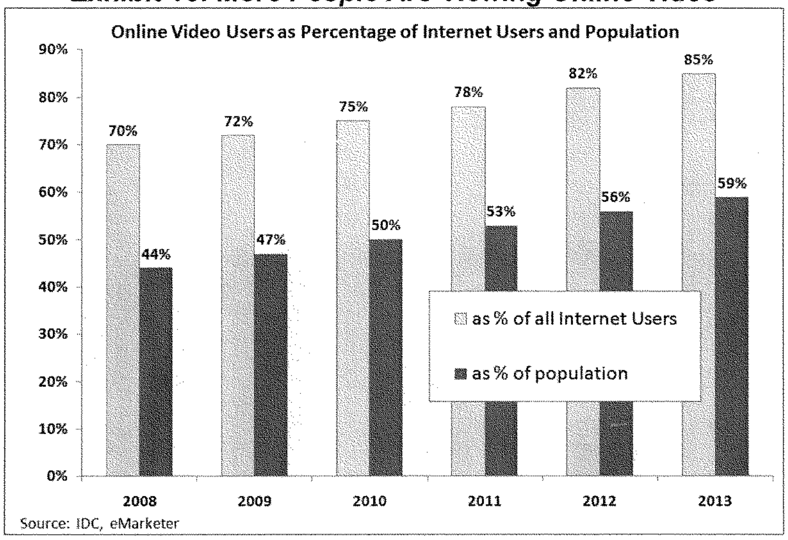


Exhibit 19: Plenty of Ways to Watch Video Content

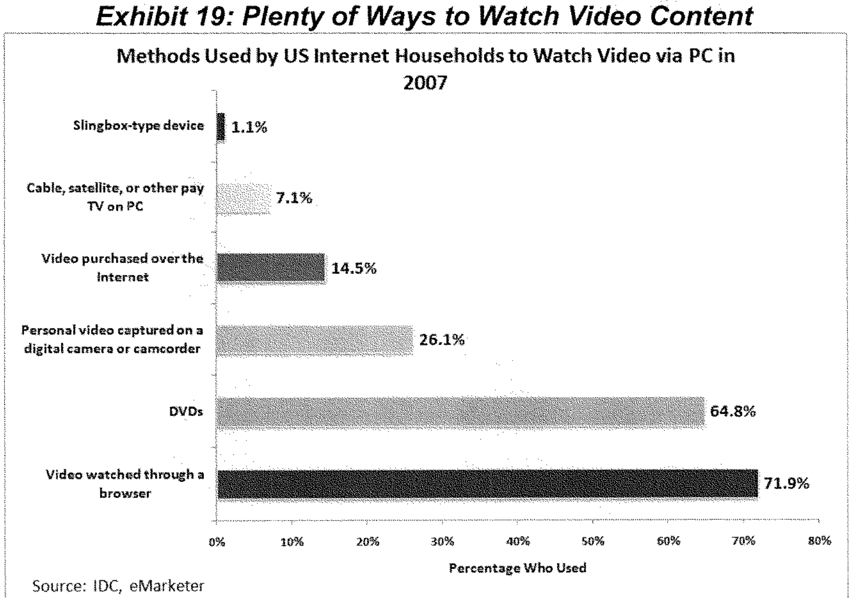
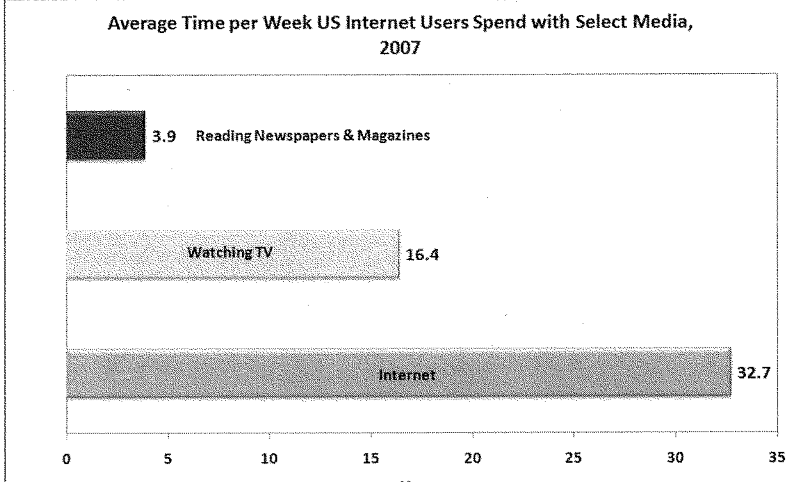
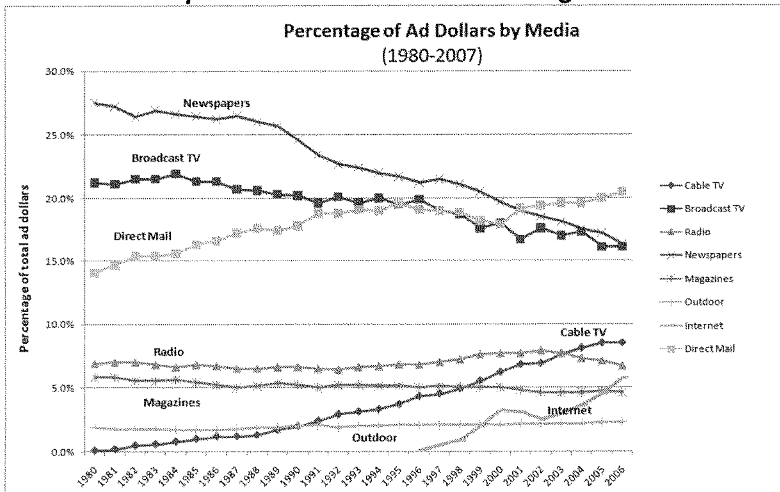


Exhibit 20: Internet Increasingly Dominating TV and Print



Source: IDC, eMarketer

Exhibit 21: Competition for Video Advertising Dollars is Intense



Source: McCann Erickson Worldwide, Bear Stearns & Co., Inc.; chart does not include Yellow Pages advertising, business magazine advertising, or other miscellaneous advertising sources.

Mr. BOUCHER. Thank you very much, Mr. Thierer, and thanks to each of our witnesses for joining us this morning for some very informed commentary on the subject matter before us.

I recognize myself for the first round of questions. I am not entering this conversation with any preconceived ideas about whether or not we should legislate anything and I would like to make that clear at the outset. I did support in 1992 the program access provisions as a part of the legislation that we passed in that year. I did so because cable at that time was a monopoly and we wanted to encourage competition. The direct broadcast satellite industry had not really launched and those companies were not established. They were clearly not in a position to generate their own content with their own expenditure at that early state, and the only way they could be successful in providing competition was to have access to the programs generated by cable so we provided that access. And I think that law has been successful for the reasons I mentioned in my opening statement. Now that marketplace is competitive. The two satellite providers have subscribers typically equal to the very large cable systems. And now we welcome into the market the very large telephone companies, in fact telcos across the country that are beginning to offer multi-channel video further expanding the competitive choice.

And, Mr. Denson, I want to ask you some questions about your arrival in the market, what that means for competition and whether we ought to consider making any changes in the law in order to sustain it or perhaps further encourage it. Some would say that a company that is well-financed like Verizon either individually or in partnership with other large telecommunications companies could finance the creation of your own content and that is a situation very unlike the situation the direct broadcast satellite industry was in in 1992. And so how do you respond to the idea that you could generate your own content given the fact that you are a very large, well-established company and could even partner with others in joint ventures in order to do that? I know you are particularly concerned about regional sports and I am going to come to that in a moment but as a general matter, let me just ask you about whether or not you are in a position to generate much of your own content?

Mr. DENSON. Certainly, you know, we actually have financed the creation of our own programming. We created local, three local hyper-local news channels, FiOS1, Long Island FiOS1, New Jersey and FiOS1 here in the D.C. metropolitan area. What we found is that local hyper-local content was crucial in order to win over customers. Customers, it wasn't enough just to have content that addressed their entire region. Customers really wanted to know what they smelled when they looked out the door. If they were smelling smoke they wanted a channel that actually would tell them where that fire was in their neighborhood and we do that. We also offer compelling stories within the community so that everyone sees themselves in the community in a positive way. So we invested heavily in that and to be honest with you, given our number of customers the true benefit for the customers is the customer itself. We are not seeing that financial return but we are doing it to benefit the customer.

Mr. BOUCHER. How important is the 1992 program access provision to you as a general matter?

Mr. DENSON. Well, I think in terms of how important that was for us in the creation of that content I think.

Mr. BOUCHER. Well, not in the creation of the content but getting access to other peoples' content, cable-affiliated content.

Mr. DENSON. Oh, absolutely vital.

Mr. BOUCHER. That was vital to you?

Mr. DENSON. Absolutely vital at the time.

Mr. BOUCHER. You could not have launched FiOS without that?

Mr. DENSON. We would not have launched FiOS without having the assurances that were provided in the Act.

Mr. BOUCHER. All right, let me come to the regional sport question because that is something you focused on in your commentary. As I understand the situation as it pertains in Philadelphia and to some extent in San Diego and maybe other markets around the country, one cable provider has under contract the major sports leagues. I think that is true almost entirely in Philadelphia and the FCC found in a study that as a consequence of that the number of DBS subscribers is about 40 percent less in Philadelphia than one would expect under different circumstances. And in San Diego the Padres are under contract with one cable company, and as a result of that the FCC found the DBS subscribership was about 30 percent, 33 percent less than otherwise it would have been. Some would say that this is merely the functioning of the private market, that these contracts expire periodically and I assume they do. Maybe you know how often they expire and can tell us but upon that expiration why could other competitors within the multi-channel distribution space not go into the market, bid for those contracts and if they offer more money prevail and become the offerers of those programs? Now, assuming all of that is true why should we be concerned about this? Why not just let the market operate?

Mr. DENSON. Well, for certain regions.

Mr. BOUCHER. First of all, can you tell us when those contracts expire?

Mr. DENSON. The every market is different. Every team is different. They typically expire on a 5-year basis however there are some contracts specifically between the Yes Network and the New York Yankees which I know run significantly longer than that. In terms of the competition, for sure regional sports networks are unique and we cannot duplicate that, and the cost of sports rights are enormous and there is no way in which we could monetize it so to that end we would not be able to actually make a meaningful bid for those regional sports networks. I think what we have here.

Mr. BOUCHER. So is it the concern that contracts are exclusive that troubles you the most or is it the length of the contract that troubles you the most?

Mr. DENSON. It is, well, it is two things really. It is one, it is the partnership with the joint ownership of a cable operator and a team and the actual regional sports network there that is definitely vital. But for certain areas.

Mr. BOUCHER. Well, I am taking more time than I should here but we really need to understand how this works. I don't understand why it is a problem. If the contract expires within a sufficiently short period of time and that contract is then available for you and direct broadcast satellite and other cable companies to go in and bid on, why is that a problem?

Mr. DENSON. Well, let me take just the issue head on. It is a problem because I don't see how we could reasonably expect a company like Cablevision who owns the New York Rangers, it won't even offer us, it won't even negotiate with us with respect to the delivery of high definition content to entertain a bid where we would actually secure the rights for the telecast distribution of the New York Rangers and their market.

Mr. BOUCHER. So you're saying Cablevision has some kind of permanent right associated with the sports leagues under the terms of which it can deny high definition carriage or in fact any carriage at all to a competitor?

Mr. DENSON. Absolutely, they own the New York Rangers.

Mr. BOUCHER. So there is a permanent right so the actual contract doesn't expire. They actually own the league, is that what you are saying?

Mr. DENSON. They own the team. They own the New York Rangers. They own the New York Knicks and they are free to contract with whomever they like and they contract with themselves and then they deny the HD content to us. Now, on the other hand, a tale of two cities, we look at Philadelphia and Comcast. Through creative negotiations we have actually been able to secure the rights even though that content is protected by the terrestrial loophole, we have been able to secure those rights with Cablevision, the largest provider right in and where it is a similar situation. We are competing head-to-head in Philadelphia and they could deny it but cable Comcast took a different route and we are willing to negotiate and bargain in good faith with Cablevision at any time they denied us the access so that is specifically what we are looking for in this instance.

Mr. BOUCHER. All right, let me just ask if there is anybody else on the panel that wants to comment and the Chair will tell other members I will be generous with their time for questions in view of the fact that I have consumed so much. Does anyone else want to comment on this?

Mr. Rutledge.

Mr. RUTLEDGE. I just want to make a brief comment.

Mr. BOUCHER. Yes.

Mr. RUTLEDGE. Mr. Chairman, I just want to be clear that Cablevision provides every game on our regional sports networks to Verizon. What hasn't been provided to Verizon is a high definition feed but all of their customers have access to every game on the regional sports channels we own, and in New York there are four regional sports channels. The Yankees have their own, the Mets have their own and Cablevision owns two channels, one service. And it is interesting Dish TV which we do sell our service to has the right to carry the high definition feed and does not for their own competitive and business reasons. They don't carry the Yankees so they carry the Mets and they carry our services but don't carry the Yankee network for whatever competitive reason they have decided. And Cablevision has been without the Yankees for up to a year at a time in various contractual arrangement problems and succeeded in the marketplace so there are a variety of approaches that different distributors make to the marketplace and it is quite robust and there are quite a few regional sports up there as well.

Mr. BOUCHER. All right, OK, that is fine. Thank you very much.

The gentleman from Florida, Mr. Stearns.

Mr. STEARNS. Thank you, Mr. Chairman.

Recently I attended an open mobile TV forum and spoke to all the operators and it was sponsored I think by LG and Ion and they had all these mobile devices where I could get television on here. So it appears that to me the next challenge is going to be when the TVs are sold to the consumers and they have an Internet chip in it so I can decide do I want to get cable or do I want to get DirecTV or do I want to go the Internet and get live streaming of digital or high definition programming, and that seems to me as a consumer that that is where I would go. I would have the digital and high definition streaming on my mobile and I would have it at home on my television and there might be a point where I might not say I even need a cable or DirecTV, satellite TV because I am just going to get it through the Internet. I think that after I went to this forum it seemed to me the next really growing demand is going to be that everything is going to come through the broadband Internet and it will be high definition and it will be high speed.

So, Mr. Rutledge, if I am wrong you can tell me but it seems to me that is where you folks should be making your investment for programming over the Internet in the future. And I guess my question is, is that true and if it is true what kind of deregulation or regulation should be involved? And certainly you might want to comment on network neutrality or network regulation, as I call it which would be even as we speak today I think the FCC is going to have a vote on it so I would be curious about your opinion and then Mr. Denson and Mr. Moore.

Mr. RUTLEDGE. Ranking Member Stearns, thank you.

Mr. STEARNS. Does the future as I explained, does that seem a likelihood?

Mr. RUTLEDGE. Yes, I think it is a very complicated future and what is happening is that devises.

Mr. STEARNS. I need you to make your answer pretty short so I can move around here.

Mr. RUTLEDGE. Yes, devices, there is a device of convergence so that what looks like a phone is a television and what looks like a television is a phone.

Mr. STEARNS. OK.

Mr. RUTLEDGE. And we have products that work really well and one of the things Cablevision has done is launch the first 100 megabit data service across its entire footprint. We are the fastest data service in the country and the only company offering speeds at that level to all of its customers.

Mr. STEARNS. So you have already made an investment in this?

Mr. RUTLEDGE. Yes, we have been putting investments in what is called DOCSIS 3.0.

Mr. STEARNS. OK.

Mr. RUTLEDGE. Which is the most advanced platform out there in terms of high speed capacity. We believe that if our customers can use that network and be happy with the way that network operates that we will be able to sell our network services and as part of that we encourage developers of programming to make applications that work on a big fat network like we sell. And so our goal is to have content providers flourish and have people subscribe to us because we have the best network.

Mr. STEARNS. OK and Mr. Denson.

Mr. DENSON. Yes, and I think we are in a similar position and I think you are exactly right as how you see the future and what you have really described is the TV everywhere initiative which is a collaborative initiative amongst all distributors in the multi-channel video marketplace. So in that situation I think what you are looking at is programmers, content providers are looking to drive their revenue from subscription-based services as are we as distributors. So the—but your unique insight was well if I have a phone, I would like to see it on the phone. If I have it on the PC I would like to see it on a PC and TV. You subscribe one place and then you get access to the content across every device and what that does is that spurs the innovation on our side. As a distributor we need to make sure that we have the fastest networks and we do. We need to make sure that we have the best picture quality, not just across one platform FiOS but broadband and also our V-cast video, the Verizon wireless video service as well. So we are enabling those services and we are doing it across carrier so we are not looking to make it unique for Verizon itself. We want to work with the Time Warners, the Comcasts, the Cablevisions of the world so it doesn't matter where a customer is, that customer can actually access their content by paying just one time to one distributor.

Mr. STEARNS. OK, Mr. Moore, based upon sort of what I sort of prophesize what I think is going to happen here, why couldn't I get a Web site and I go to you and say, Mr. Moore, you know, I am very impressed with what you did with Star Trek and the Next Generation. I want you to do the next Next Generation and I will pay you. You come onto my Web site and we will be through the Internet everywhere and that gives you access. That seems simple to me but based upon what I say is going to happen in the future, do you see problems of you and others with your talent and your skill getting this programming to the consumer market?

Mr. MOORE. Well, I think you are correct and that is theoretically possible. I think that, however, the convergence that I think we all agree is coming is going to take awhile and that history shows is that these sorts of technologies don't completely wipe out prior technologies. When television came along everyone said that the movies are going to die.

Mr. STEARNS. Right.

Mr. MOORE. And when the VCR came along they all said the movies and television were going to die and none of those things have proven true, and I think the point is that traditional media and the way that we have known television for a very long time is probably going to continue in some form for quite—for the foreseeable future. An Internet—a web startup site like the one that you are postulating will have its biggest problem to get people to come see it so it is all about getting the consumer access to it.

Mr. STEARNS. No, I like the advertising. I would say Mr. Moore who did this in Star Trek has got something, you know, and I would create a sensation like they are trying to do with Dan Brown's new book, The Symbol. They are creating all this sensation to try and sell it and I would have to do all of that as part of the contract with you to get you.

Mr. MOORE. It is a viable form that your are postulating. Again, it takes a tremendous amount of money to create television programs like the ones that I have done. It then takes a tremendous amount of money to make them accessible to the audience.

Mr. STEARNS. So only the big players can do it then?

Mr. MOORE. Only the big players basically can do it and if the big players have basically own the means of their own production, they tend to go to those.

Mr. STEARNS. OK. Yes, sir, Mr. Knorr.

Mr. KNORR. Thank you, Congressman Stearns.

I think this is an excellent question that you are posing and really our concern about the ESPN360 business model goes directly to this. In your hypothetical, if Mr. Moore was able to put together a Web site and put on his content, under the business model that we are concerned about where all of our broadband subscribers are paying, in this case ESPN but it could be any of the existing major brands could leverage this type of arrangement, that anyone of my customers that access Mr. Moore's content not only would be paying Mr. Moore but would be paying all these other existing content providers. In which case a competing entity never would be able to get ahead because every time someone went to this new entrant, the existing companies would make money, and there would be no way that someone could get a pure connection to the Internet and choose to take a different path. It would carry over the existing cable business model and in many cases the existing cable participants onto the Internet and replicate.

Mr. STEARNS. My time has expired unless there is someone else who wanted to answer the question.

Mr. Pyne.

Mr. PYNE. I just would like to briefly comment on the ESPN360. The ESPN.com is a free Internet site that everybody who has an Internet connection can access. It is a very, very competitive business whether in every months we look at Yahoo Sports, ESPN.com, FOX Sports, CBS Sportsline, but that is there is more video on ESPN.com itself then any of the other dotcom sites. ESPN360 is the unique per-sub business model that in fact we created to help broadband adoption and today there is—we have no evidence of someone raising their ISP fee to a consumer because they have launched ESPN360 and it is we don't force people. We are only—we are in 50 million homes. It has doubled over the last year because of the popularity of the service but the whole purpose of 360 was to help broadband get further adoption in our country because it is programming that drives—that will help drive adoption.

Mr. STEARNS. Thank you, Mr. Chairman.

Mr. BOUCHER. Thank you very much, Mr. Stearns.

The gentleman from Michigan, Mr. Stupak, is recognized for 5 minutes.

Mr. STUPAK. Thank you, Mr. Chairman.

Mr. Knorr, in your testimony you state that the ACA members pay 10 times as much as your competitors for the same content. How have you been able to make this determination and by competitors do you mean like satellite providers like Dish and DirecTV?

Mr. KNORR. Competitors in some cases DirecTV and the satellite. In other cases, larger cable operators and a lot of it is anecdotal based on smaller cable operators that acquire cable systems from larger providers see the discrepancy in their cost of programming and that is, you know, that is anecdotal. That is one of the things that we are putting out there is we would like the FCC to empirically examine and review programming to determine what level of price discrimination occurs. I mean based on acquisitions and other things, we know it is occurring. Documenting that is what we want to do so that we can address the problem.

Mr. STUPAK. Well, like in my district there I get very rural districts, Sunrise Communications pay in about $40 for 35 channels and that is a cable but then yet the same area, Dish is offering for $30 over 100 channels. Is that where you are doing your because that is about a 300 percent increase if you look at the number of channels.

Mr. KNORR. I think there are a lot of things that figure into that. One is the disparity in cost of programming. Another one is again, the unique burdens of being a small operator. I mean regulatory costs, retransmission costs, disparities in all those costs make it more difficult for a small operator to make investments.

Mr. STUPAK. You are taking all of those into consideration when you say 10 times more than?

Mr. KNORR. No, in programming alone it can be up to that much just in programming.

Mr. STUPAK. OK.

Mr. KNORR. And then those other things would explain the disparity you are talking about of having 35 channels for a higher price than 100 channels.

Mr. STUPAK. All right, well, you also said that you are given a take it or leave it offer when attempting, take it or leave it when you are attempting to negotiate a program carriage.

Mr. KNORR. Especially in regards to retransmission consent.

Mr. STUPAK. OK, how does that negotiation go? It is just take it or leave it, or do you have any input? Do you have any room to negotiate or is it just here is what we are offering, that is it.

Mr. KNORR. It varies. In many cases it is getting a contract and saying here is the deal if you want to carry the network, and well that deal doesn't work for us. OK, here is the deal, you sign it, you don't sign it. It is up to you.

Mr. STUPAK. Sure.

Mr. KNORR. As opposed to—oh, go ahead.

Mr. STUPAK. OK, I was—Mr. Pyne was shaking his head there. Do you want to add something on that one?

Mr. PYNE. Well, I shouldn't have shaken my head.

Mr. STUPAK. I was going to ask anyways even if you didn't shake your head.

Mr. PYNE. OK.

Mr. STUPAK. Because you are one of the bigger ones so I was going to ask.

Mr. PYNE. Well, as it I mean, we work very hard to work and help our smaller cable affiliates as I mentioned in my testimony. I mean two specific things as it relates to retransmission consents for our own stations, in this last round we in fact in an effort to help, I mean it was a take it or leave it offer but it was free retransmission consent. In other words, the 1992 Cable Act allows us to make a cash offer available.

Mr. STUPAK. Right.

Mr. PYNE. Or negotiate some other consideration. We have practiced that successfully for since 1993 actually but in this last round in an effort to help our smaller operators we said OK for these 90 in these smaller territories we will not extract any cash or ask for any other consideration. You can have it for the next 3 year cycle.

Mr. KNORR. And I think honestly Mr. Pyne makes an excellent point. ESPN generously offered free carriage to about 90 of our 1,000 cable systems but he also said exactly what the fact is it was a take it or leave it offer. ESPN generously made a zero cost take it or leave it offer to those smaller cable operators. Many, many, many of the broadcasters in this country are not so generous and that is the problem.

Mr. STUPAK. Well, Mr. Pyne, let me ask you this. Are you planning to see access to that ESPN360 directly to consumers over their Internet if their service provider does not pay for access?

Mr. PYNE. That is not in our business model today, no.

Mr. STUPAK. Thank you.

Mr. PYNE. We have other products at ESPN.com and actually throughout the entire portfolio such as ESPN Insider which is something that if you are subscribing, I mean if you get ESPN.com you can subscribe that goes into deeper that we offer directly consumers but ESPN360, no.

Mr. STUPAK. OK, well, if the content is so compelling, I would think you would want to get it out there without having to go through the ISP, just sell it directly to consumers.

Mr. PYNE. Again, in this fascinating space of the Internet we are looking for multiple different models to get our content to consumers and we have ESPN.com which is for free. We have an ESPN mobile product. We have ESPN Insider.

Mr. STUPAK. Right.

Mr. PYNE. We have ESPN VOD but in this particular case, we believe this business model actually helps the adoption and we don't force it on anybody but which is our decision but we think it will actually help the adoption and in fact Beta does research which is a sort of cable industry entity that sort of values the different programming and ESPN360 has been named the number one broadband service to help adoption of broadband and that is our goal. That is why we would do it.

Mr. STUPAK. OK, but the service provider is still paying something, right? Someone is paying somewhere along the line here because if we go on the Internet we think we can have access and have it pretty much free.

Mr. PYNE. Right.

Mr. STUPAK. But in a way you are no longer, you are putting an extra hurdle up there for someone to.

Mr. PYNE. Well, I think as the way we look at it is it is the service provider's option.

Mr. STUPAK. Right.

Mr. PYNE. To work to negotiate a deal or not from, you know, and we again, there are many providers who don't. In fact, Cablevision doesn't carry 360 nor does Time Warner at the moment. Comcast and Cox Communication has just signed up and Verizon has it so it is a competitive product in the marketplace, and I will just say that the reason we developed the product was that as we saw Internet or broadband penetration grow, we saw that there would be a plateau at some point and that it would need extra content. And ultimately we are here trying to provide that content and the margins in the ISP world for providers are, you know, depending on who you look at, anywhere from 40 percent to 70 percent so we are ultimately helping to support that model.

Mr. BOUCHER. Thank you very much, Mr. Stupak.

The gentleman from Texas, Mr. Barton, is recognized for 5 minutes.

Mr. BARTON. Thank you, Mr. Chairman.

I think we have a vote on the floor so I know that we need to be.

Mr. BOUCHER. We do but we have got 8 minutes left here so I think we can probably fit you in.

Mr. BARTON. Eight minutes, I can probably give some of that back.

I didn't hear the opening statements of the panel and I didn't hear all the statements of our witnesses but I am trying to figure out why we are having this hearing. It looks like we have got a food fight going on between some of the folks that at some point in the past decided to buy a sports team and a venue and a medium to distribute that programming, and the people that didn't do that don't like it. Am I wrong?

Mr. DENSON. I will take that. I think are you wrong, I wouldn't go so far to say that you are wrong but what I would say is that there is certain baseline content that is unique in a community that without it we cannot compete and we would like very much better to compete on the services that we do have and the innovation that we have created. We offer over 400 digital channels, over 17,000 video-on-demand channels, the highest broadband speeds with the best picture quality and we want to make that choice to the customers. We offer more foreign languages then any other distributor yet if we do not have the regional sports networks that are germane to that particular community then it is not meaningful choice.

Mr. BARTON. Now, is there any prohibition with you buying your own team?

Mr. DENSON. There is no prohibition.

Mr. BARTON. I think a lot of people would want you to buy the Redskins right now. I mean, you know, is anybody on the panel say that there is less competition today then there was in 1992? Are there less programs available? Are there less mediums available? Is there less content available?

Mr. MOORE. Well, I would say in response to that to when you look at the dial there is a tremendous amount of competition. There is a tremendous amount of choices but the point that I would like to make is that the people that provide that content are becoming a smaller and smaller number.

Mr. BARTON. And I did get to hear you and but even there is, if I heard you correctly, there is still eight, didn't you say eight companies that are in the provider business?

Mr. MOORE. Yes, there are eight and of those eight, two of them are reality-based or do reality shows and are based in the UK and only one is an actual independent, and these others are the multinational media block.

Mr. BARTON. But even there, is there some bar that would prohibit entry into that arena if one was predisposed and felt they had the creative ability to do so?

Mr. MOORE. Well, the marketplace is developed in such a way that if a network owns its own in-house production studio, there is a tremendous incentive to buy from that studio and not from independent producer.

Mr. BARTON. Right.

Mr. MOORE. So and because these shows cost so much to produce and get on the air, if you are going to set yourself up as an independent studio and risk all this capital, you should be able to compete fairly. But unfortunately what happens is that networks turn to their corporate sibling for programming more and more and more, and that is essentially why you have seen a decrease from 18 production studios who provided content in 1989 to only eight today, and as I said only one of those is a true independent and the other two are reality providers from the UK.

Mr. BARTON. OK, well, Mr. Chairman, I know we are short of time. I am going to yield back the last minute and a half but my advice to our witnesses is go have lunch together and work it out and, you know, if this is really—if the Yankees not being available on Verizon is a huge problem then Verizon ought to be able to come up with an incentive package to encourage some of the Yankee games being on Verizon or the 76ers being on whatever in Philadelphia or whatever it is. I just don't think, Mr. Chairman, I mean this is an entertaining hearing but I don't think this is worthy of Congressional oversight unless the goal is just to get these guys to work it out amongst themselves at which you and Mr. Markey are past masters at that.

Mr. BOUCHER. Well, thank you very much.

Mr. BARTON. So I will join you in that effort if that is what the goal of this is.

Mr. BOUCHER. Thank you very much, Mr. Barton. There are a number of people who are quite interested in this subject matter, and I choose to think it is an appropriate hearing but it is going to have to be recessed because we have three votes pending on the floor of the House and we need to respond to those. We will be gone for probably 40 minutes, 45 minutes and so stay tuned and stay close and we will be in recess until the conclusion of the third vote.

[Recess.]

Mr. BOUCHER. I thank everyone for your patience while we attended to business on the floor.

The gentlelady from Tennessee, Ms. Blackburn, is recognized for 5 minutes.

Mrs. BLACKBURN. Thank you, Mr. Chairman, and I will probably not use my full 5 minutes. I know that you all have been very patient with us and you are probably ready to move on with your day and I know some of you have flights that you want to catch so you can get back to business.

A couple of quick questions, Mr. Pyne, I will start with you. I have got to say if I understood you right you said the whole purpose of ESPN360 was to spur the adoption of broadband. That was quite a generous offer and I thank you all for doing that to spur broadband. I hope that we continue to make certain that we look at how that is available to people that do have broadband but thank you all for making that the whole purpose of ESPN360. I know that 50 million users are pleased with that decision that you all carried out.

A couple of quick questions and this is a yes or a no, and I want to just go down the list. Mr. Rutledge, I am going to start with you. Currently, do you think that the current marketplace needs government intervention at this time, yes or no?

Mr. RUTLEDGE. No.

Mrs. BLACKBURN. No. OK, Mr. Pyne?

Mr. PYNE. No.

Mrs. BLACKBURN. No. OK, Mr. Knorr?

Mr. KNORR. Yes, in some areas.

Mrs. BLACKBURN. Yes, in some areas. OK, Mr. Moore?

Mr. MOORE. Yes.

Mrs. BLACKBURN. Yes. OK, unequivocal yes?

Mr. MOORE. In some areas I would say.

Mrs. BLACKBURN. In some areas, OK, so a qualified yes. Mr. Denson?

Mr. DENSON. Qualified yes, narrow legislative act, yes.

Mrs. BLACKBURN. OK. Mr. Thierer?

Mr. THIERER. No, ma'am.

Mrs. BLACKBURN. No. All right, OK, are you in favor of net neutrality? We have the principles that were released this morning. I call it fairness doctrine for the Internet. Some of you call it net neutrality, some of you not so neutral. So, Mr. Rutledge, aye or no?

Mr. RUTLEDGE. No.

Mrs. BLACKBURN. No. OK, Mr. Pyne?

Mr. PYNE. Yes, to the extent it allows network management to help with piracy.

Mrs. BLACKBURN. OK, so you are a qualified and so qualified on piracy, is that what you said?

Mr. PYNE. Right, traditionally we have not been proponents of net neutrality but as it relates to helping with piracy.

Mrs. BLACKBURN. To piracy. OK, Mr. Knorr?

Mr. KNORR. Having not seen exactly what came out today but my understanding it would apply narrowly just to distributors in which case that would be a concern.

Mrs. BLACKBURN. OK, so are you a yea or a nay?

Mr. KNORR. It would be a nay if it is only applied to distributors.

Mrs. BLACKBURN. OK, all right. Mr. Moore?

Mr. MOORE. From my understanding, I would support it, yes.

Mrs. BLACKBURN. OK. Mr. Denson?

Mr. DENSON. Nay.

Mrs. BLACKBURN. OK, all right. Mr. Moore, I appreciated what you had to say about the change in cable rules in the '90s and I know you are concerned about you feel like that that really impeded some of the independent producers and I appreciate the charts and the graphs that you brought forward in your testimony today. So let me ask you this, it seems like there were fewer cable channels just a few years ago and so there were fewer outlets. A lot of our cable programming producers in Tennessee said there were fewer outlets to sell their content and turn that intellectual property and that work product into something that could be monetized. And so I would ask you this, I know you are saying you favor government intervention, don't we need to be careful about intervening now given the possibility of unintended consequences like reducing the incentive for the continued carriage of some of these channels and your concerns over consolidation?

Mr. MOORE. Well, my concern is about, oh, I am sorry. My concern is about the ability to provide content to a variety of forums and the way that the rules use to be in traditional television was that networks could not actually own or could not program most of their programming from in-house production studios like say Disney owns ABC Studios that then provides most of their content for ABC. However, on the Internet where we are going now what we are trying to do is with Internet neutrality is to maintain an environment where we have an ability to sell our wares to multiple places and not to have the Internet sort of turn into what has happened in the repeal of the financial interests in syndication rules.

Mrs. BLACKBURN. OK, so the piracy issue is a part of your concern also?

Mr. MOORE. Oh, we are very concerned about piracy as well. I mean, you know when people pirate.

Mrs. BLACKBURN. Mr. Thierer?

Mr. THIERER. Yes, Congresswoman, with all due respect to Mr. Moore, I believe that the fact is is that he is a pretty good example of why the repeal of the financial syndication, informational syndication rules have made sense because we have a lot more platforms then ever before for things like Battlestar Galatica to go out over. I watched all four seasons on a combination of DVD, Blu-Ray and downloads from my Xbox 360. I never watched it once on television per se. Number two, the cost of programming, the cost of producing a show like Battlestar is enormously expensive and the Syfy Channel itself is an example of a station that did not exist 10–20 years ago. Universal and others put a lot of money into that to create a platform for folks like Mr. Moore. And then third, you know, this whole question about is it evil to have too much ownership and in-house production is a classic make versus buy decision. Newspapers and magazines produce the vast majority of their content in-house. Is that good, bad, evil, in-between? I don't think it is any of those things. It is just a business choice. Sometimes it makes a great deal of sense because you are sharing the risk and the rewards of the enormous expense associated with the production of television.

Mrs. BLACKBURN. I appreciate that and I thank you all for your answers. And, Mr. Pyne, I picked on you at first so I am going to come back to you and let you answer your question. Go ahead.

Mr. PYNE. I just wanted to make one further point in terms of broadcast networks and where they get programming from. This year, ABC in its own studio developed 26 pilots at great expense and of the 11 new shows that are on ABC this fall only three of those 26 will actually appear. The other eight are from other studios so it is I mean we try—all of the broadcast networks and all of the cable networks try—to do the best to get the best programming and content on the air.

Mrs. BLACKBURN. OK, great. I have two questions I will submit. Mr. Rutledge, one to you—I want to ask you an MVPD question that I will submit to you for writing—and, Mr. Denson, I am going to come back to you because I want to go back to this exclusivity issue with you and how you view that differently from sports networks to handset exclusivity. So with that I thank you all very much and I yield my time.

Mr. BOUCHER. Thank you very much, Ms. Blackburn.

The gentleman from Pennsylvania, Mr. Doyle, is recognized for 7 minutes.

Mr. DOYLE. Thank you, Mr. Chairman.

I live in Pittsburgh where we have division one college sports, the defending Super Bowl Champions, the Stanley Cup Champions. I am sorry Mr. Stupak isn't here because he is a Red Wings fan. In Pittsburgh we love our sports but I am also sympathetic to my constituents that want to have their broadband at an affordable price. Now, as I understand it for any of the ISP customers to have access to ESPN360 all of them have to pay for it and that strikes me in some of ways as fundamentally unfair. I have read that some independent ISPs were quoting as much as 79 cents per subscriber per month for ESPN360. Even if only one subscriber watched it, all of them would have to pay for it. Now, Mr. Knorr, you are a small cable person. Do you believe that all your broadband customers want and will watch ESPN360?

Mr. KNORR. No, I mean I think fundamentally and know for a fact and where in Lawrence, Kansas is a huge sports market with the Jayhawks. We have the Chiefs although that is down this year but we know our customers aren't all sports fans and we think the ones that are, 360 is a great product. But for the ones that aren't as I said in my testimony, if you are just the only reason you are getting your Internet access is because you lost your job and you have to find a new one, having that Internet access be more expensive just for those that want that product, again we don't think that is right.

Mr. DOYLE. Yes, I mean it seems to me if they are going to quote 79 cents per month per subscriber that wants to watch it, that seems like a perfectly reasonable thing to do but if you are going to charge the ISP and people start to try to out-exclusive one another, you know, if this is this business model what happens when we have a dozen more ESPN360 business models? What happens to broadband prices for the average consumer when they are forced to pay, you know, whether they are watching this or not and if everybody would adopt that kind of a model what would happen to pricing? And, Mr. Pyne, I will let you maybe discuss that.

Mr. PYNE. Well, as I mentioned earlier but will reaffirm now, for all the research and work that we have done on ESPN360, no one has told us they are raising prices to consumers because of launching ESPN360 and in fact when the broadband margins that operators or ISPs are making can be up to 70 percent. It varies by market for sure but it is certainly well worth their while to get another subscriber and if ESPN360 can help with that, that is fantastic. And I am able—I don't think.——

Mr. DOYLE. You are saying in Pittsburgh they are not passing that cost on? They are absorbing that cost because they want the ESPN360?

Mr. PYNE. To be clear, we don't tell our distributors how they need to manage their retail pricing, just as we don't tell people who carry ESPN how to manage their retail pricing. That is between them and the consumer but if we are offering a business proposition to ISPs to make them valuable in their marketplace and it is actually up to them what they want to do with it. I mean in the New York market.

Mr. DOYLE. But wouldn't you concede if there were half a dozen other business ventures like your own that adopted that same model that were attractive content and the ISPs had to pay for it for every subscriber they had regardless of whether every subscriber watched it or not, at some point they have to pass that cost on to their especially the small. I mean what does it do to a small cable operator, Mr. Knorr, that is having to pay 80 cents per person per subscriber per month?

Mr. KNORR. Well, I mean it has two impacts. I mean we can absorb it but that reduces the capital we have available to launch things like DOCSIS 3.0 and more advanced broadband services or we can pass it along to our customers which raises the price of the service and if everybody is raising the price of the service, I mean that is fine, it doesn't put me at a competitive disadvantage if everybody carries ESPN360 but it certainly doesn't do anything to make broadband more affordable. One of the key concerns that we have is what has been stated several times by Mr. Pyne today is that it is a negotiation with the operator. It is up to the operator to decide whether or not they want to take the deal. That is one of our concerns that we are replicating one of the chief concerns of the cable business model onto the Internet and that distributors will decide what customers can access. You know, I can choose to say no, I am not going to do a deal and my customers can't get it or I can choose to do a deal and all my customers have to pay for it. When in the age of the Internet the great promise of the Internet was that customers would have control. Customers would be able to make choices more like more than ever before and this model would take away that great promise of the Internet.

Mr. DOYLE. Yes, thank you, Mr. Knorr.

I want to ask Mr. Denson a question too and it is a different question. Mr. Denson, we all agree that competition is good for consumers. FiOS is rolling out in my district and I understand why Verizon wants popular programming in HD. I mean that kind of programming certainly makes for a compelling package so it seems here that Verizon supports government intervention for competitors to have access to programming that incumbents own saying that it will help competition. But if my memory serves me correct, I have sat in this committee and watched Verizon oppose the CLEC industry from line-sharing. You have opposed government intervention to help small wireless carriers struggling because big wireless carriers have lengthy handset exclusivity contracts. And yesterday, your CEO reiterated Verizon's opposition to net neutrality rules that would ensure that companies offering competing services won't be blocked. So those are all exclusivities that Verizon likes. What makes this exclusivity that you want different?

Mr. DENSON. Well, I think the most important part of this exclusivity is that it benefits the consumers and it provides the consumers with the maximum amount of choice. If we don't provide— it is not a choice for consumers. You are from Pittsburgh and if you could not watch the Pittsburgh Pirates or the Penguins in high definition——

Mr. DOYLE. I could probably go with not watching the Pirates.

Mr. DENSON. OK.

Mr. DOYLE. The Steelers might have been a better pick, yes.

Mr. DENSON. So let us take those Stanley Cup Champions Pittsburgh Penguins, if you could not get the Penguins in HD you might not choose Verizon even though we will have a wealth of services and content and innovations and applications that would make us all told a superior service for consumer choice. The promise we like to make is that every customer should want to consider or be in a position to consider FiOS and that is what is being defeated if we don't have access to that highly valuable unique regional sports network programming.

Mr. DOYLE. Thank you.

I see my time is up, Mr. Chairman, thank you.

Mr. BOUCHER. Thank you very much, Mr. Doyle.

The gentleman from Georgia, Mr. Deal, is recognized for 5 minutes.

Mr. DEAL. Thank you, Mr. Chairman.

Mr. Pyne, I think we have established a couple of things and everything seems to revolve around sports it seems. The ESPN360 is not available on a subscriber basis over the Internet to individuals. That is what you said, I believe. It is only available if an Internet provider chooses to participate with you and I assume that when you negotiate with that ISP that it is on a per customer basis which your fee is based. Would that be a logical assumption?

Mr. PYNE. Per ISP customer?

Mr. DEAL. Yes.

Mr. PYNE. That is correct.

Mr. DEAL. OK, but that so far you don't think anybody is passing that cost on to their customers.

Mr. PYNE. Correct.

Mr. DEAL. They are absorbing it. It is interesting that it appears that ESPN360 is being sold to potential ISP providers on the basis that it gives them a competitive advantage over perhaps their competition. But on the television side it appears that ESPN doesn't seem to follow that same model because it is under current statutes a cable operator or a satellite provider cannot simply enhance their offerings in a package that would include niche tiers or a per channel basis in order to gain competitive advantage over their competition. Why is it that it works in one environment as a free market opportunity but in the other environment it is not considered to be that?

Mr. PYNE. I am not sure if I understand. What do you mean by in the other environment?

Mr. DEAL. Well, let us just take the television environment in terms of cable, operators cannot simply just pick and choose their packages they are required to take.

Mr. PYNE. Actually I don't think that is true. No, if people would like ESPN they don't have to take any other ESPN, Disney or even ABC service. We have been—in fact, they have affidavits that I have submitted that if you want—there are two most popular services, Disney Channel and ESPN. There is absolutely nothing else a cable operator, telco or satellite provider needs to take. We make it available on that basis.

Mr. DEAL. Mr. Knorr, does that reconcile with what you are?

Mr. PYNE. And in fact just to add I mean we have several hundred situations where people just take ESPN around this country.

Mr. DEAL. Mr. Knorr?

Mr. KNORR. To my knowledge, I mean there is significant financial incentives to take the bundle of services that ESPN offers on the video side and so I believe that most operators choose to take that route. Fundamentally, whether it is the Internet side and ESPN360 or on the programming side and this is true for most of the top programmers, there is very little options in how we can package that content to our customers.

Mr. DEAL. Now, with regard to all of this, let me preface what I am about to ask by saying I believe that negotiations are private in private business. They should remain private; however, we are operating in somewhat of a public domain. Mr. Moore alluded to some of the problem here. Do you think that the FCC should have some availability to know what the negotiations are among providers and carriers in terms of determining if in fact the rules, general rules of fairness are being followed even though the public may not have access to that, even though individual subscribers may not know what a per channel cost is being allocated to them on? Is there reason to say that this is a type of transparency at the FCC that we currently don't have but we should be encouraging? Mr. Moore, I will start with you since that is sort of in an area you have alluded to.

Mr. MOORE. I think generally speaking, you know, transparency is a good thing when we are dealing with the public airwaves and when we are dealing with content providers and so on. I don't know that I can speak to that specific example of whether the FCC should have the authority to look into all the details of these kind of negotiations. I think I would want to probably confer with the Writers' Guild and sort of study that before I gave you a definitive answer.

Mr. DEAL. OK, I will try to—yes, Mr. Thierer?

Mr. THIERER. Congressman Deal, I think you really hit the nail on the head when you said first and foremost that sports is really what is the thorn in our side here on so many of these issues right but I hope that the committee doesn't lose sight of the fact that that is a very, very unique problem and that we don't have this problem in most other types of content. Second of all, to the extent it is a problem I think we need to understand that some of these fields might be—the role of the FCC could be more of a, to rip a page from baseball if you will, could be baseball style arbitration. Bring parties together, ask them to sit at a table and hammer out a deal and then maybe set a clock and set some sort of an independent person or group together there as an arbitrator to help them hammer out that deal if they don't reach it at the end of a certain timetable. But one final point let us not lose sight of the fact that exclusivity also has competitive benefits. Many of these regional sports networks would have never existed without a fair degree of exclusivity and I do wonder would a national service like DirecTV have the legs it does today without exclusivity for the Sunday ticket. It really does help create new forms of entertainment and new platforms that weren't there before. These things did not exist 10–15 years ago. Are new problems created because of that? Yes, it is true especially about sports but that is again I think a unique situation.

Mr. DEAL. Well, I would suggest it is broader than that, that the packaging and bundling is a much broader issue that goes far beyond just sports programming but my time is up.

I will yield back.

Mr. BOUCHER. Thank you, Mr. Deal.

The gentleman from Vermont, Mr. Welch, is recognized for a total of 7 minutes.

Mr. WELCH. Thank you, Mr. Chairman, thank you very much.

Mr. Rutledge, your company owns the sports teams and does the distribution and broadcast, is that correct?

Mr. RUTLEDGE. Cablevision owns the Knicks and Rangers.

Mr. WELCH. Right, so if I am in New York and I want to watch the Knicks and Rangers I have to get it through you? How does that work?

Mr. RUTLEDGE. No, it works this way. There are in the service footprint that Cablevision serves, we are a cable TV company as well, there are four providers of Knicks and Rangers and all of the other sports services that are sold in the market. Verizon, for instance, has access to every Knicks and Rangers game.

Mr. WELCH. Right, but if I want to get it in HD, I have to get it from you?

Mr. RUTLEDGE. Yes and they don't have it in the HD.

Mr. WELCH. So why won't you allow Verizon or others to get it in HD?

Mr. RUTLEDGE. I do allow others but I want to have a competitive differentiation against Verizon so that I can be more successful.

Mr. WELCH. So that is good for you but not necessarily for the consumer.

Mr. RUTLEDGE. Well, it is for the consumer to have companies that create products that are new and innovative. We invested and created this high definition regional sports programming service more than 10 years ago and we invested and created it, distributed it.

Mr. WELCH. All right, I get it.

Mr. RUTLEDGE. And we are trying to get our return to it.

Mr. WELCH. All right, Mr. Pyne, I just want to make sure I understood this. You were asked about your position on net neutrality. What I thought I heard you say and I just want to confirm this is that you want to deal with the piracy question because that is your product but if that is dealt with Disney favors net neutrality or opposes it? I just want some clarification on that.

Mr. PYNE. I mean traditionally we have not been proponents of net neutrality. We haven't really been part of the discussion but we do support it to allow ISPs to manage their networks, particularly around piracy.

Mr. WELCH. I am not sure I understand you. So you have a piracy issue but dealing with that.

Mr. PYNE. Well, the piracy is to make sure that——

Mr. WELCH. I understand what that is. You have got to protect your product. You invested in it and people are stealing it and I have some sympathy for that, but dealing with that are you saying yes or no that you are for net neutrality as you were asked by Congresswoman Blackburn?

Mr. PYNE. I think we support it to the extent we believe ISPs should have the ability to manage their networks.

Mr. WELCH. OK, I come from Vermont where we have a lot of small rural carriers, Waitsfield Champlain Valley Telecom probably has, I don't know, fewer than a thousand folks and it is very, very tough for them to bring cable programming and Internet services to those rural markets that aren't served by the larger cable companies, tough markets to serve. There is a lot of difficulty in getting affordable terms for programming services that make that business even more difficult and I heard some conversation back and forth really between Mr. Pyne and Mr. Knorr and I want each of you to comment on what the obstacles are, and perhaps you too, Mr. Moore, as well, but, Mr. Knorr, why don't we start with you? What are some of the impediments that have to be addressed in order to provide fair access to the consumer?

Mr. KNORR. Well, I think especially when it comes to retransmission consent, I think some type of balancing of the equation that is one thing that was brought up in testimony by ESPN is we have a buying cooperative but that buying cooperative is for national content. It does not and cannot scale to market by market broadcasters to negotiate those agreements.

Mr. WELCH. And I think what you had said in your testimony, if I remember, is that you have got a take it or leave it type of document that I guess is faxed to you or submitted?

Mr. KNORR. Correct, yes, for the smaller operators, yes, often it is a faxed document or just a letter that comes in the mail with the election notice that says here are the terms and so I think injecting some fairness and some transparency giving us the ability that other DBS operators have to tier broadcasters would be one negotiating element. And then also for many small broadcasters who are outside the exclusion zone that broadcasters have and if they had the right to pick neighboring channels as well, I think that would help competition.

Mr. WELCH. OK, let me go to Mr. Pyne, just I want to add something too to you. You were talking about the ESPN360 and that you don't get involved in how that is priced by the people you sell it to but the bottom line is if the buyers can't absorb the cost indefinitely without passing that on obviously so isn't there down the road a problem that ultimately will result in higher cost to the consumers in order to have access to this with the approach that Disney is taking on this?

Mr. PYNE. I don't believe so. I am sorry. I don't believe so for the following reason is that as broadband has still not fully penetrated in the United States and just a point is if because an ISP has a very strong programming service like ESPN360 and it gets additional subscribers, it actually will get more margin or profit margin to help in fact reduce its overall.

Mr. WELCH. So if I understand what you are saying, it helps on the build out but, you know, I think Mr. Doyle had a fair question. If he wants that service and is going to pay 79 cents for it or $7.90 and I don't want it, as a consumer my preference is to let Doyle pay and not me help him pay. Mr. Knorr.

Mr. KNORR. Well, I mean I would like to answer that directly. I mean we have in our community with very high adoption, I think it might be as high as 80 percent. Fundamentally, I don't think there is any operator and we have several right here that feel that the only impediment to broadband adoption at this point is price sensitivity. I don't think any—there are customers out there that are requiring incentive to get onto the Internet. I mean everybody is getting on the Internet. I mean the Internet has been growing exponentially.

Mr. WELCH. OK, I only have another minute and I want to go to Mr. Moore. I happen to be somebody who thinks that the programming that we had before was an awful lot better than the programming we are having now and you mentioned a number of things in your very good testimony. The tying and bundling you mentioned was a bit of a problem and I wonder if you can elaborate on that?

Mr. MOORE. Well, what is happening is that as you are aware in bundling, you know, the operators are given here is a bundle of programs, channels that you have to take, you know, take it or leave it because you can't just a la carte differentiation them out.

Mr. WELCH. Right.

Mr. MOORE. And what we have discovered is happening is that some of those channels are being occupied by essentially just filler. They are weather maps with a crawl going across the bottom. They are sub-genres of music videos in some cases and these channels basically have national viewership in the tens of thousands and a viable cable operation needs at least, a cable channel needs around 200,000 to just to make it sort of a going concern. So when you look at what they are actually providing and the numbers of people that are actually watching this and the money that they are making, it is clear that they are not actually a business opportunity. They are not actually being innovative. They are simply squatting on the space and keeping other people off the dial.

Mr. WELCH. OK, thank you.

I think my time is up, Mr. Chairman.

Mr. BOUCHER. Thank you, Mr. Welch.

The gentleman from Massachusetts, Mr. Markey, is recognized for 5 minutes.

Mr. MARKEY. Thank you, Mr. Chairman, very much.

Mr. Denson, the program access rules specifically are designed to prohibit discrimination and they provide for a case by case enforcement regime to stop any such discrimination. Moreover, Verizon supported extending the program access rules when they are scheduled to expire asserting that nondiscrimination rules were needed. And so for me as I listen to this discussion and I can understand why Verizon would vigorously oppose any efforts to deny it access to programming particularly sports programming, although my concern for people's access to Yankee games would only be received with crocodile tears but the principle is the same, OK, for any community in American for their sports teams. So I understand that debate but the principle of nondiscrimination is extremely important to me and to our economy. So what I would ask you to do is square that up then with the position that Verizon is taking on the question of nondiscrimination in the net neutrality bill and the net neutrality rulemaking because I kind of feel that there should be a presumption that if you are going to support nondiscrimination over here because it is, you know, good for the company, that the same kind of principle will then be adopted when it comes to other things that are unrelated to that issue but the principle is the same. So could you talk about how you square that circle internally in terms of your views on nondiscrimination?

Mr. DENSON. Yes, to be sure that area is outside of my area of expertise. I am video content across multiple platforms. I program all of the platforms at Verizon, broadband, wireless and the FiOS Service but I am not involved in our net neutrality, however what I would say is that for us it is about the competition is for benefit, direct benefit to the customer and that our position on the regional sports network is that it actually precludes a customer from making a choice that they might otherwise want to make or just consider another provider that they might otherwise want to.

Mr. MARKEY. No, and I appreciate that but you can understand how someone who sat on this committee for 33 years and understands that there are protections on the books for—AT&T lobbied me for 10 years to kind of mandate that they be allowed reasonable cost to deliver long distance service into the network and they begged me, you know, and I worked with them to give that to AT&T in their access to the local loop so that they could provide as a long distance company more competition to Verizon and towards other companies. And so when AT&T and Verizon get together and start to because they were bitter enemies and we are in a new era, you know. It is kind of like, you know, just got to adjust to this changing terrain and now they are aligned against allowing for this open Internet. What Mr. Moore next to you, he supports net neutrality. Mr. Pyne says that he could be open-minded to it as long as illegal activity, as long as piracy is not allowed and in my bill and I don't think there is any of us who have ever advocated that illegal activity should be condoned. In fact, it should be punished to the full extent of the law. And you are here, Mr. Denson, kind of with a portfolio that does not give you authority for fear of jeopardizing your job to speak on net neutrality or can you speak on net neutrality at all?

Mr. DENSON. I cannot and I think the best way that I can portray it here in terms of what I do and in my testimony today is that the Red Sox and the Bruins and the Celtics are each owned by different entities and if you had to choose between or among cable providers or satellite providers because each one had an exclusive right on one of those particular teams, that might be an unfair choice. You might not want to have to make your determination based upon that so that is what I am testifying on today.

Mr. MARKEY. No, and I appreciate that, Mr. Denson, and back in 1992 when the Chairman and I were working on the programming access rules we were thinking about how do we get HBO and ESPN, I think there was only one ESPN then, and other cable programs over to the satellite dish industry. Because I think more than any reason because the Chairman was getting tired of having eight foot size dishes try to get zoning variances all over his district. So if we could get that programming access maybe we could get an 18 inch dish and we have 30 million people with it. And you kind of evolve to this question now that you are talking about which is the Yankee question or, you know, the Bruins question or whatever it is which is just kind of a perfect form of that same question that HBO, ESPN question back then. You just have to keep—how far do you take nondiscrimination? How far do you, you know, do you take it but you are advocating for kind of an outer limit definition here and all I am saying is that the same thing is true in net neutrality. What we are trying to do I would say to your company through you though it is not your responsibility that what we are trying to do is to protect those startups, those Steve Jobs and Serge Gurins and Larry Pages of today who are in the garage and they have got a gadget or they have got an application that they would want to get out there and they have got some ideas, you know, and that is where the revolutions come from. And we are just trying to make sure that the marketplace doesn't stultify, that is we shouldn't have a world where you innovate by permission. OK, you should be able to innovate and you shouldn't be able to be stultified and that is the point that I would make.

I thank you, Mr. Denson, for being here. I thank all the rest of you, as well.

I thank you, Mr. Chairman.

Mr. BOUCHER. Thank you very much, Mr. Markey.

The gentleman from Florida, Mr. Stearns, you have asked questions I think. I am going to ask unanimous consent that we put two documents in the record for today's hearing. One is a letter from Wealth TV. The other is a response from Comcast to the letter from Wealth TV and without objection these items shall be admitted to the record.

[The information appears at the conclusion of the hearing.]

Mr. BOUCHER. I want to say thank you to our witnesses this morning and I will say again that this hearing from my perspective is entirely informational. We wanted to get the benefit of your views on the current state of competition in the video marketplace. You have provided that well. We are well-informed on the subject thanks to you and I think some additional questions are going to be submitted to you. Ms. Blackburn indicated her intention to submit questions to at least two of the witnesses. When they are received, please submit them back to us promptly. We will hold this record open for about a 2-week period in order to receive your responses. So with the committee's thanks to our witnesses this morning, this hearing stands adjourned.

[Whereupon, at 1:05 p.m., the Subcommittee was adjourned.

[Material submitted for inclusion in the record follows:]

STATEMENT OF REPRESENTATIVE EDWARD MARKEY (D-MA)
SUBCOMMITTEE ON COMMUNICATIONS, TECHNOLOGY AND THE INTERNET HEARING ON
"VIDEO COMPETITION IN THE DIGITAL AGE"
OCTOBER 22, 2009

Thank you, Mr. Chairman, for holding this morning's hearing on video competition.

Today's topic is particularly fitting, as the FCC is meeting to consider a Notice of Proposed Rulemaking on preserving the current open Internet architecture that has enabled the Internet to blossom into the most successful communications medium in history.

Such an open architecture is necessary – not only to spur continued competition in the video marketplace – but also to enable Internet users to innovate, to get their voices heard, to launch new services and business enterprises that create jobs and propel our economy forward, and to participate in cultural communications across the planet.

When I was Chairman of this Subcommittee, we held a hearing two and a half years ago on the future of video, exploring high resolution, high definition digital on big screens to digital wireless video services on mobile gadgets and finally, to the video services and technologies enhanced by a high speed, open architecture Internet.

In many ways, the future is now.

Since that hearing in May 2007, we have seen the rise of services that may compete with the movies or traditional television, as well as services and technologies that will complement the video experience consumers have been used to for years.

Technologies such as TiVo and the Slingbox are fascinating technologies that help to make consumers the masters of their video universe – no longer tethered to the networks' time-schedules, or the physical space of the living room.

Moreover, broadband wireless technologies are giving consumers even greater chances to have video "on the go" as they roam.

These technologies often supplement efforts by existing TV networks and content creators themselves to find other apertures and distribution mechanisms for their video content.

The openness of the broadband Internet helps to ensure that innovation can continue to drive opportunity, entrepreneurial investment, and economic growth in this area.

The fact that today any consumer can be a programmer and get their video content up on the Net is changing the way consumers view the Web, their creative opportunities and how politicians run for President and Congress.

Thank you again, Mr. Chairman, for holding this hearing, and I look forward to the opportunity to ask questions of the witnesses.

The Honorable Bobby L. Rush
Subcommittee on Communications, Technology & the Internet
"Video Competition in a Digital Age"
October 22, 2009

As we await the respective sunsets of the exclusive contracting satellite-delivered and satellite-broadcast exemptions under Section 628 of the 1992 Cable Act, which are now approximately two and a half years away, it is only fitting that this subcommittee considers today the state of "video competition in the digital age."

Through passage of the 1996 Telecommunications Act, which mandated that broadcasters transition to digital television in addition to Congressional passage of the Cable Act and Satellite Home Viewer Act – along with scores of FCC orders, rules and ALJ rulings construing those laws – Washington has done its best to promote the most competitive marketplace imaginable for the production and delivery of video over digital satellite, cable, and broadcast airwaves and facilities.

We honor the bedrock free market principles of supply and demand that would preempt dominant firms, who would otherwise seek to consolidate horizontally or to vertically integrate themselves in order to exert market power to the detriment of communications subscribers.

As we watch the emergence of new facilities and non-facilities based video programmers and carriers, we as Members of Congress must ensure that our definition of "multichannel video programming distributor" remains current and up-to-date. In so doing, Congress can ensure full and fair access to programming and non-discriminatory carriage for competitors. As a result, Congress will also be better able to answer whether the aforementioned exemptions should continue, be expanded, or simply be permitted to elapse on schedule.

It is my hope that this hearing will serve as an important guidepost that leads consumers to an increased number of improved offerings and features, which are made available at affordable rates and prices and that are delivered just as reliably and extensively to remote and hard-to-serve areas.

Thank you Chairman Boucher. With that, I yield back the balance of my time.

Statement of Representative Anna G. Eshoo
Subcommittee on Communications, Technology, and the Internet
Hearing on "Video Competition in a Digital Age
2123 Rayburn House Office Building
October 22, 2009

Thank you, Mr. Chairman, for holding this hearing on video competition issues and for bringing together this distinguished panel of witnesses.

We are holding this hearing at the same time as the FCC's historic Open Meeting today, where I expect the Commission will issue a "Notice of Proposed Rule Making" to keep America on the right track when it comes to Network Neutrality. I assume that some Committee Members will use this coincidence of history to focus on the complaints of certain industry representatives that the FCC's actions are a threat to the future of the free world, instead of what this rule making really is – essential to the preservation of a free Internet.

Fear of regulation and fear of profit loss often guide the telecommunications lobby, when it should instead focus on the public interest. Let's remember first and foremost that some of those here today are common carriers and as such, you have enhanced responsibilities to serve America's consumers.

Today's hearing is about the delivery of entertainment. And speaking of entertainment, I'm often entertained when someone has a monopoly and does everything to preserve it, then turns around and accuses someone else of a monopoly when it suits their pecuniary interest. If someone cries monopoly or asks for regulatory intervention or laws to open up an entertainment conduit to increase a profit margin, kindly do not place a choke-hold on someone else's information conduit.

It was only two and a half years ago that my colleague, Ed Markey chaired a hearing to examine the future of video services. We discussed the wide range of changes coming our way during the advent of digital. I remember well being "wowed" by the range of options that we expected to see in the next few years, especially those that could be delivered by the open Internet. Since then, the Internet's Open Architecture, combined with a range of new services, has made video mobile and accessible…not stationary and static.

Today's generation moves between communications platforms as quickly as they use their thumbs to text, and I can only imagine what the next generation will experience when it comes to video services. Competition in this industry is robust and the service providers are numerous. We can expect the new FCC to fulfill its responsibilities to safeguard this competitive environment and adopt rules that encourage the development of new informational resources.

I often hear references to "must have" programming that some providers want, and I have to conclude that the definition of "must have" is often up to a particular sports fan. Some people here consider a football game to be "must have" while I consider noncommercial educational services to be "must have" – and if they are publicly funded, to be "must show."

Thank you all for being here and I look forward to hearing about today's services and tomorrow's expectations. Let's impress everyone with a forward thinking, futuristic outlook that takes us to the next level of video programming and encourages the continued development of these services well into the future.

Wealth TV
Wealth - an abundance of good.

October 21, 2009

The Honorable Rick Boucher
Chairman
Subcommittee on Communications,
Technology and the Internet
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Boucher:

I write to express my hope and concern that your Subcommittee consider the need for greater competition and diversity in the television programming marketplace afforded by independent programming networks. Doing so would help drive down retail prices for the consumer, enhance program quality and meaningful choices, and accelerate the implementation of advanced services. Before independent programmers, entrepreneurs and the financial community invest the significant resources necessary to launch a new cable programming service, however, Congress must address the lack of a fair playing field and meaningful procedures to discourage discriminatory conduct.

The current state of fair program carriage access in the cable industry is unacceptable. Without legislative action, the outlook is grim for emerging independent programmers. WealthTV urges the Subcommittee to recognize that the current environment in the cable industry does not promote a level playing field for unaffiliated programming entrants with respect to fair access to programming carriage by large cable companies. This is because programming affiliated with the large cable Multiple Systems Operators ("MSOs") is afforded considerable structural advantages that are at odds with statutory and regulatory provisions prohibiting discrimination on the basis of affiliation or nonaffiliation. Today, many large cable operators directly own significant programming services and

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Wealth - an abundance of good.

The Honorable Rick Boucher
October 21, 2009
Page 2

the problem is only getting worse. For example, Steve Burke, Chief Operating Officer of Comcast Corporation ("Comcast"), the nation's largest cable company, has stated that the cable distribution arm of Comcast represents 95 percent of its business and the affiliated programming arm of Comcast represents only about 5 percent of its business. Moving forward, Comcast has established a goal to increase the relative composition of its revenues from this mix to one more reliant on revenues from its affiliated programming arm, raising these revenues from 5 percent of the company's revenues to 35 to 40 percent of the company's revenues, a seven- to eight-fold increase over the affiliated programming arm's current contribution to company revenues. Comcast's stated drive to increase the revenues generated by its affiliated programming raises considerable public policy concerns. When a large cable operator carries its own affiliated programming network, it sets the price that it charges itself at the wholesale level, and can pass on the costs to the consumer without any "open marketplace" or oversight protection for the consumer. The small, entrepreneurial community that is the engine for truly independent programming is on the verge of extinction unless immediate and decisive action is taken. Recent news that Comcast is in the midst of due diligence for concluding a deal with GE that would give Comcast a 51 percent stake in NBC Universal should raise further "red flags" for those concerned about video competition and independent voices in television.

Instead of an open playing field with respect to carriage access consideration, decision making takes place behind closed doors. For example, the nation's largest cable companies, specifically Comcast, Time Warner, Cox, and Bright house, cooperate and coordinate some of their programming carriage decisions via their direct or indirect ownership of iN DEMAND, a wholly owned subsidiary that appears to operate as a buying group or agent for the four companies. Additionally, these cable companies have a history of launching their own very similar networks to what is already established in the marketplace by unaffiliated networks.

Over the last few years, there have been bright spots for independent programming networks. The telecommunications carriers, led by Verizon's FiOS TV services and AT&T's U-Verse TV services, have extended fair carriage access consideration to independent networks such as WealthTV. These companies, launching video services against large incumbent cable operators, can only gain subscribers by offering the best possible services at competitive prices. Numerous independent programmers, including WealthTV, have received national distribution on widely distributed packages with the two largest telco video providers, namely Verizon and AT&T, along with regional telecommunications video providers such as SureWest. WealthTV, which launched its 24/7 linear services in 2004, has gained broad carriage of its standard definition and high definition linear feeds by Verizon, AT&T, SureWest and numerous other telecommunications video providers, but, ironically, has been unsuccessful in receiving linear carriage from Comcast and Time Warner, the two largest cable companies. In addition, smaller regional cable operators and overbuilders forced to compete with the large cable providers have also extended carriage to WealthTV utilizing the NCTC, a cooperative of small regional cable operators. Unfortunately some of the largest cable operators, namely Comcast, Time Warner, Bright House and Cox, control approximately 70 percent of the cable market.

There has been much excitement surrounding Internet distribution platforms, such as Hulu and YouTube and direct-to-consumer Internet content distribution platforms. Yet these Internet models have not become a viable, sustaining business model for long-form content from programming networks, but are rather subsidized by existing television distribution models. Moreover, Hulu's alternative content distribution platform would be jeopardized by Comcast's impending purchase of a majority stake in NBC Universal. As a result, the Subcommittee should thoroughly examine not only the impact of a Comcast purchase of NBC Universal on independent cable program, but also the impact such a deal would have on Internet content.

In conclusion, the lack of a level playing field for carriage access consideration with the large cable operators is preventing meaningful programming competition. For the reasons enumerated above, we respectfully urge the Subcommittee to ensure greater competition and diversity in television programming marketplace by directing the Commission to initiate a rulemaking to consider the following reforms: (1) when a prima facie case alleging anticompetitive behavior has been established against a cable operator, the burden should be shifted to the cable operator to demonstrate that it has not engaged in anticompetitive conduct; (2) when the cable company does not carry independent programming; capping the percentage of cable-affiliated programming; (3) prohibiting vertical integration; and (4) requiring cable operators to include a percentage of independent programming as part of their content offering. Such steps would lead to lower prices, more quality programming choices and diversity, and faster implementation of advanced services for the consumer.

Sincerely,

Robert S. Herring
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October 22, 2009

The Honorable Rick Boucher
Chairman
Subcommittee on Communications, Technology and the Internet
2187 Rayburn House Office Building
Washington, D.C. 20515

Re: WealthTV

Dear Chairman Boucher:

We understand that you have received a letter from WealthTV, complaining that it is the victim of discriminatory carriage decisions by cable operators, including Comcast. These claims are the subject of pending adjudicatory proceedings at the Federal Communications Commission, and that process should be permitted to run its course.

The most recent development in these proceedings is that the Commission's Chief Administrative Law Judge released a recommended decision on October 14, 2009, after a 10-day trial, concluding that WealthTV had "failed completely" to substantiate its claims of discrimination on the basis of affiliation by any of the defendants. This decision reflected numerous careful judgments about the reliability of the evidence and the credibility of the witnesses, including WealthTV's President, Charles Herring.

A copy of the Chief Judge's recommended decision and a summary of key quotations from that ruling are attached, and we respectfully request their inclusion in the record of today's hearing.

Sincerely,

David H. Solomon

David H. Solomon
Counsel for Comcast Corporation in *Herring Broadcasting, Inc. d/b/a WealthTV v. Comcast Corporation*, MB Docket No. 08-214, CSR-7907-P

Enclosures

Selected Quotations from Recommended Decision of FCC Chief Administrative Law Judge Richard L. Sippel (Released October 14, 2009), *In the Matter of Herring Broadcasting, Inc. d/b/a WealthTV, Complainant v. Time Warner Cable Inc, Bright House Networks, LLC, Cox Communications, Inc., and Comcast Corporation, Defendants*

The following are direct quotations from the Chief Judge Sippel's Recommended Decision (apart from the headings and subheadings). All paragraph references are to the Recommended Decision; internal citations have been omitted.

WealthTV's Witnesses

Charles Herring

- The record contains a number of statements by WealthTV or its officials that are inconsistent with WealthTV's claim that the network's target audience is males between 25 and 49 years old. For example, prior to this proceeding, Mr. Charles Herring asserted under oath in another case that WealthTV's programming "appeals to about a 25 to 65+ crowd," a demographic that includes all adults within that broadly-defined age group, not just males. Mr. Herring also stated that WealthTV's overriding theme, *i.e.,* the showcasing of a luxury lifestyle, had a very broad appeal and that the only group that would not find WealthTV attractive was "monks that have taken a vow to poverty." Indeed, Mr. Herring acknowledged in cross examination in this case his belief that WealthTV had a broad appeal to men and women. Such statements contradict Mr. Herring's direct written testimony that WealthTV targeted males aged 25-49. ¶ 32.

- Given the contrary testimony of [Comcast executive] Mr. [Alan] Dannenbaum, Mr. Herring's testimony concerning the interest of Comcast "locations" in WealthTV is rejected as unreliable and not credible. ¶ 44 n.179.

- Mr. Herring's testimony regarding Comcast's blocking of WealthTV's launch on Adelphia is rejected as speculative and lacking in reliability. ¶ 46.

- WealthTV also claims that [Comcast executive] Mr. [Alan] Dannenbaum, at a meeting in 2006 with [WealthTV representatives] Messrs. [John] Ghiorzi and [Charles] Herring, asserted that Comcast did not "want to [have] another MTV on its back without owning the network." According to WealthTV, Mr. Dannenbaum's statement "convey[ed] the message that Comcast would not have any interest in launching WealthTV unless it had a direct ownership interest in the network." This allegation lacks credibility for several reasons. First, Mr. Dannenbaum denies making that statement and WealthTV has provided no testimony from Mr. Ghiorzi or any contemporaneous documentation corroborating Mr. Herring's version of the conversation. Second, there is no record evidence suggesting that Comcast had any interest in obtaining any ownership interest in WealthTV. Third, the record shows that the majority of networks that Comcast carries are unaffiliated companies. Comcast even closed on many carriage arrangements with unaffiliated networks during the same time period in which it was discussing possible business arrangements with WealthTV. It is unlikely that a Comcast representative would state that the company objects to carrying WealthTV without Comcast having an equity interest when Comcast's practice is to [do] just the opposite, *i.e.*, to carry unaffiliated networks if such carriage[] further[s] Comcast's business interests. ¶ 47.

Mark Kersey

- The Presiding Judge refused to permit [WealthTV expert witness] Mr. [Mark] Kersey to testify due to his tardiness, and disallowed his proposed testimony on the ground that it was unreliable. ¶ 5 n.18.

- Among the evidence before the Media Bureau was the declaration of Mr. Mark Kersey concerning the tabulation of a survey of WealthTV customers. On the day before Mr. Kersey was expected to be cross-examined WealthTV attempted to change substantial data in Mr. Kersey's written testimony, an attempt that was nipped in the bud. Mr. Kersey's declaration was deemed unreliable. Mr. Kersey was not permitted to testify. ¶ 60 n.238.

- In support of [WealthTV's] claim that its targeted demographic was males, WealthTV also relies upon a "tabulation of data collected through its website by Kersey Research Strategies" . . . . However, at the hearing the Presiding Judge excluded from the record that tabulation on the grounds that it was unreliable. ¶ 34 n.130.

Sandy McGovern

- Ms. Sandy McGovern, WealthTV's programming expert, testified that MOJO was the launch of a new channel because MOJO and INHD were fundamentally different . . . . That conclusion must be rejected in light of the weight of the contrary evidence set forth above. Ms. McGovern acknowledged that she had concluded in her verified declaration that MOJO was a launch of a new network without having viewed a single episode of MOJO programming . . . . It was only after she reached that unsupported conclusion, that Ms. McGovern viewed two weeks of MOJO programming and one week of INHD programming. ¶ 17 n.62.

- Ms. Sandy McGovern, WealthTV's programming expert, testified that the programming content of WealthTV and MOJO were "strikingly similar" in their theme and content. [Defendants' expert witness] Mr. [Michael] Egan's contrary testimony . . . is far more credible. It is significant that Ms. McGovern based her opinion on a sample of WealthTV's programming selected for her review by Mr. Charles Herring. Nothing in the record establishes that the selections of WealthTV's programming viewed by Ms. McGovern are representative of WealthTV's programming as a whole. Shockingly, Ms. McGovern acknowledged that she had reached the conclusion concerning the similarities of the two networks without undertaking a systematic review of the programming of either WealthTV or MOJO. Moreover, Ms. McGovern's conclusion is even further undercut by her acknowledgement on cross-examination of many differences in the programming of the two networks. ¶ 25.

Gary Turner

- Mr. Gary Turner, WealthTV's expert witness, stated that WealthTV "always described itself" as a "male focused channel" . . . . That statement is not credible given the weight of the contrary evidence set forth above. ¶ 31 n.117.

Defendants' Witnesses

Time Warner Cable

- Both Ms. Melinda Witmer, TWC's Chief Programming Officer since 2007 and Mr. Arthur ("Mickey") Carter, TWC's former Senior Director of Programming, testified that TWC's ownership interest in MOJO played no role in TWC's decision not to provide full linear carriage to WealthTV. Their testimony is consistent, competent and credible. ¶ 40.

Comcast

- [Comcast executives] Mr. [Alan] Dannenbaum and Mr. [Matt] Bond testified that pursuing a carriage agreement with WealthTV was a low priority for Comcast given the cost of carriage, the uncertain consumer appeal of WealthTV's programming, bandwidth constraints, the fact that WealthTV had attracted relatively few carriage agreements, the lack of experience of its owners in the programming business, and absence of outside investment support. Both Comcast officials testified that Comcast's affiliation with MOJO played no role either in Comcast's negotiations with WealthTV or in its carriage decisions regarding that network. Their testimony is consistent, competent and credible. ¶ 44.

Cox

- [Cox executive] Mr. [Leo] Brennan testified completely and convincingly that Cox would have refused to carry any national cable network as a multicast feed. Clearly, the refusal was to comply with a non-discriminatory business policy and was not attributable to WealthTV's lack of affiliation with Cox. ¶ 43.

Bright House

- [Bright House executive] Mr. [Steve] Miron testified that BHN's carriage of MOJO played no role in BHN's decision not to carry WealthTV, and his testimony is consistent, competent and credible. ¶ 51.

Expert Witness Michael Egan

- WealthTV provides no evidence to show that [Defendants' expert Michael Egan's] methodology is wrong or unreliable. WealthTV also attempts to discredit Mr. Egan's genre analysis by arguing that Mr. Egan's conclusions concerning the genres of MOJO'S programming are inconsistent with a MOJO press release cursorily listing the types of programming on the network . . . . WealthTV does not show, however, that the programming actually aired by MOJO did not fall into the genres set forth in Mr. Egan's testimony. ¶ 22 n.76.

- The mere fact that Mr. Egan had business dealings with TWC while employed by Cablevision Industries, does not undermine the reliability or credibility of Mr. Egan's consistent, convincing and well organized expert testimony in this case. ¶ 25 n.91.

INHD and MOJO

- WealthTV was not -- and could not have been -- a factor in any of the defendants' decisions to provide carriage to their affiliated networks, INHD and INHD2. ¶ 12.

- [T]he defendants created and carried INHD because it furthered specific, non-discriminatory business objectives. There is no credible evidence that the defendants, in deciding to carry INHD, discriminated against WealthTV or any other independent programming vendor on the basis of affiliation or non-affiliation. ¶ 65.

- The preponderance of the record evidence demonstrates that re-branding of INHD to MOJO involved only the re-focus of an existing channel, and not the launch of a new channel. ¶ 17.

- [T]he record shows that the iN DEMAND personnel responsible for the re-branding were unaware of the existence of WealthTV at the time that the re-branding took place. ¶ 18.

MOJO and WealthTV

- The preponderance of record evidence establishes that MOJO and WealthTV neither aired the same type of programming, nor targeted the same audience. ¶ 20.

- One basis for WealthTV's claim that WealthTV and MOJO are similarly situated is that both networks targeted the same audience: affluent males between the ages of 25 and 49. The parties agree that MOJO targeted this demographic. The overwhelming weight of the record evidence, however, shows that WealthTV targeted a much broader audience that was not limited to adult males between the ages of 25 and 49. Indeed, WealthTV's ... marketing presentations to MVPDs and prospective advertisers; statements on its website; Mr. Charles Herring's sworn testimony in another case; as well as other matters of record show that WealthTV's target audience is not limited to males aged 24 to 49. ¶ 27.

- Significantly, [Defendants' expert] Mr. [Michael] Egan opined that the on-air "look and feel" of MOJO and WealthTV were demonstrably different. Mr. Egan concluded that MOJO conveyed a "hip, urban irreverent, aggressive, and edgy" image akin to that of the MTV Network channels. MOJO's hosts were young, irreverent, and often sarcastic. Its hard-charging production style featured contemporary music, fast-paced transitions between shows and advertisements, and offbeat humor. In contrast, WealthTV presented a "calmer, more mature attitude." WealthTV used orderly transitions to commercial breaks, and aired like library background music, not MOJO's rock and roll. ¶ 23.

- There [is] no credible or reliable evidence proving that any defendant refused to carry WealthTV for any purpose of enhancing the competitive position of the affiliated programming vendor, MOJO. Overall, there is no credible or reliable evidence that any of the defendants considered MOJO at all in deciding whether or not to carry WealthTV. ¶ 67.

Defendants' Dealings with WealthTV

- The record evidence considered as a whole . . . does not support WealthTV's factual claim that any of the defendants failed to negotiate in good faith. ¶ 35.

- The weight of record evidence shows that TWC's decision not to offer full linear carriage to WealthTV was based upon business considerations that were unrelated to TWC's affiliation with MOJO. ¶ 39.

- The preponderance of the record evidence . . . shows that business factors, and not Cox's affiliation with MOJO, were the reasons that Cox declined to carry WealthTV. ¶ 42.

- Even though carriage of WealthTV was a low priority for Comcast, the preponderance of evidence thus shows that Comcast was willing to negotiate in good faith some form of affiliation agreement with WealthTV, and that Comcast made a good faith effort to avoid this carriage complaint. ¶ 45.

- WealthTV also alleges that in 2005 Comcast blocked WealthTV from gaining carriage on Adelphia. But the weight of record evidence does not support such allegation. ¶ 46.

- In July 2007, Mr. James Mead, at the direction of BHN [Bright House Networks], conducted a survey of BHN's customers to measure the level of interest in currently available HD networks that were not then carried by BHN. BHN intended to use the results of the survey to determine which additional HD networks to add to its lineup. The survey showed that BHN customers had very little interest in WealthTV. The survey concluded that WealthTV ranked a dismal 36th of 37 channels most requested by subscribers having HDTV, and was rated next to last among 36 channels that HDTV owners were very likely to watch, if available. ¶ 50.

- The preponderance of the evidence establishes that WealthTV's status as an independent programming vendor played no role in the defendants' individual decisions not to provide full linear carriage to WealthTV. Because there are more programming vendors seeking linear carriage than bandwidth capacity to carry them, MVPDs simply cannot carry all channels that seek carriage. The record evidence shows that defendants based their separate decisions not to carry WealthTV on a linear basis for non-discriminatory business reasons that included not only their evaluation of WealthTV's programming but also their perception that WealthTV lacked an established brand with a proven record of appeal to their subscribers; that WealthTV had not obtained carriage with a number of competing MVPDs; that WealthTV's owners were inexperienced in launching networks; that bandwidth necessary to carry WealthTV could be used for better purposes; that WealthTV lacked outside financing; and that WealthTV's proposed terms and conditions of carriage were unfavorable. There is no credible or reliable evidence proving that any defendant refused to carry WealthTV for any purpose of enhancing the competitive position of the affiliated programming vendor, MOJO. Overall, there is no credible or reliable evidence that any of the defendants considered MOJO at all in deciding whether or not to carry WealthTV. ¶ 67.

- WealthTV argues brashly that the defendants had a double standard for program carriage as compared to unaffiliated vendors . . . . That argument is unavailing because it is unsupported by the evidence of record. ¶ 68.

<u>The Martin Media Bureau's *Hearing Designation Order* and the ALJ's Hearing</u>

- The evidence compiled after the completion of the evidentiary hearings is more complete, accurate, and reliable than the evidence before the Media Bureau when it issued the *HDO*. ¶ 60.

- During the course of the hearing, the direct testimony of the parties, including WealthTV, was tested by searching cross-examination. WealthTV withdrew evidence at hearing immediately prior to cross-examination, such as the written testimony of Ms. McGovern that programming of MOJO deliberately replicated the concepts, genres, formats and targeted audiences of WealthTV. Also, some of the material WealthTV had presented to the Media Bureau, such as the written declaration of WealthTV's expert, Mr. Mark Kersey, was found to be unreliable at the hearing and was rejected. ¶ 60.

<u>WealthTV "Failed Completely" to Prove Affiliation-Based Carriage Discrimination</u>

- Section 76.1301(c) does not impose a per se requirement on a cable operator to negotiate in good faith with a video programming vendor. An alleged failure to negotiate in good faith is relevant to a section 76.1301(c) violation only to the extent that it constitutes factual evidence of a cable operator's discrimination against a video programming vendor "on the basis of affiliation or non-affiliation." ¶ 35 n.131.

- In the final analysis, the manner in which the burden of proof is allocated becomes immaterial to the decision. Whatever the allocation of burdens, the preponderance of the evidence, viewed in its entirety, demonstrates that the defendants never violated section 616 of the Act or section 76.1301(c) of the rules. ¶ 62.

- [A] video programming vendor seeking to satisfy its burden of proving a violation of sections 616 and 76.1301(c) must first establish that a MVPD discriminated against it in the selection, terms, or conditions of carriage "on the basis of the affiliation or non-affiliation." ¶ 63.

- WealthTV failed completely to make that showing in these cases. ¶ 63.

- In order to establish an inference of affiliation-motivated discrimination that was based on defendants' disparate treatment of WealthTV and MOJO, WealthTV bears the threshold burden of showing that WealthTV and MOJO are similarly situated. WealthTV has not satisfied that burden. As shown above, the preponderance of the record evidence demonstrates that WealthTV and MOJO were not similarly situated networks. The two networks aired different types of programming and targeted different demographic. And contrary to WealthTV's intimation, the disparate treatment of two networks by itself does not establish violations of sections 616 and 76.1301(c). To establish those violations, a complainant must affirmatively establish a nexus between the disparate treatment and the programming vendor's affiliation or non-affiliation with the MVPD. Each of the defendants in these cases decided to carry INHD/MOJO for business reasons that are independent of and unrelated to their affiliation with INHD/MOJO. And each of the defendants decided not to carry WealthTV on a linear basis for business reasons that are unrelated to their lack of affiliation with WealthTV. The defendants are not obligated to employ identical criteria in their carriage decisions; they are only required not to discriminate on the basis of affiliation or non-affiliation. WealthTV has not satisfied its burden of proving discrimination on the basis of affiliation or non-affiliation in these carriage complaint cases. ¶ 69.

REDACTED VERSION

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Before the
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)	
	)	MB Docket No. 08-214
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7709-P
Complainant	)	
v.	)	
Time Warner Cable Inc.	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7822-P
Complainant	)	
v.	)	
Bright House Networks, LLC,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7829-P
Complainant	)	
v.	)	
Cox Communications, Inc.,	)	
Defendant	)	
	)	
Herring Broadcasting, Inc. d/b/a WealthTV,	)	File No. CSR-7907-P
Complainant	)	
v.	)	
Comcast Corporation,	)	
Defendant	)	

Issued: October 8, 2009 **Released: October 14, 2009**

RECOMMENDED DECISION OF
CHIEF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Appearances

Kathleen Wallman, Esquire, Harold Feld, Esquire, and Joshua Rose, Esquire, on behalf of Herring Broadcasting, Inc., d/b/a WealthTV; *Jay Cohen, Esquire, Arthur H. Harding, Esquire, Gary Carney, Esquire, Seth A. Davidson, Esquire, Samuel E. Bonderoff, Esquire, Micah M.*

Caldwell, Esquire, and Vibhuti Jain, Esquire, on behalf of Time Warner Cable Inc.; *R. Bruce Beckner, Esquire, Arthur J. Steinhauer, Esquire, Cody Harrison, Esquire, Adam M. Copeland, Esquire, and Robert M. Nelson, Esquire*, on behalf of Bright House Networks, L.L.C.; *David E. Mills, Esquire, Jason E. Rademacher, Esquire, J. Parker Erkmann, Esquire, and Lynn M. Deavers, Esquire*, on behalf of Cox Communications, Inc.; *David H. Solomon, Esquire, L. Andrew Tollin, Esquire, Robert G. Kirk, Esquire, J. Wade Lindsay, Esquire, James L. Casserly, Esquire, Michael H. Hammer, Esquire, Megan Stull, Esquire, Michael Hurwitz, Esquire, Michael P. Carroll, Esquire, David B. Toscano, Esquire, Antonio J. Perez-Marques, Esquire, and Jennifer A. Ain, Esquire*, on behalf of Comcast Corporation; *Kris Anne Monteith, Esquire, William Davenport, Esquire, Gary Schonman, Esquire, and Elizabeth Mumaw, Esquire*, on behalf of the Enforcement Bureau of the Media Bureau of the Federal Communications Commission.

PRELIMINARY STATEMENT

1. In 2007 and 2008, Herring Broadcasting, Inc. d/b/a WealthTV ("WealthTV"), a video programming vendor,[1] filed separate carriage complaints against four multichannel video programming distributors ("MVPDs") [2] — Comcast Corporation ("Comcast"), Time Warner Cable Inc. ("TWC"), Cox Communications, Inc. ("Cox"), and Bright House Networks, LLC ("BHN") — alleging that these MVPDs had violated section 616 of the Communications Act of 1934, as amended, [3] and section 76.1301(c) of the Commission's rules,[4] by discriminating against WealthTV in video programming distribution.[5] Specifically, WealthTV asserted that the defendants failed to negotiate in good faith and denied it carriage while providing preferential treatment to MOJO, a programming vendor affiliated with defendants. According to Wealth TV, MOJO's programming was similar to WealthTV's programming and MOJO targeted the same audience as WealthTV. WealthTV claimed that the defendants' actions unreasonably restrain its ability to compete fairly in the marketplace and requested the Commission to order each defendant to carry WealthTV for a period of ten years under specified terms and conditions.

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[1] A "video programming vendor" is "a person engaged in the production, creation, or wholesale distribution of video programming for sale." 47 U.S.C. § 536(6)(b).

[2] A "multichannel video programming distributor" is "an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming . . . includ[ing]. . . but are not limited to a cable operator.." 47 C.F.R. § 76.1000(e). MVPDs include cable operators, such as the defendants, telephone companies, such as Verizon FIOS, and satellite video program distributors, such as DirecTV and DISH Network.

[3] 47 U.S.C. § 536(a)(3).

[4] 47 C.F.R. § 76.1301(c).

[5] *See* Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against TWC, File No. CSR-7709-P (filed December 20, 2007); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against BHN, File No. CSR-7822-P (filed March 13, 2008); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against Cox, File No. CSR-7829-P (filed March 27, 2008); Herring Broadcasting, Inc. d/b/a WealthTV, Carriage Agreement Complaint Against Comcast, File No. CSR-7907-P (filed April 21, 2008).

2. On October 10, 2008, the Media Bureau, by delegated authority, designated the four captioned cases for hearing in a single consolidated proceeding before an Administrative Law Judge ("Presiding Judge").[6] The Bureau noted that the "pleadings and supporting documentation present several factual disputes, as to whether TWC, BHN, Cox and Comcast discriminated against WealthTV in favor of their affiliated MOJO service"[7] so as to make it unable "to determine on the basis of the existing records whether [it] can grant relief."[8] The Bureau ordered a recommended decision to be issued to the Commission within 60 days.[9] As subsequently modified by the Presiding Judge to comply with the regulations, the issues designated by the *HDO* are as follows:

> (a) whether the defendant[s] engaged in conduct the effect of which is to unreasonably restrain the ability of the complainant to compete fairly by discriminating in video programming distribution on the basis of the complainant's affiliation or non-affiliation in the selection, terms, or conditions for carriage of video programming provided by the complainant in violation of Section 76.1301(c);
>
> (b) if the Administrative Law Judge determines that the defendant[s] [have] discriminated against the complainant's programming in violation of Section 76.1301(c), whether mandatory carriage of the complainant's programming on the defendant[s'] system[s] is necessary to remedy the violation and, if so, the prices, terms and conditions for such carriage, and such other remedies as the Administrative Law Judge recommends."[10]

3. Shortly after the release of the *HDO*, the Presiding Judge issued an Order assigning WealthTV both the burden of proceeding with the introduction of evidence and the burden of proof with respect to the designated issues.[11] The Presiding Judge in a subsequent order ruled

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[6] *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV, et al.*, Memorandum Opinion and Hearing Designation Order, MB Docket 08-214, 23 FCC Rcd 14787, 14792 (¶ 7) (MB 2008) ("*HDO*"). The *HDO* also designated two additional program carriage complaints for hearing in this consolidated proceeding, *NFL Enterprises LLC v. Comcast Cable Communications, LLC,* File No. CSR 7876-P and *TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network v. Comcast Corporation ("MASN")*, File No. CSR-8001-P. The *NFL Enterprises* case was dismissed after the parties reached a settlement. *See NFL Enterprises LLC v. Comcast Cable Communications, LLC,* FCC 09M-42 (released May 19, 2009). The *MASN* case will be addressed in a subsequent decisional ruling.

[7] *HDO*, 23 FCC Rcd at 14814 (¶ 58).

[8] *Id.* at 14787, 14792 (¶ 7).

[9] *Id.* at 14790 (¶ 1).

[10] *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Memorandum Opinion and Order, FCC 08M-47 at 4 (¶ 8) (ALJ, released Nov. 20, 2008) ("*Nov. 20, 2008 Order*").

[11] *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, Order, FCC 08M-44 at 2 (ALJ, released Oct. 23, 2008) ("*Oct 23 Order*").

that the "evidence adduced at the hearing in this proceeding will be given *de novo* consideration and that the resolution of the issues in this case will be "based solely on the evidence compiled during the course of the hearing, and not on the basis of how those questions were addressed in the *HDO*." [12] In light of the multiple complaints, the intricate and unique factual situation of each case, and the need for discovery, the Presiding Judge determined that the "60-day timeframe set forth in the *HDO* cannot be achieved" and set a hearing schedule that extended beyond the deadline set forth in the *HDO*.[13]

4. On December 24, 2008, the Media Bureau issued an order declaring (1) that the Administrative Law Judge had exceeded his authority in issuing a hearing schedule beyond its 60-day deadline, (2) that his delegated authority expired at the end of the 60-day period set forth in the *HDO* and (3) that the Media Bureau would resolve the carriage complaints without the benefit of a recommended decision.[14] Approximately one month later, the Commission, *sua sponte*, issued an order rescinding the Media Bureau's order.[15] The Commission concluded that "the factual determinations required to fairly adjudicate these matters are best resolved through hearings before an Administrative Law Judge, rather than solely through pleadings and exhibits as contemplated by the Media Bureau."[16] The Commission directed the Presiding Judge to update the hearing schedule to accommodate delays caused by the Bureau's December 24th decision. The Commission further directed issuance by the Presiding Judge of a recommended decision "as expeditiously as possible, consistent with the mandates of fairness and due process."[17]

5. Following the completion of discovery, and the submission of written direct testimony, proposed exhibits, and trial briefs, formal hearings were held in the Office of Administrative Law Judges ("OALJ") courtroom at Commission headquarters from April 20, 2009 through May 1, 2009. Three witnesses appeared on behalf of WealthTV[18] and eighteen witnesses collectively appeared on behalf of the defendants.[19]

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[12] *Nov. 20, 2008 Order* at 3 (¶ 6) (emphasis omitted).

[13] *Id.* at 3 (¶ 7).

[14] *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, 23 FCC Rcd 18316 (MB 2008).

[15] *In the Matter of Herring Broadcasting Inc. d/b/a WealthTV, et al.*, 24 FCC Rcd 1581 (2009) ("*Reinstatement Order*").

[16] *Id.* at 1581 (¶ 2).

[17] *Id.*

[18] Mr. Charles Herring, WealthTV's president, testified as a fact witness on behalf of WealthTV. In addition, WealthTV presented two expert witnesses: Ms. Sandra McGovern, President, McGovern Media Associates, LLC; and Mr. Gary Turner, former Chief Executive Officer of Turner Media Group, Inc. WealthTV proffered written direct testimony of another expert witness, Mr. Mark Kersey, but the day before his cross-examination WealthTV sought to withdraw his testimony which concerned the tabulation of a survey, and to substitute a revised tabulation. The Presiding Judge refused to permit Mr. Kersey to testify due to his tardiness, and disallowed his proposed testimony on the ground that it was unreliable. Tr. 3699-3700, 3012-13 (Presiding Judge's bench rulings).

[19] The defendants presented *fifteen fact witnesses* at the hearing: Mr. David Asch, Executive Vice President of iN Demand (for all Defendants); Ms. Melinda Witmer, TWC's Executive Vice President and

6. Subsequently, WealthTV for itself and the defendants in a joint submission filed (1) Proposed Findings of Fact and Conclusion of Law; (2) Reply Proposed Findings of Fact and Conclusions of Law, and (3) optional Proposed Recommended Decisions. The Enforcement Bureau, participating as a party limited to representing the public interest, conducted selective cross-examination and filed Comments opposing the four complaints.

FINDINGS OF FACT

Description of Parties

7. WealthTV is a national video programming vendor as defined by section 616 of the Act and section 76.1301(c) of the Commission's regulations.[20] WealthTV launched[21] its service on June 1, 2004 and provides 24-hours seven day per week, original themed programming in a high definition ("HD") format[22] as well as a down-converted standard definition ("SD") format.[23] WealthTV's programming offers showings of luxury lifestyles, such as travel, fine dining, luxury transport, gadgetry, finance and even philanthropy."[24] WealthTV is a family-owned company, and its principals include Chief Executive Officer Robert Herring Sr., and his son, Mr. Charles Herring. The Messrs. Herring have considerable experience as business entrepreneurs but had not operated a cable network before establishing WealthTV.[25] WealthTV

Chief Programming Officer; Mr. Arthur Carter, former Senior Director of Programming for TWC; Mr. Eric Goldberg, Senior Director of Programming for TWC; Mr. Andrew Rosenberg, Vice President of Programming for TWC (for Defendant TWC); Mr. Madison Bond, Executive Vice President for Content Acquisition for Comcast Cable Communications, LLC, an indirect subsidiary of Comcast; Mr. Alan Dannenbaum, then an Executive Vice President of Network Distribution for Comcast Programming Management, LLC, an indirect subsidiary of Comcast (for Defendant Comcast); Mr. Robert C. Wilson, Senior Vice President of Programming for Cox; Mr. Leo Brennan, Cox's Chief Operating Officer; Ms. Kimberly Edmunds, Senior Vice President and General Manager of Cox's Arkansas/Kansas cable systems (for Defendant Cox); Mr. Steve Miron, President of BHN; and Ms. Anne Stith, former Director of Product Marketing for BHN's Tampa Division (for Defendant BHN). In addition, *three expert witnesses* testified on behalf of the defendants: Mr. Michael Egan, Founder and Principal of the consulting firm Renaissance Media Partners, LLC; Mr. Howard Homonoff, Director in Price Waterhouse Coopers LLC's Entertainment, Media and Communications practice; and Dr. Janusz Ordover, Professor of Economics at the New York University and founding director of a consulting firm.

[20] *See* 47 U.S.C. § 536(b); 47 C.F.R. § 76.1300(e).

[21] Launching occurs when an MVPD commences carriage of a particular video programming network.

[22] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755, 2766 n.25 (2005) (High-definition programming "is a television signal with greater detail and fidelity than provided by the National Television Systems Committee ("NTSC") system. The high-definition picture has approximately twice the visual resolution as NTSC. High-definition programming also provides CD-quality audio.").

[23] WealthTV Exh. 144 (Testimony of Charles Herring) at 1-2, 9.

[24] *Id.* at 9. Apparently, philanthropy shows a sense of one's *noblesse oblige* while gaining tax advantages.

[25] *Id.* at 3-4.

is exclusively funded by the Herrings, as owners, without any outside funding.[26] WealthTV is not affiliated with Comcast, TWC, Cox, or BHN.

8. WealthTV has had uneven success in obtaining carriage on MVPDs but, significantly, WealthTV has been able to reach affiliation agreements with over 125 MVPDs. These include the three Bell telephone companies (Verizon FiOS, AT&T U-Verse, and Qwest Broadband Services), Charter Communications ("Charter"), the National Cable Television Cooperative ("NCTC") and GCI Cable.[27] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** WealthTV is not carried by 18 of the 25 largest MVPDs in the United States, including the two largest satellite MVPDs (DirecTV and Dish Network), Cablevision, Mediacom, Suddenlink, Cable One, Atlantic Broadband, Armstrong, Knology, Midcontinent Communications, Blue Ridge Communications and Broadstripe.[30] WealthTV is not carried by any of the defendants on a linear basis.[31]

9. But Wealth TV still is a significant program vendor and in the past two years **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

10. Defendants Comcast, TWC, Cox, and BHN are MVPDs that serve approximately 24.6 million, 13.3 million, 5.4 million and 2.3 million customers, respectively.[33] Comcast,

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[26] *Id.* at 6.

[27] WealthTV Exh. 144 at 23 (Testimony of Charles Herring).

[28] TWC Exhs. 10, 18, 61; Tr. at 3026-28, 3260-67, 3301 (Herring). "A 'hunting license' refers to an agreement that specifies basic carriage terms and gives the programmer the right to seek carriage by individual cable systems owned by a cable MSO [multiple system operator], as opposed to a nationwide carriage agreement which provides the programming service with carriage on all systems owned by the MSO." *HDO,* 23 FCC Rcd at 14792 n.25.

[29] For example, **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**

[30] Tr. at 3252, 3054, 3255, 3257, 3278, 3290-95, 3302 (Herring).

[31] Tr. at 3253, 3258, 3289. (Herring). A linear service is a service offered on a fixed schedule established by the network, *i.e.*, a service that is available on a specified tier and channel position on a 24 hour/seven days a week schedule. Linear programming is programming that is delivered at the scheduled time it is telecast. In contrast, "on demand" programming is programming that is aired only when specifically requested by a subscriber. Tr. at 3993 (Witmer).

[32] Comcast Exh. 25.

[33] TWC Exh. 75.

TWC, Cox, and BHN jointly own iN DEMAND,[34] the company that provided HD programming between 2003 and 2008 through MOJO and MOJO's predecessors, INHD and INHD2.[35]

iN DEMAND and MOJO

11. In 2002 and 2003, HD programming was scarce.[36] Cable operators, however, were eager to act swiftly to make available HD programming to those "early adopters" who had expended substantial sums in purchasing HD television sets.[37] A number of MVPDs, including satellite providers such as DirecTV and EchoStar, at this time were developing capabilities to distribute HD content.[38]

12. In 2002 and 2003, in response to evolving HD technology and market forces, iN DEMAND developed a business plan to create two new channels, INHD and INHD2, that would showcase the HD format.[39] iN DEMAND launched INHD and INHD2 in September 2003.[40] Soon thereafter, each of the defendants carried the INHD and INHD2 channels without entering into a written affiliation agreement with iN DEMAND.[41] The defendants had business reasons for carrying INHD and INHD2. First, the carriage of these affiliated networks provided defendants with channels in which they could showcase HD programming to those customers which were "early adopters" of HD television sets at a time when there was little HD programming available.[42] Second, by exercising preemption rights, carriage of INHD and INHD2 provided locations in which defendants could air regional or local programming of particular interest to their viewers, such as a special sports event, in HD format.[43] It is particularly noteworthy that WealthTV was not yet launched when the defendants decided to carry INHD and INHD2. Therefore, WealthTV was not — and could not have been — a factor in any of the defendants' decisions to provide carriage to their affiliated networks, INHD and INHD2.

[34] BHN Exh. 9 (Testimony of Steve Miron) at 1-2 (¶ 3); Tr. at 4292 (Asch).

[35] Cox Exh. 84 (Testimony of David Asch) at 6-25 (¶¶ 17-91).

[36] Cox Exh. 84 (Testimony of David Asch) at 4 (¶ 12); TWC Exh. 81 (Testimony of Melinda Witmer) at 7 (¶ 16); Cox Exh. 79 (Testimony of Robert Wilson) at 8 (¶ 26). Tr. at 4290-91 (Asch), 4870 (Wilson).

[37] TWC Exh. 81 (Testimony of Melinda Witmer) at 7 (¶ 15).

[38] Cox Exh. 84 (Testimony of David Asch) at 5 (¶ 16).

[39] Cox Exh. 84 (Testimony of David Asch) at 6 (¶¶ 17-18); Cox Exh. 79 (Testimony of Robert C. Wilson) at 9-10 (¶¶ 31-32).

[40] Cox Exh. 84 (Testimony of David Asch) at 6 (¶ 19).

[41] Tr. at 4334, 4308 (Asch). INHD and INHD2 were made available only to the defendants' HD subscribers, *i.e.*, those subscribers with HD tuners. *E.g.*, Cox Exh. 79 (Testimony of Robert Wilson) at 11 (¶ 36). Tr. at 4333, 4998 (Wilson). TWC tiered INHD, and made the channel available only to a subset of its HD subscribers. Tr. at 4998 (Wilson).

[42] Cox Exh. 84 (Testimony of David Asch) at 6 (¶ 20); Cox Exh. 79 (Testimony of Robert C. Wilson) at 9-10; Comcast Exh. 3 (Testimony of Madison Bond) at 7; Tr. at 4291-93 (Asch).

[43] Cox Exh. 84 (Testimony of David Asch) at 8 (¶ 27); Cox Exh. 79 (Testimony of Robert C. Wilson) at 9-10; Comcast Exh. 3 (Testimony of Madison Bond) at 7; Tr. at 4308 (Asch).

13. The defendants believed that the carriage of INHD and INHD2 furthered their business interests, but viewed the carriage of INHD and INHD2 channels to be a short-term project. They expected eventually to replace those networks when SD networks with established brands and audience developed HD versions of their existing programming.[44]

14. The early adopters of HD technology and primary audience for HD programming at that time were males aged 18-49. For that reason, the iN DEMAND management identified age 18-49 males as the target demographic group for INHD and INHD2,[45] although a specific subset of that group, males aged 25-49, was particularly targeted by INHD and INHD2.[46] To advance its business, iN DEMAND acquired and aired HD programming — *i.e.,* shows featuring sports, movies, and rock music — that was designed to appeal to this target demographic group.[47] Among the programs aired on INHD and INHD2 were "Fields of Glory", a program about college football stadiums; "The A List," a program of high school basketball games; "Hardwood Heavens," a program about famous college basketball arenas, "Tour de Gorge" a program featuring eating contests; "Cathedrals of the Game," a program on famous baseball stadiums, and rock concerts featuring artists such as Ozzy Osbourne and The Who.[48]

15. But HD programming was then relatively scarce, and therefore INHD and INHD2 also aired animated shows and family type programming.[49] Still, the bulk of INHD's and INHD2's budget was expended on programming that was targeted to younger adult males such as sports and movies.[50] Only a small percentage of MOJO's programming budget was allocated to family programming.[51]

16. In 2004, iN DEMAND management commissioned marketing studies of the audience for INHD and INHD2.[52] Research showed that most INHD and INHD2 viewers were affluent and within the targeted group of 18-49 age males.[53] This research also showed that

[44] Cox Exh. 79 (Testimony of Robert C. Wilson) at 10 (¶ 34); Cox Exh. 84 (Testimony of David Asch) at 8-9 (¶ 28); Cox Exh. 3; Tr. at 4310-11 (Asch).

[45] Cox Exh. 84 (Testimony of David Asch) at 7-8. Tr. at 4294, 4296, 4305, 4362-63 (Asch). TW Exh. 12. The demographic males aged 18-49 was used by Nielson for rating purposes.

[46] Tr. at 4297-98 (Asch).

[47] Tr. at 4296-27, 4324 (Asch).

[48] Tr. at 4324-25 (Asch).

[49] Tr. at 4300, 4340-41 (Asch). Mr. Asch testified that family programming had been discontinued by late 2004 or early 2005. Tr. at 4398-4400 (Asch).

[50] Tr. at 4401 (Asch).

[51] *Id.* INHD and INHD2 ceased airing family programming by late 2004 or early 2005. Tr. at 4398-4400 (Asch).

[52] TW Exh. 12.

[53] Cox Exh. 84 (Testimony of David Asch) at 10 (¶ 32). The market research showed that 56 percent of the audience for INHD and INHD2 were men aged 18-49 (100 percent more than HD viewers overall) and that 61 percent of them had annual household incomes of $75,000 or higher. *Id.*

viewers perceived the channels to be random and lacking in focus.[54] To correct this situation, iN DEMAND's management proposed a new brand identity for both INHD and INHD2 to better appeal to its target audience.[55] But iN DEMAND owners would approve only the re-branding of INHD.[56] That re-branding was an evolutionary process that was accomplished over a period of months.[57] This process included the airing of a branded block of original programming called the "MOJO Block," a three hour schedule of programming that was broadcast during prime time two nights a week. Initially, the network retained the name INHD.[58] iN DEMAND's management necessarily retained a substantial portion of its original programming line-up during the re-branding process, but it also acquired additional programming suited to the target demographic. This additional programming enabled it to retire programming that was not geared to younger adult males.[59] On May 1, 2007 — after the MOJO Block had been aired for almost a year — INHD was officially renamed MOJO.[60]

17. Expert testimony of Mr. Michael Egan, defendants' programming expert, shows that it is customary practice in the cable industry for a network to make changes in its programming to heighten its appeal to current viewers and attract new viewers while keeping the same or similar programming genres.[61] The preponderance of the record evidence demonstrates that re-branding of INHD to MOJO involved only the re-focus of an existing channel, and not the launch of a new channel.[62] The programming aired on the INHD-MOJO network between 2004 and 2008 consistently was dominated by the same four genres: sports, movies, music and documentaries.[63] And the programming of each network in each of these four genres generally was geared to the same demographic: younger adult males.[64]

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[54] Tr. at 4312 (Asch).

[55] Cox Exh. 84 (Testimony of David Asch) at 13-14 (¶ 45-46); Tr. 4329-30 (Asch).

[56] Subsequently iN DEMAND's owners shut down INHD2 because they needed more bandwidth for other channels. The INHD2 channel went dark on December 31, 2006. *Id.* at 15 (¶ 52).

[57] Cox Exh. 84 (Testimony of David Asch) at 15 (¶ 49).

[58] Cox Exh. 84 (Testimony of David Asch) at 15 (¶¶ 49, 53-54); Tr. at 4341 (Asch).

[59] Tr. at 4326, 4340 (Asch). Cox Exh. 84 (Testimony of David Asch) at 10, 15 (¶¶ 35, 49).

[60] Cox Exh. 84 (Testimony of David Asch) at 16 (¶ 55); Tr. at 4329 (Asch).

[61] TWC Exh. 85 (Testimony of Michael Egan) at 18 (¶ 25).

[62] Ms. Sandy McGovern, WealthTV's programming expert, testified that MOJO was the launch of a new channel because MOJO and INHD were fundamentally different. WealthTV Exh. 152 (Testimony of Sandy McGovern) at 8 (¶ 14). That conclusion must be rejected in light of the weight of the contrary evidence set forth above. Ms. McGovern acknowledged that she had concluded in her verified declaration that MOJO was a launch of a new network without having viewed a single episode of MOJO programming. Tr. at 3808 (McGovern). It was only after she reached that unsupported conclusion, that Ms. McGovern viewed two weeks of MOJO programming and one week of INHD programming. Tr. at 3811 (McGovern).

[63] TWC Exh. 85 (Testimony of Michael Egan) at 20-21 (¶ 27).

[64] *Id.* at 20-21 (¶¶ 27-28). For example, the movies on INHD included "Clash of the Titans," "Gleaming the Cube," "Lord of the Flies," "Hoffa," and "Hellraiser;" the movies featured on MOJO included "Badlands," "Beyond the Poseidon Adventure," and "Body Heat." *Id.* at 21 (¶ 28). INHD aired

18. iN DEMAND's management did not consider WealthTV's programming or its status as a competitor in its decision to re-brand INHD as MOJO.[65] None of the defendants directed or suggested to iN DEMAND's management that it emulate WealthTV's demographic, content or genre.[66] Indeed, the record shows that the iN DEMAND personnel responsible for the re-branding were unaware of the existence of WealthTV at the time that the re-branding took place.[67]

19. In June 2008, the iN DEMAND owners made the final decision to terminate MOJO.[68] A majority of owners considered the viewership of MOJO to be too low to justify the cost of carriage.[69] The owners also wanted to use the bandwidth occupied by MOJO to carry HD simulcasts of existing networks with established brands and audiences.[70] The MOJO channel served its purposes and was allowed to go dark in December, 2008.[71]

MOJO and WealthTV Networks Not Similarly Situated

20. WealthTV claims that it was similarly situated with MOJO because the two networks targeted the same demographic — affluent younger adult males — and presented similar types of programming.[72] The defendants dispute that WealthTV and MOJO were similar networks. The preponderance of record evidence establishes that MOJO and WealthTV neither aired the same type of programming, nor targeted the same audience.

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performances by music artists such as U2 and Lynaryd Sknyrd; MOJO aired concerts by Sheryl Crow, The Killers, Primal Scream and Rush. *Id.*

[65] Cox Exh. 84 (Testimony of David Asch) at 12, 13, 17 (¶¶ 40, 41, 43, 59); Cox Exh. 79 (Testimony of Robert Wilson) at 38 (¶ 130).

[66] Cox Exh. 84 (Testimony of David Asch) at 12 (¶ 41). *See* Cox Exh. 79 (Testimony of Robert Wilson) at 34, 38 (¶¶ 115, 130).

[67] Cox Exh. 84 (Testimony of David Asch) at 12, 13, 17 (¶¶ 40, 42. 59).

[68] Cox Exh. 84 (Testimony of David Asch) at 15 (¶ 52); Tr. at 4341 (Asch).

[69] Cox Exh. 84 (Testimony of David Asch) at 24-25 (¶ 90).

[70] *Id.* at 24 (¶ 87).

[71] *Id.* at 15 (¶ 52); Tr. at 4664 (Bond).

[72] WealthTV also argues that it is similarly situated with MOJO because the two networks sought advertising from the same companies. WealthTV Exh. 144 (Testimony of Charles Herring) at 26. WealthTV however, identifies only a single company, Bose, in which both networks advertised and only one additional company, Grey Goose Vodka, in which both networks had solicited for advertisements. *Id.* Evidence that MOJO and WealthTV both had business dealings with two advertisers, however, does not establish that the two networks generally solicited or contracted with the same advertisers. And even if WealthTV had established that it and MOJO generally dealt with the same advertisers, the record evidence when considered in its entirety fails to show that the two networks were similarly situated.

Contrast in WealthTV and MOJO Programming

21. According to Mr. Charles Herring, WealthTV's programming is centered upon an overall theme of "how wealth is achieved, used and enjoyed."[73] He testified that the programming "focus[es] on enjoyable aspects of financial success, including travel, fine dining, luxury transport, gadgetry, finance, philanthropy and thoughtful insights on cultures."[74] By contrast, MOJO s programming did not involve the showcasing of a luxury lifestyle, but rather focused generally on sports, movies and music.

22. Defendants' expert, Mr. Egan, compared the programming of WealthTV and MOJO by categorizing and quantifying every program aired by the two networks in sample weeks during July 2007 and January 2008 into specific genres (*i.e.*, music, sports, travel, and recreation, *etc.*).[75] Mr. Egan's analysis established that 54 percent of MOJO's programming time was devoted to sports, music, and movies whereas only three percent of WealthTV's programming time consisted of shows in those genres.[76] He also established that 60 percent of WealthTV's programming time consisted of shows in the genres of travel & recreation, lifestyle, food & drink, documentary, and art/design/collectables — programming that aired only 19 percent of the time on MOJO.[77]

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[73] WealthTV Exh. 144 (Testimony of Charles Herring) at 9.

[74] *Id.*

[75] TWC Exh. 85 (Testimony of Michael Egan) at 6-7 (¶¶ 10-11).

[76] *Id.* Mr. Charles Herring testified that MOJO aired a number of program series that were similar in category type (*i.e.*, adventure, travel, comedy) to the programming broadcast on WealthTV, *see* WealthTV Exh. 144 (Testimony of Charles Herring) at 24-26, but neither he nor any other WealthTV witness attempted to quantify the amount of broadcast time devoted to allegedly similar programming. WealthTV claims that Mr. Egan's analysis is not credible because the genre analysis is not a tested methodology. WealthTV's Proposed Findings at 59 (¶¶ 257-258). But WealthTV provides no evidence to show that methodology is wrong or unreliable. WealthTV also attempts to discredit Mr. Egan's genre analysis by arguing that Mr. Egan's conclusions concerning the genres of MOJO's programming are inconsistent with a MOJO press release cursorily listing the types of programming on the network. WealthTV Reply Findings at 28-29 (¶ 58). WealthTV does not show, however, that the programming actually aired by MOJO did not fall into the genres set forth in Mr. Egan's testimony.

[77] TWC Exh. 85 (Testimony of Michael Egan) at 6-7 (¶¶ 10-11). Based upon a network genre analysis, Mr. Egan provided evidence that WealthTV's programming was more similar to programming of networks such as Fine Living, and American Life TV than to the programming of MOJO. Specifically, Mr. Egan testified that several of the dominant genres on Fine Living and the American Life TV Network were among the top five genres on WealthTV. *Id.* at 14 (¶ 18). Although Mr. Charles Herring stated that it was his "impression" that the programming of Fine Living was not similar to the programming of WealthTV, WealthTV Exh. 144 (Testimony of Charles Herring) at 11, Mr. Herring is not an expert on network programming and his impressions were not the product of any quantitative analysis of the two networks. In any event, even if it were established that WealthTV's programming is dissimilar to the programming aired on Fine Living, that fact would not support the claim that WealthTV is similarly situated to MOJO.

23. Significantly, Mr. Egan opined that the on-air "look and feel" of MOJO and WealthTV were demonstrably different.[78] Mr. Egan, concluded that MOJO conveyed a "hip, urban irreverent, aggressive, and edgy" image akin to that of the MTV Network channels.[79] MOJO's hosts were young, irreverent, and often sarcastic. Its hard-charging production style featured contemporary music, fast-paced transitions between shows and advertisements, and off-beat humor.[80] In contrast, WealthTV presented a "calmer, more mature attitude."[81] WealthTV used orderly transitions to commercial breaks, and aired like library background music, not MOJO's rock and roll.[82]

24. Mr. Egan further testified that if WealthTV and MOJO presented programming covering the same subject-matter, the programming would be dissimilar. This is illustrated by a MOJO's program *Uncorked*, which features an unsophisticated Bill Merritt, a professional comedian who "promises to ask the dumb questions about wine so we won't have to and he delivers."[83] Mr. Merritt is a bumbler who "jokes, rambles, and mugs" while asking silly questions in street interviews, wine stores and restaurants.[84] In contrast, *Taste! The Beverage Show* features serious hosts dressed attractively who visit locations around the world reporting on rum-making in Jamaica, on the brewing of beer in Canada, and the history and art of winemaking in California,[85] featuring travelogue-type scenes.[86] MOJO's show, *Test Drive,* features Craig Jackson, described on MOJO's web site as "the son of an Air Force pilot and semi-pro bowler who grew up to desire to drive really, really fast, drink stale beer, and wear ugly shoes."[87] In that *persona,* Mr. Jackson depicts with humor driving issues and situations faced in urban life, such as auto theft, rental cars, and radar detectors.[88] In contrast, WealthTV's *Wealth on Wheels*, is a program featuring luxury or exotic automobiles, *e.g.*, the history of the Lamborghini automobile company, a show of vintage classic antique cars, or the Concorso Italiano.[89]

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[78] Mr. Egan, testified that "look and feel" is an industry term that describes the personality of a network conveyed by its visuals, the speech and dress of its hosts, music, subject matter, graphics and other factors. Tr. at 5172-73.

[79] TWC Exh. 85 (Testimony of Michael Egan) at 9 (¶ 14); Tr. at 5176 (Egan).

[80] TWC Exh. 85 (Testimony of Michael Egan) at 9 (¶ 14); Tr. at 5176 (Egan).

[81] TWC Exh. 85 (Testimony of Michael Egan) at 9 (¶ 14); Tr. at 5176 (Egan).

[82] TWC Exh. 85 (Testimony of Michael Egan) at 9 (¶ 14); Tr. at 5176 (Egan).

[83] TWC Exh. 85 (Testimony of Michael Egan) at 10-11 (¶ 16).

[84] Tr. at 5182-83 (Egan).

[85] TWC Exh. 85 (Testimony of Michael Egan) at 10 (¶ 16). Tr. at 5180 (Egan).

[86] Tr. at 5180 (Egan).

[87] TWC Exh. 85 (Testimony of Michael Egan) at 11 (¶ 16).

[88] *Id.*

[89] *Id.*

25. Notwithstanding the illustrative evidence described above, Ms. Sandy McGovern, WealthTV's programming expert, testified that the programming content of WealthTV and MOJO were "strikingly similar" in their theme and content.[90] Mr. Egan's contrary testimony described above is far more credible.[91] It is significant that Ms. McGovern based her opinion on a sample of WealthTV's programming selected for her review by Mr. Charles Herring.[92] Nothing in the record establishes that the selections of WealthTV's programming viewed by Ms. McGovern are representative of WealthTV's programming as a whole.[93] Shockingly, Ms. McGovern acknowledged that she had reached the conclusion concerning the similarities of the two networks without undertaking a systematic review of the programming of either WealthTV or MOJO.[94] Moreover, Ms. McGovern's conclusion is even further undercut by her acknowledgement on cross-examination of many differences in the programming of the two networks. For example, Ms. McGovern conceded that MOJO aired sports programming and movies but that WealthTV does not air that type of programming.[95] Ms. McGovern also admitted that WealthTV, but not MOJO, broadcasted shows about fashion, shopping, philanthropy, and health.[96] In addition, she testified that MOJO has no programming comparable to WealthTV's specials on subjects such as watches and jewelry or to WealthTV's "The Boomer Show," a show targeted to the "Baby Boomer" generation of adults between the ages of 44 and 60-64.[97] Conceding at least one difference in the "look and feel" of the two networks, Ms. McGovern testified that WealthTV's programming is family-friendly whereas MOJO's programming was not family-friendly.[98] Ms. McGovern's acknowledgement of many differences in the programming of WealthTV and MOJO negates any credibility of her conclusion that the two networks had strikingly similar programming.

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[90] Tr. at 3715 (McGovern).

[91] WealthTV argues that Mr. Egan's opinions should carry no weight because a company in which Mr. Egan had been a principal was a business partner of TWC in a venture called Renaissance Media Holdings, LLC ("Holdings"). WealthTV Proposed Reply Findings at 30-31 (¶ 61). That relationship lasted less than one and one-half years and ended in March 1998. Tr. at 5216-17 (Egan). The fact that aspects of this past business relationship may have been financially rewarding to Mr. Egan does not establish that his testimony is tainted or unreliable. WealthTV also points out that Mr. Egan "worked in conjunction with TWC as a result of the sale of Cablevision Industries, Mr. Egan's previous employer, to TWC." WealthTV Proposed Reply Findings at 31. The mere fact that Mr. Egan had business dealings with TWC while employed by Cablevision Industries, does not undermine the reliability or credibility of Mr. Egan's consistent, convincing, and well organized expert testimony in this case.

[92] Tr. at 3814-15 (McGovern).

[93] Tr. at 3814-27. Ms. McGovern viewed only six of the 29 shows that were featured on WealthTV's website. Tr. at 3816-17 (McGovern).

[94] Tr. at 3871-72 (McGovern).

[95] Tr. at 3799-3800 (McGovern).

[96] Tr. at 3800-02 (McGovern).

[97] Tr. at 3802-03 (McGovern).

[98] Tr. at 3799 (McGovern).

26. WealthTV's attempt to discredit Mr. Egan's showing on the "look and feel" of the two networks is unpersuasive. WealthTV criticizes the formality of the method by which Mr. Egan conducted the "look and feel" analysis.[99] But it fails to show how Mr. Egan's conclusions were erroneous. Nor did WealthTV present any evidence on the comparative "look and feel" of MOJO and WealthTV in support of its claim that the programming of the two networks is similar. With this gap in evidence, WealthTV does not make a case of favoritism.

Demographic Audience Targeted by WealthTV and MOJO.

27. One basis for WealthTV's claim that WealthTV and MOJO are similarly situated is that both networks targeted the same audience: affluent males between the ages of 25 and 49. The parties agree that MOJO targeted this demographic. The overwhelming weight of the record evidence, however, shows that WealthTV targeted a much broader audience that was not limited to adult males between the ages of 25 and 49. Indeed, WealthTV's **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** its marketing presentations to MVPDs and prospective advertisers; statements on its website; Mr. Charles Herring's sworn testimony in another case; as well as other matters of record show that WealthTV's target audience is not limited to males aged 24 to 49.

28. **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** .

29. Similarly, many of WealthTV's PowerPoint marketing presentations to MVPDs, potential advertisers, and others describe WealthTV as appealing to an audience broader than the claimed target demographic of adult males aged 25 to 49. For example, in a PowerPoint marketing presentation made to ID Media in March 2007, WealthTV described itself as "targeting the most affluent viewer, 25-60+, educated, equal appeal to men and women."[104] In a number of PowerPoint presentations to MVPDs and advertisers, WealthTV described itself in boldface as having a "**[b]road appeal** across age and income demographics."[105] In a PowerPoint

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[99] *See* WealthTV Proposed Reply Findings at 29-30 (¶ 61).

[100] Cox Exh. 75 at 75-6; Cox Exh. 77 at 77-2; TWC Exh. 10 at 10-3; Tr. at 3032-38 (Herring).

[101] WealthTV Exh. 144 at 23 (Testimony of Charles Herring).

[102] Tr. at 3035, 3038, 3047 (Herring).

[103] Tr. at 3795-96 (McGovern).

[104] TWC Exh. 28 at 28-2.

[105] Comcast Exh. 22 at 22-2; Cox Exh. 6 at 6-3; Cox 23 at 23-3; Cox Exh. 56 at 56-3; TWC Exh. 4 at 4-7; TWC Exh. 9-3; TWC Exh. 22 at 22-2 (emphasis in original). Tr. at 3103-3014, 3144-45, 3149-52

slide presented to several of the defendants titled "WealthTV Demographic," WealthTV described its target audience as individuals with "luxury fever," a group "crossing all age groups."[106] Mr. Charles Herring disclosed that people with "luxury fever," *i.e.*, individuals interested in luxury items, include both men and women.[107] Another slide, titled "WealthTV Demographic," features the "baby boomers,"[108] the generation of adults between the ages of 44 and 60-64, which extends well beyond the group targeted by MOJO and its predecessor.

30. In its PowerPoint presentations to MVPDs and other companies. WealthTV typically included a "Magazine Complementary Set" intended to show sample periodicals with demographics overlapping those of WealthTV.[109] Although the Complementary Set included some male-skewed magazines, such as *The Robb Report*, a majority of the sample periodicals were either women magazines, such as W and *Town and Country*, or gender-neutral publications, such as *The New Yorker.* [110] Indeed, Mr. Charles Herring acknowledged that eight of the 10 presented in the "Magazine Complementary Set" were not male-skewed.[111] Similarly, WealthTV presented a marketing PowerPoint presentation to several companies entitled the "TV Competitive Set."[112] According to Ms. McGovern, a television competitive set is designed to convey the channels in which a specific network has an overlapping target demographic.[113] Of the four networks featured on this slide, WealthTV identified two as male-skewed (Golf and CNBC) and two as female-skewed (BBCA and HGTV).[114] The median age of the viewers of CNBC and HGTV were listed as 58.0 and 51.5, respectively.[115]

(Herring). Mr. Charles Herring testified that he had prepared a master PowerPoint deck with various slides that were used by himself and WealthTV sales personnel for presentations to potential advertisers and distributors. Tr. at 3162-63 (Herring).

[106] Comcast 22 at 22-18; Cox Exh. 23 at 23-8.

[107] Tr. at 3119 (Herring). In another PowerPoint slide presented to a number of companies, WealthTV stated that "luxury is hot across broad demographics. . . . Broad demographics with special appeal to multiple groups including Baby Boomers, aspiring low and middle class, and upper class." TWC Exh. 9 at 9-20; Cox Exh. 56 at 56-22; TWC Exh. 22 at 22-15.

[108] TWC Exh. 28 at 28-20. The same "WealthTV Demographic" was presented to a number of companies. *See also*, *e.g.*, Comcast Exh. 22 at 22-20; Cox Exh. 23 at 23-9.

[109] TWC Exh. 22 at 22-3; Cox Exh. 23 at 23-7; TWC Exh. 9 at 9-14; Comcast Exh. 22 at 22-3; Cox Exh. 56 at 56-7.

[110] Tr. at 3100-03, 3118 (Herring).

[111] *Id.*

[112] TWC Exh. 4 at 4-26; TWC Exh.9 at 9-35.

[113] Tr. at 3783.

[114] TWC Exh.9 at 9-35.

[115] *Id.* WealthTV's PowerPoint presentations also typically included slides titled "Featured Programming," setting forth descriptions of highlighted shows including their demographics. *See*, *e.g.*, TWC Exh. 4 at 4-2 to 4-6; Cox Exh. 23 at 23-12 to 23-17. Most of the shows featured in these slide presentation did not target males. For example, in presentations made to Cox and Forbes, WealthTV identified only five of the 18 featured shows as male-skewed. *Id.*

31. WealthTV also included a slide in its PowerPoint marketing presentations to MVPDs and potential advertisers that categorized its demographics in terms of six programming genres: travel/adventure; lifestyle; entertainment; new/information; biography/history; and health.[116] According to WealthTV, its programming in travel/adventure, lifestyle; entertainment; new/information and biography/history, which represents 95 percent of its total programming, is targeted to adults (male and female) whereas its programming on health, which consists of the remaining five percent of its total programming, is targeted specifically to females. WealthTV in that slide identified none of its programming as exclusively targeting men.[117]

32. The record contains a number of statements by WealthTV or its officials that are inconsistent with WealthTV's claim that the network's target audience is males between 25 and 49 years old. For example, prior to this proceeding, Mr. Charles Herring asserted under oath in another case that WealthTV's programming "appeals to about a 25 to 65+ crowd,"[118] a demographic that includes all adults within that broadly-defined age group, not just males. Mr. Herring also stated that WealthTV's overriding theme, *i.e.*, the showcasing of a luxury lifestyle, had a very broad appeal and that the only group that would not find WealthTV attractive was "monks that have taken a vow to poverty."[119] Indeed, Mr. Herring acknowledged in cross-examination in this case his belief that WealthTV had a broad appeal to men and women.[120] Such statements contradict Mr. Herring's direct written testimony that WealthTV targeted males aged 25-49.[121]

33. WealthTV states on its website that it has "a wide range of programming designed to have a broad appeal,"[122] with no mention of a target demographic of males aged 25-49.[123] The website also includes a link to a Call Center Sheet[124] that in turn depicts WealthTV as a network with "broad appeal across all demographics," again without reference to targeting younger adult males.[125] In addition, prior to its launch, WealthTV issued a press release describing itself as a

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[116] TWC Exh.9 at 9-26; Cox Exh. 23 at 23-10; TWC Exh. 4 at 4-16. Tr. at 3789.

[117] Mr. Gary Turner, WealthTV's expert witness, stated that WealthTV "always described itself" as a "male focused channel." WealthTV Exh. 146 at 3 (¶ 3) (Declaration of Gary Turner). That statement is not credible given the weight of the contrary evidence set forth above.

[118] TWC Exh. 139 at 139-4.

[119] TWC Exh. 139 at 139-6; Tr. at 3054-55 (Herring).

[120] Tr. at 3236 (Herring).

[121] WealthTV Exh. 144 at 11-20 (Testimony of Charles Herring).

[122] TWC Exh. 102.

[123] *Id.*

[124] A Call Center Sheet is an informational sheet created by WealthTV to assist distributors of its programming in training its personnel about WealthTV so that they can answer subscribers' questions about the network. Tr. at 3234-35 (Herring).

[125] TWC Exh. 111.

"network designed to appeal to a broad market[]."[126] Nothing in that press release describes the network as targeting 25-49 year old males.

34. In support of its contention that its programming targeted males aged 25-49, WealthTV claims that it presented a slide entitled "Target Audience of WealthTV" in a PowerPoint presentation to Cox, Comcast, Orion Cable and Yachting Magazine's Time4Media, a subsidiary of TWC that characterizes WealthTV's target audience as males between the ages of 25 and 49.[127] WealthTV also relies upon the fact that its exhibits at trade shows featured male-oriented items such as cigar rollers and exotic sports cars and that its advertising images are designed to appeal to affluent younger adult men.[128] Notwithstanding the existence of these presentations, exhibits, advertisements and other evidence, WealthTV's assertion that it "consistently" has described its target demographic as males aged 25-49[129] conflicts with the record evidence considered as a whole. Indeed, the great weight of evidence reflects that WealthTV's target audience is not limited to males aged 25-49.[130]

Good Faith Negotiations

35. WealthTV asserts that "[i]n addition to affording preferential treatment to its affiliate, MOJO, each of the defendants refused to negotiate with WealthTV in good faith for carriage on their respective systems."[131] The record evidence considered as a whole, however, does not support WealthTV's factual claim that any of the defendants failed to negotiate in good faith.

TWC Negotiations

36. WealthTV actively sought carriage on TWC since its inception in 2004, engaging in meetings and discussions with TWC personnel both at the corporate headquarters level and in

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[126] TWC Exh. 109; Tr. at 3249.

[127] WealthTV Exh. 2; WealthTV Exh. 117 at 7; WealthTV Exh. 120 at 8; WealthTV Exh. 122 at 8; WealthTV Exh.144 (Testimony of Charles Herring) at 11-13. In a number of those PowerPoint presentations, however, WealthTV also describes itself as having "broad appeal across age and income demographics. *E.g.*, WealthTV Exh. 117 at 3; WealthTV Exh. 120 at 3; WealthTV Exh. 122 at 3.

[128] WealthTV Exh.144 (Testimony of Charles Herring)) at 17-20; WealthTV Exh. 5.

[129] *See* WealthTV Proposed Reply Findings at 23.

[130] In support of its claim that its targeted demographic was males, WealthTV also relies upon a "tabulation of data collected through its website by Kersey Research Strategies," WealthTV Findings at 24 (¶ 90). However, at the hearing the Presiding Judge excluded from the record that tabulation on the grounds that it was unreliable. Tr. at 3012-13 (Presiding Judge).

[131] "Complainant's Proposed Findings of Fact and Conclusions of Law," (June 2, 2009) at 28 (¶ 107) ("WealthTV's Proposed Findings of Fact and Conclusions of Law"). Section 76.1301(c) does not impose a *per se* requirement on a cable operator to negotiate in good faith with a video programming vendor. An alleged failure to negotiate in good faith is relevant to a section 76.1301(c) violation only to the extent that it constitutes factual evidence of a cable operator's discrimination against a video programming vendor "on the basis of affiliation or non-affiliation." 47 C.F.R. § 76.1301(c).

individual systems across the country.[132] Mr. Herring testified that WealthTV's marketing efforts had produced positive feedback among a number of TWC systems, including locations in Texas, New York, North Carolina, South Carolina, Wisconsin, Ohio, and New England.[133] In contrast, a number of TWC officials, on the basis of direct communications with TWC employees, testified that those reports of interest in WealthTV were inflated and that there was no groundswell of support among TWC systems to carry WealthTV.[134] Contemporaneous emails, however, support the testimony of the TWC officials.[135] At a minimum, the weight of evidence shows that TWC officials in fact believed reasonably that there was not a substantial demand from TWC systems for an affiliation agreement with WealthTV and these officials made reasonable business decisions based on that belief.

37. The parties agree that the TWC system in San Antonio did express an interest in carrying WealthTV.[136] On February 16, 2007, WealthTV and TWC-San Antonio executed a six-month agreement whereby WealthTV would provide video-on-demand ("VOD")[137] programming on TWC's San Antonio system.[138] TWC corporate was interested in the San Antonio VOD trial so it could evaluate WealthTV's appeal.[139] TWC concluded that the performance of WealthTV's VOD was not overwhelming and saw that viewership began to decrease over time.[140] Nonetheless, TWC's San Antonio's office, with the concurrence of TWC corporate officials, expressed an interest in extending the VOD agreement after the expiration of the six month period.[141] But it was WealthTV that refused to extend the VOD trial unless TWC

[132] *E.g.*, WealthTV Exh. 44 (Testimony of Charles Herring) at 29-39; TWC Exh. 82 (Testimony of Arthur Carter) at 3 (¶ 9); TWC Exh. 84 (Testimony of Andrew Rosenberg) at 5-11 (¶¶ 10-26).

[133] WealthTV Exh. 144 (Testimony of Charles Herring) at 30.

[134] TWC Exh. 82 (Testimony of Arthur Carter) at 3-4 (¶¶ 9-10); TWC Exh. 83 (Testimony of Eric Goldberg) at 11 (¶ 5); TWC Exh. 84 (Testimony of Andrew Rosenberg) at 5 (¶ 12); TWC's ownership interest in MOJO played no role in TWC's decision not to carry WealthTV. Contemporaneous emails support the testimony of these TWC officials, *see, e.g.*, TWC Exh. 29, and their testimony is credible.

[135] *See, e.g.*, TWC Exh. 29.

[136] TWC Exh. 82 (Testimony of Arthur Carter) at 4 (¶ 10); WealthTV Exh. 144 (Testimony of Charles Herring) at 32-34.

[137] VOD is programming offered on a per program basis, either with or without a separate per program fee. "VOD allows subscribers to order programming from a central server at any time of day, and to fast-forward, rewind, and pause the programs." *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Report, 24 FCC Rcd 542, 571 (¶ 60) (2009).

[138] TWC Exh. 26; TWC Exh. 83 (Testimony of Eric Goldberg) at 3 (¶ 4); TWC Exh. 84 (Testimony of Andrew Rosenberg) at 3 (¶ 5). WealthTV's VOD content was the only HD VOD content that TWC's San Antonio's system was carrying at that time. TWC Exh. 83 (Testimony of Eric Goldberg) at 3 (¶ 5).

[139] *See* Tr. at 4197-2000 (Rosenberg).

[140] TWC Exh. 83 (Testimony of Eric Goldberg) at 3 (¶ 5).

[141] *Id.* at 3-4 (¶ 7).

agreed to a linear carriage agreement.[142] TWC did not take the bait and there was no extension by mutual refusals to deal.

38. After the San Antonio trial ended, WealthTV and TWC engaged in further negotiations in an attempt to reach a carriage agreement.[143] The two parties met on July 18, 2007. TWC asked WealthTV to offer market research, consumer data or other evidence that that would show WealthTV's value as a programming network. [144] Networks seeking carriage on TWC regularly produce such data. WealthTV did not supply that information at that meeting or thereafter.[145] Still, the parties continued to negotiate, exchanging various proposals and attempting to narrow differences. On September 6, 2007, as part of the continuing negotiations, WealthTV forwarded TWC a revised term sheet that included a hunting license agreement for the linear and VOD carriage of WealthTV's programming that would give TWC free HD VOD carriage upon condition of a linear launch in at least one system.[146] On October 31, 2007, TWC made a counteroffer proposing the removal of the provision that free HD VOD carriage be conditioned on the linear launch in at least one system.[147] WealthTV that same day rejected the counteroffer, asking instead for retention of the provision that that the free HD VOD content be conditioned upon a linear carriage launch on at least one system.[148] On December 3, 2007, TWC offered WealthTV exactly the same terms that WealthTV proposed in its October 31 counteroffer, *i.e.*, a hunting license for linear and VOD service, and an agreement that the HD VOD would be free if TWC launched WealthTV's linear service on at least one system.[149] WealthTV rejected this proposal.

39. The weight of record evidence shows that TWC's decision not to offer full linear carriage to WealthTV was based upon business considerations that were unrelated to TWC's affiliation with MOJO. TWC has a demonstrated history of providing carriage to unaffiliated networks. Only three of 59 networks launched by TWC between 2004 and 2008 were affiliated

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[142] TWC Exh. 83 (Testimony of Eric Goldberg) at 3 (¶ 6); TWC Exh. 84 (Testimony of Andrew Rosenberg) at 4 (¶ 8); TWC Exh. 32.

[143] TWC Exh. 83 (Testimony of Eric Goldberg) at 5-6 (¶ 12); TWC Exh. 84 (Testimony of Andrew Rosenberg) at 4-11 (¶¶ 9-26).

[144] TWC Exh. 84 (Testimony of Andrew Rosenberg) at 5 (¶ 11).

[145] *Id. See* TWC Exh. 81 (Testimony of Melinda Witmer) at 3, 12 (¶¶ 26, 27).

[146] TWC Exh. 48; TWC Exh. 83 (Testimony of Eric Goldberg) at 9 (¶¶ 19, 21).

[147] TWC Exh. 52; TWC Exh. 83 (Testimony of Eric Goldberg) at 10 (¶ 22).

[148] TWC Exh. 83 (Testimony of Eric Goldberg) at 10 (¶ 22).

[149] *Id.* at 10 (¶ 23); TWC Exh. 84, (Testimony of Andrew Rosenberg) at 10 (¶ 23); Tr. at 4191-92 (Goldberg). WealthTV maintains that "TWC does not dispute that [the December 3, 2007] offer was ever presented in writing." *see* WealthTV Proposed Reply Findings of Fact and Conclusions of Law at 19 (¶ 36). But WealthTV does not claim that the offer never was made. Indeed, Mr. Charles Herring on cross-examination acknowledged that TWC made such an offer and that WealthTV rejected it. Tr. at 3379-82 (Herring).

with TWC.[150] TWC lacks capacity to carry all the networks that seek affiliation and must decide what networks are in its best interest to carry.[151] TWC concluded that WealthTV had not shown that its carriage would assist TWC to attract or maintain subscribers. TWC perceived that there was not sufficient support for WealthTV from its systems and WealthTV had failed to provide TWC with ratings data or other form of empirical proof of customer interest.[152] TWC took into account the fact that WealthTV had no established brand recognition with proven appeal to subscribers.[153] In addition, WealthTV, an aspirational channel, did not offer sports or movies which are the types of programming that TWC believes to be highly sought-after by its subscribers.[154] TWC also considered the fact the WealthTV had not gained carriage on TWC's primary satellite competitors DirecTV and DISH and on a number of its cable competitors.[155] Nonetheless, as stated above, TWC had entered into an agreement with WealthTV for VOD carriage on its San Antonio system and offered the network a nationwide hunting license for both linear and VOD carriage — actions which evidence a willingness to carry within business limitations or at least to consider carriage of WealthTV's programming when it would be in the company's business interest.

40. Both Ms. Melinda Witmer, TWC's Chief Programming Officer since 2007 and Mr. Arthur Carter, TWC's former Senior Director of Programming, testified that TWC's ownership interest in MOJO played no role in TWC's decision not to provide full linear carriage to WealthTV.[156] Their testimony is consistent, competent and credible.

Cox Negotiations

41. WealthTV met with Mr. Robert Wilson, Senior Vice President of Programming for Cox and others in Cox's corporate programming department in 2004 and 2005 to discuss WealthTV's desire to obtain carriage on Cox's systems.[157] WealthTV continued to market its programming to Cox in the ensuing years.[158] In 2004, Cox concluded that WealthTV was a marginal network that would not bring value to Cox, and thus it decided not to carry WealthTV.[159] Cox continued to meet with WealthTV, however, because it kept open the

[150] TWC Exh. 56 (Affiliation Agreement); TWC Exh. 81; TW Exh. 85 (Testimony of Michael Egan) at 23 (¶ 31); TW Exh. 81 (Testimony of Melinda Witmer) at 15 (¶ 33).

[151] Tr. at 3912-13 (Witmer).

[152] TW Exh. 81 (Testimony of Melinda Witmer) at 12 (¶ 26).

[153] *E.g.*, TWC Exh. 82 (Testimony of Arthur Carter) at 2-3 (¶¶ 5-7); TW Exh. 81 (Testimony of Melinda Witmer) at 12 (¶ 26).

[154] TWC Exh. 82 (Testimony of Arthur Carter) at 3 (¶ 8).

[155] *E.g.*, TWC Exh. 82 (Testimony of Arthur Carter) at 2-3 (¶¶ 5-7); TW Exh. 81 (Testimony of Melinda Witmer) at 12 (¶ 26).

[156] TW Exh. 81 (Testimony of Melinda Witmer) at 15 (¶ 33); Tr. at 3951-52 (Witmer); Tr. at 4097-98 (Carter).

[157] Cox Exh. 79 (Testimony of Robert Wilson) at 14, 16 (¶¶ 51, 55).

[158] Tr. at 4920 (Wilson).

[159] *Id.*

possibility that WealthTV would provide it with new material that might convince it to carry the network.[160]

42. Cox makes its carriage decisions at the corporate level.[161] It considers a variety of factors in considering whether to add a new network including likely viewer appeal, quality of the programming; probability of success in light of management and business plan; bandwidth constraints; proposed terms and conditions of carriage; and the unique needs of Cox's systems, such as local or regional content.[162] Cox based its decision not to carry WealthTV on the basis of those criteria. Cox believed that WealthTV lacked any brand appeal that might draw an audience and was indistinguishable from many other start-up networks seeking carriage on Cox.[163] Cox concluded that WealthTV offered programming that was closely similar in content and audience to Fine Living, an unaffiliated network already carried by Cox.[164] Cox viewed WealthTV's business plan as assuming that producing content in an HD format would ensure success. Cox considered that plan not to be sustainable because all linear SD networks eventually would roll out HD feeds.[165] Cox also found WealthTV's management team to lack experience in video programming and to have no proven track record.[166] Cox also thought that WealthTV's programming lacked any regional or local appeal.[167] In addition, Cox believed that carriage of WealthTV would not fit into its business strategy of using its scarce bandwidth only for HD programming with demonstrated customer appeal.[168] Finally, Cox viewed the terms of carriage proposed by WealthTV to be unacceptable as a business proposition and even impossible to meet from a logistical standpoint.[169] The preponderance of the record evidence

[160] Tr. at 4919, 4902 (Wilson).

[161] Tr. at 4862 (Wilson); Cox. Exh. 81 (Testimony of Leo (Brennan) at 2 (¶ 4); Tr. at 5077 (Edmunds).

[162] Cox Exh. 79 (Testimony of Robert Wilson) at 14 (¶ 48).

[163] *Id.* at 13, 14, 16-17 (¶¶ 46, 50, 56-58).

[164] *Id.* at 16-17 (¶¶ 56-59).

[165] *Id.* at 24 (¶¶ 77-78).

[166] *Id.* at 25 (¶ 81).

[167] *Id.* at 28-29 (¶¶ 94-95). Mr. Wilson, Cox's Senior Vice President for Programming, is the company official that has the final say in determining whether Cox will enter into affiliation agreements. So Cox's systems knew to contact Cox's corporate programming department if they wanted to seriously consider carriage of a particular network. *See, e.g.*, Exh. 81 (Testimony of Leo Brennan) at 4 (¶ 10); Tr. at 5077-79 (Edmunds). Mr. Wilson received no expression of interest in carrying WealthTV from any Cox system. Cox Exh. 79 (Testimony of Robert Wilson) at 21 (¶ 70). *See* Tr. at 4895 (Wilson). Mr. Wilson is aware of only a single expression of interest received at Cox's corporate programming department — a contact made by Mr. Tony Matthews, the employee responsible for marketing in Cox's Kansas/Arkansas system . Cox Exh. 79 (Testimony of Robert Wilson) at 22 (¶ 71); Tr. at 4895 (Wilson). But Ms. Kimberly Edmunds, the General Manager of Cox's Kansas/Arkansas system testified that she never asked Cox's corporate programming department to carry WealthTV and that she believed that there was no business reason for Cox to carry WealthTV. Cox Exh. 82 (Testimony of Kimberly Edmunds) at 4-5 (¶¶ 14-15); Tr. at 5085 (Edmunds).

[168] *Id.* at 24 (¶ 78).

[169] Cox Exh. 79 (Testimony of Robert Wilson) at 26-28 (¶¶ 86-93).

thus shows that business factors, and not Cox's affiliation with MOJO, were the reasons that Cox declined to carry WealthTV.

43 Still, WealthTV alleges that Cox unreasonably blocked it from carriage on its Las Vegas system by not permitting a deal with KLAS(TV), a network affiliated with CBS, for the multicast of WealthTV's programming.[170] But Cox's actions did not constitute discrimination on the basis of affiliation. KLAS(TV) has the capability to use its digital signals to transmit not only its primary video signal, but also multiple subsidiary programming, known as "multicast" streams.[171] **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** When KLAS(TV) asked Cox if it were willing to carry a multicast program stream that consisted of WealthTV broadcasting, Mr. Leo Brennan, then Senior Vice President and General Manager of Cox's Las Vegas cable system, refused because: (1) **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]**, (2) the carriage of WealthTV via KLAS(TV) would circumvent Cox's policy that all cable programming deals are to be made through Cox's corporate programming department.[174] Mr. Brennan testified completely and convincingly that Cox would have refused to carry any national cable network as a multicast feed.[175] Clearly, the refusal was to comply with a non-discriminatory business policy and was not attributable to WealthTV's lack of affiliation with Cox.[176]

Comcast Negotiations

44. In March 2004 — before the launch of the WealthTV network — WealthTV began meeting with Comcast officials to discuss its desire to obtain carriage on Comcast systems.[177] Between 2004 and 2006, WealthTV representatives had numerous meetings and telephone calls with Mr. Dannenbaum, Comcast's Executive Vice President of Network Distribution of Programming Management and/or Mr. Madison Bond, Executive Vice President for Content

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[170] *See* WealthTV's Proposed Findings of Fact and Conclusions of Law at 40-41 (¶ 178-86).

[171] Exh. 81 (Testimony of Leo Brennan) at 5 (¶ 15).

[172] *See* Cox Exh. 49; Exh. 81 (Testimony of Leo Brennan) at 6 (¶ 17).

[173] Exh. 81 (Testimony of Leo Brennan) at 6 (¶ 17).

[174] Exh. 81 (Testimony of Leo Brennan) at 6-7 (¶¶ 18-19).

[175] *Id.* at 7 (¶ 19).

[176] Cox's decision affected only the broadcast of KLAS(TV) on Cox's Las Vegas system. That decision did not preclude WealthTV from reaching an agreement with KLAS(TV) that provided for the broadcasting of WealthTV's programming over-the air. *Id.* at 7 (¶ 20-21).

[177] WealthTV Exh. 144 (Testimony of Charles Herring) at 41. Tr. 2906-08 (Herring), 4758 (Dannenbaum).

Acquisition. The parties discussed the possibility of Comcast entering into a hunting license with WealthTV and including WealthTV's programming in Comcast's VOD service.[178] Neither Mr. Dannenbaum, Mr. Bond, nor any other Comcast representative ever expressed any interest in entering into a national carriage agreement with WealthTV.[179] Mr. Dannenbaum and Mr. Bond testified that pursuing a carriage agreement with WealthTV was a low priority for Comcast given the cost of carriage, the uncertain consumer appeal of WealthTV's programming, bandwidth constraints, the fact that WealthTV had attracted relatively few carriage agreements, the lack of experience of its owners in the programming business, and absence of outside investment support.[180] Both Comcast officials testified that Comcast's affiliation with MOJO played no role either in Comcast's negotiations with WealthTV or in its carriage decisions regarding that network.[181] Their testimony is consistent, competent and credible.

45. After WealthTV threatened to file a program carriage complaint, Comcast made two offers of carriage to WealthTV. In a telephone call to Mr. Herring on April 14, 2008, Mr. Bond proposed that WealthTV enter into a hunting license with Comcast.[182] Mr. Herring rejected that proposal.[183] WealthTV instead made a proposal that included carriage on a digital tier of Comcast's systems in at least four designated market areas with guaranteed carriage for ten years.[184] On April 17, 2008, Mr. Bond proposed to Mr. Herring that, in addition to the hunting license, Comcast would guarantee linear carriage in an urban market, such as Chicago, and also include WealthTV's programming in Comcast's VOD service.[185] Mr. Bond then offered to toll

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[178] Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 2 (¶¶ 3-4); Comcast Exh. 3 (Testimony of Madison Bond) at 3 (¶ 6).

[179] Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 3 (¶ 7); Tr. at 4753. Mr. Charles Herring testified that "several" Comcast locations expressed support of WealthTV after they were visited by WealthTV's "affiliate sales team." WealthTV Exh. 144 (Testimony of Charles Herring) at 42. Mr. Herring does not identify any such location nor did any member of the WealthTV affiliate sales team corroborate Mr. Herring's testimony. Mr. Danenbaum testified that he made inquiries to Comcast's divisional and corporate management to ascertain whether there was any interest in carrying WealthTV and found no such interest. Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 3 (¶ 7). *See* Tr. at 4777-78 (Dannenbaum). Mr. Dannenbaum's testimony is corroborated by an email sent in 2006 to Mr. John Ghiorzi, WealthTV's Vice President of Affiliate Sales, in which Mr. Dannenbaum stated that he previously informed "both [Mr. Ghiorzi] and Charles [Herring] that I have not received any indication from anyone in the systems or divisions, nor here at corporate, that there is interest in launching your service." Comcast Exh. 21 at 21-2. Given the contrary testimony of Mr. Dannenbaum, Mr. Herring's testimony concerning the interest of Comcast "locations" in WealthTV is rejected as unreliable and not credible.

[180] Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 2-3 (¶¶ 5-6); Comcast Exh. 3 (Testimony of Madison Bond) at 4-5 (¶¶ 8-10).

[181] Comcast Exh. 3 (Testimony of Madison Bond) at 2 (¶ 3); Tr. at 4755 (Dannenbaum); Tr. 4561 (Bond).

[182] Comcast Exh. 3 (Testimony of Madison Bond) at 5 (¶ 12).

[183] *Id.* at 6 (¶ 12). Tr. 3619 (Herring).

[184] Tr. 3619-27 (Herring) WealthTV Exh. 204.

[185] Comcast Exh. 3 (Testimony of Madison Bond) at 6 (¶ 15). Tr. at 4651-52 (Bond). Although WealthTV asserts correctly that Comcast's proposals were not made in writing (*see* WealthTV's

the statute of limitations for the filing of WealthTV's carriage complaint to give the parties additional time to negotiate.[186] Mr. Bond advised Mr. Herring that a Chicago launch would not cover the entire Chicago DMA with its 2.2 million subscribers, but would only cover a subset of that market.[187] WealthTV rejected any such limitation and terminated negotiations.[188] Even though carriage of WealthTV was a low priority for Comcast, the preponderance of evidence thus shows that Comcast was willing to negotiate in good faith some form of affiliation agreement with WealthTV, and that Comcast made a good faith effort to avoid this carriage complaint.

46. WealthTV also alleges that in 2005 Comcast blocked WealthTV from gaining carriage on Adelphia. But the weight of record evidence does not support such allegation. In 2005 WealthTV signed an agreement with OlympuSAT that would have resulted in WealthTV replacing Chronicle on OlympuSAT's channel lineup carried on Adelphia, a cable company that Comcast was in the process of acquiring, as well as other cable systems.[189] Mr. Herring testified that Mr. Dannenbaum met with Messrs. Herring and Ghiorzi on July 6, 2005, and told WealthTV's representatives that Comcast had directed Adelphia not to make any channel lineup changes without Comcast's approval, and that he would block the launch of WealthTV on Adelphia.[190] Mr. Dannenbaum denies any recollection of that conversation.[191] He testified that he was "virtually 100 percent certain" that he did not call Adelphia regarding the carriage of WealthTV.[192] WealthTV did not have Mr. Ghiorzi testify at the hearing. Nor did WealthTV provide any documentary evidence to corroborate Mr. Herring's version of the events, or to support its claim that Comcast prevented WealthTV's carriage on Adelphia. However, Mr. Herring acknowledged on cross examination that he had no personal knowledge of whether Mr. Dannenbaum had contacted Adelphia, or whether Adelphia might have had business reasons for not permitting the carriage of WealthTV.[193] Mr. Herring's testimony regarding Comcast's blocking of WealthTV's launch on Adelphia is rejected as speculative and lacking in reliability.

Proposed Findings of Fact and Conclusions of Law at ¶ 159; *see also* Tr. at 4701 (Bond)), it does not claim that the offers were never made.

[186] Comcast Exh. 3 (Testimony of Madison Bond) at 6 (¶ 15).

[187] WealthTV Exh. 144 (Testimony of Charles Herring) at 45.

[188] Tr. at 3623-24 & 3627 (Herring), 4559-60 (Bond).

[189] WealthTV Exh. 144 (Testimony of Charles Herring) at 42. *Applications for Consent of Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation to Time Warner Cable Inc., and from Adelphia Communications Corporation to Comcast Corporation*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) ("*Adelphia Order*") (approving Comcast and Time Warner acquisition of all domestic cable systems of Adelphia Communications Corporation.).

[190] WealthTV Exh. 144 (Testimony of Charles Herring) at 42-43. Adelphia subsequently decided not to carry WealthTV. *Id.* at 43.

[191] Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 5 (¶ 12).

[192] Tr. at 4779-80 (Dannenbaum).

[193] Tr. at 3639-40 (Herring).

47. WealthTV also claims that Mr. Dannenbaum, at a meeting in 2006 with Messrs. Ghiorzi and Herring, asserted that Comcast did not "want to [have] another MTV on its back without owning the network."[194] According to WealthTV, Mr. Dannenbaum's statement "convey[ed] the message that Comcast would not have any interest in launching WealthTV unless it had a direct ownership interest in the network."[195] This allegation lacks credibility for several reasons. First, Mr. Dannenbaum denies making that statement[196] and WealthTV has provided no testimony from Mr. Ghiorzi or any contemporaneous documentation corroborating Mr. Herring's version of the conversation. Second, there is no record evidence suggesting that Comcast had any interest in obtaining any ownership interest in WealthTV. Third, the record shows that the majority of networks that Comcast carries are unaffiliated companies.[197] Comcast even closed on many carriage arrangements with unaffiliated networks during the same time period in which it was discussing possible business arrangements with WealthTV.[198] It is unlikely that a Comcast representative would state that the company objects to carrying WealthTV without Comcast having an equity interest when Comcast's practice is to just the opposite, *i.e.*, to carry unaffiliated networks if such carriages further Comcast's business interests.

BHN Negotiations

48. BHN is affiliated with TWC.[199] BHN is covered by the affiliation agreements that TWC negotiates with national cable networks.[200] However, BHN has decision-making authority as to what programming is carried on BHN's cable systems,[201] and has entered into separate affiliation agreements with cable networks.[202] Typically, BHN's programming decisions were tied to TWC's programming decisions and BHN usually carried those networks that had affiliation agreements with TWC.[203]

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[194] WealthTV Exh. 144 (Testimony of Charles Herring) at 44.

[195] WealthTV Proposed Findings of Fact and Conclusions of Law at 35 (¶ 154).

[196] Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 5 (¶ 13).

[197] *Id* at 5 (¶ 13); Comcast Exh. 3 (Testimony of Madison Bond) at 2 (¶ 3).

[198] Comcast Exh. 8 (Testimony of Alan Dannenbaum) at 5-6 (¶ 13); Comcast Exh. 3 (Testimony of Madison Bond) at 2 (¶¶ 3, 4).

[199] BHN is an affiliate of Time Warner Entertainment – Advance/Newhouse Partnership, a general partnership whose interests are held by the "TW Partners" (direct and indirect subsidiaries of TWC) and by Advance/Newhouse (a partnership owned by subsidiaries of Advance Publications Inc. and Newhouse Broadcasting Corporation. BHN Exh. 9 (Declaration of Steve Miron) at 1 (¶ 2).

[200] BHN Exh. 9 (Declaration of Steve Miron) at 2 (¶ 7).

[201] Tr. at 4441 (Stith), 4484, 4508 (Miron).

[202] Tr. at 4508-10 (Miron).

[203] Tr. at 4422 (Stith).

49. WealthTV met with BHN representatives between 2004 and 2007 to discuss WealthTV's desire to obtain carriage on BHN's systems.[204] Ms. Anne Stith, then Director of Product Marketing for the BHN's Tampa Division, met with WealthTV after Verizon FiOS, one of BHN's competitors, decided to carry WealthTV.[205] Although Ms. Stith believed that WealthTV had a "[n]ice product," she did not think it was worth BHN's bandwidth needed to carry an HD channel, particularly since there was a lack of customer demand for WealthTV's programming.[206] Mr. Steve Miron, then BHN's President had no interest in carrying WealthTV[207] and declined to meet with the network's representatives.[208] He did advise WealthTV truthfully that BHN is covered by TWC's national affiliation agreements and suggested that WealthTV attempt to negotiate directly with TWC.[209]

50. In July 2007, Mr. James Mead, at the direction of BHN, conducted a survey of BHN's customers to measure the level of interest in currently available HD networks that were not then carried by BHN.[210] BHN intended to use the results of the survey to determine which additional HD networks to add to its lineup.[211] The survey showed that BHN customers had very little interest in WealthTV. The survey concluded that WealthTV ranked a dismal 36th of 37 channels most requested by subscribers having HDTV, and was rated next to last among 36 channels that HDTV owners were very likely to watch, if available.[212]

51. Mr. Miron testified that the most important factor in BHN's decision not to carry WealthTV was its subscribers' lack of interest in its programming.[213] Other decisional considerations included BHN's view that WealthTV was not an established brand; was not managed by persons with a track record of launching successful networks; did not have carriage

[204] WealthTV Exh. 144 (Testimony of Charles Herring) at 39-41.

[205] BHN Exh. 10 (Declaration of Anne Stith) at 2 (¶¶ 5-6).

[206] BHN Exh. 10 (Declaration of Anne Stith) at 4 (¶ 11); BNH Exh. 2 at 2; Tr. at 4427-28, 4465, 4469-70 (Stith).

[207] Tr. at 4534 (Miron).

[208] BHN Exh. 9 (Declaration of Steve Miron) at 4-5 (¶ 12). Tr. at 4506-07, 4527 (Miron). Mr. Miron testified that the WealthTV representative soliciting the meeting told him that a BHN division was very interested in WealthTV. But Mr. Miron's inquiries showed there was no such interest. Tr. at 4535 (Miron).

[209] BHN Exh. 9 (Declaration of Steve Miron) at 4-5 (¶ 12). Mr. Miron stated that WealthTV's failure to obtain an affiliation agreement with TWC played only a "very minor role" in BHN's decision not to carry WealthTV. Tr. at 4508 (Miron). He testified that a lack of consumer interest in the network was the major factor in his decision not to carry the network. Tr. at 4508 (Miron).

[210] BHN Exh. 3 (HD Programming Study Interest, Use, Perceptions); BHN Exh. 9 (Declaration of Steven Miron) at 3-4 (¶ 10). *See* Tr. at 4498-99 (Miron).

[211] Tr. at 4498 (Miron).

[212] BHN Exh. 3 (HD Programming Study, Interest, Use, Perceptions at 2-3. WealthTV ranked 33rd of 36 HD channels that users are "very likely" to watch if available. Id. at 4.

[213] BHN Exh. 9 (Declaration of Steve Miron) at 3 (¶ 9). The lack of subscriber interest in WealthTV in the 2007 James Mead survey was a factor in BHN's decision not to carry WealthTV. Tr. at 4500 (Miron).

agreement with many MVPDs; and did not fill any unique gap in BHN's lineup.[214] The record also shows that BHN is not adverse to carrying unaffiliated networks. In fact, the large majority of networks on BHN systems are those in which BHN has no equity interest.[215] Mr. Miron testified that BHN's carriage of MOJO played no role in BHN's decision not to carry WealthTV,[216] and his testimony is consistent, competent and credible.

CONCLUSIONS OF LAW

A. Statutory Scheme

52. Section 616, added to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[217] directs the Commission to promulgate regulations which "prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors."[218]

53. In accordance with that Congressional directive, the Commission adopted an implementing regulation that closely tracks the operative language of section 616 of the 1992 Cable Act. Regulation section 76.1301(c) provides:

> No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.[219]

54. The statute and the regulation intended to address Congress' stated concern that "vertically integrated cable operators have the incentive and ability to favor affiliated programmers over unaffiliated programmers with respect to granting carriage on their systems."[220] Congress found that cable operators in certain instances could abuse their market

[214] BHN Exh. 9 (Declaration of Steve Miron) at 3 (¶ 9).

[215] BHN Exh.9 (Declaration of Steve Miron) at 2 (¶ 6).

[216] *Id.* at 4 (¶ 11).

[217] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[218] 47 U.S.C. § 536(a)(3).

[219] 47 C.F.R. § 76.1301(c).

[220] *Implementation of Sections 12 and 19 of The Cable Television Consumer Protection And Competition Act Of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, 2643 (¶ 2) (1993) ("*Second Report*"), *reconsideration granted in* part, 9 FCC Rcd at 4415 (1994) ("*Second Report Reconsideration*"). *See* S. Rep. No. 102-92, 102nd Cong., 1 Sess. 1991 at 25, 1991 WL 125145 "Senate Report").

power to the detriment of unaffiliated programmers.[221] Sections 616 and 76.1301(c) were designed to safeguard programming vendors against discrimination that arises from their non-affiliation with the cable operators. That discrimination must be proven to exist and must be shown to have an anti-competitive effect.

55. At the same time, Congress wanted to ensure that its bar against discrimination not have an unintended consequence of "restraining the amount of multichannel programming available by precluding legitimate business practices common to a competitive marketplace."[222] Indeed, one principle advanced by the 1992 Cable Act, of which section 616 is a part, is to "rely on the marketplace, to the maximum extent feasible, to achieve greater availability of the relevant programming," a legislative objective that the Commission took into account in implementing Section 76.1301(c).[223] In other words, Sections 616 and 76.1301(c) are designed to "strike a balance that not only proscribe[s] the behavior prohibited by the specific language of the statute, but also preserve[s] the ability of affected parties to engage in legitimate negotiations."[224]

56. Accordingly, under the statutory and regulatory language, two discrete elements must be proven by WealthTV in order to establish violations by defendants of sections 616 and 76.1301(c). First, the defendants must have discriminated against WealthTV in the selection, terms, or conditions of carriage on the basis of affiliation or non-affiliation. Second, if discrimination by defendants occurred, the effect must be to unreasonably restrain the ability of WealthTV to compete fairly.

B. Assigned Burden of Proof

57. WealthTV argues for a bifurcated burden of proof in carriage complaint proceedings. According to WealthTV, it need carry only an initial burden of proof in establishing a *prima facie* case of discrimination. Then the burden shifts to defendants to prove, by a preponderance of evidence, its legitimate, non-discriminatory business reasons for the disparate treatment.[225] Recall that the Media Bureau in its *HDO* "found" that WealthTV already had made a *prima facie*

[221] Senate Report at 24.

[222] *Second Report Reconsideration*, 9 FCC Rcd at 2643. *See Second Report*, 9 FCC Rcd at 2648 (¶ 15).

[223] *Second Report Reconsideration*, 9 FCC Rcd at 2648 (¶ 15) (*quoting* 1992 Cable Act, § 2(b)(2)). *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage,* First Report and Order, 8 FCC Rcd 3359, 3402 ¶ 145 (1993).

[224] *Second Report Reconsideration*, 9 FCC Rcd at 4416 (¶ 7). *See Second Report*, 9 FCC Rcd at 2648-49 (¶ 15).

[225] WealthTV's Proposed Findings of Fact and Conclusion of Law at 49-50 (¶¶ 227-231). Although WealthTV argues that the burden of proof shifted to the defendants after the *HDO* was issued, elsewhere it states that "[s]ection 616 of the Cable Act and the Commission's program carriage regulations require WealthTV to make two straightforward showings: (1) that Defendants discriminated in the selection, terms, or conditions of carriage on the basis of affiliation or nonaffiliation and (2) that such discrimination unreasonably restrained the ability of WealthTV to compete fairly. WealthTV's Proposed Reply Proposed Findings of Fact and Conclusion of Law at 46 (¶ 98) (internal quotations and brackets omitted).

showing that each defendant had violated Section 76.1301(c).[226] WealthTV relies on that untested prehearing "finding" by the Media Bureau to establish its initial burden of proof before the hearing even began. WealthTV contends that at hearing the defendants faced a "shifted" burden to prove a negative by an evidentiary preponderance that they did not violate the Commission's carriage rule.[227] That argument is rejected.

58. Under delegated authority, the Presiding Judge issued a prehearing order assigning WealthTV "both the burden of proceeding with the introduction of evidence and the burden of proof."[228] Neither the 1992 Cable Act, the Commission's carriage rule nor the *HDO* specify whether the MVPD or the programming vendor bears the burden of proof in a carriage complaint hearing and, therefore, the Presiding Judge had discretion to allocate the burden of proof.[229] The Presiding Judge exercised that discretion reasonably by adhering to the usual practice of requiring that the party seeking relief by Commission order to bear the burden of proving that the violations occurred.[230] WealthTV did not challenge the Presiding Judge's allocation of the burden when the ruling was first issued.[231] Instead, WealthTV has sought a reassignment of the burden of proof after the record has been closed to additional evidence. Such retroactive reassignment would be fundamentally unfair to the defendants. They had a right as parties to rely upon the Presiding Judge's prehearing allocation of the burden of proof in formulating

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[226] *HDO*, 23 FCC Rcd at 14792 (¶ 7) (2008).

[227] *See* WealthTV's Proposed Findings of Fact and Conclusion of Law at 51 (¶ 235).

[228] *Oct 23 Order* at 2.

[229] Section 4(j) of the Communications Act authorizes the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). *See also* 47 U.S.C. § 154(i); 47 C.F.R. § 1.1; *FCC v. Schreiber*, 381 U.S. 279, 289 (1965); *FCC v. Pottsville*, 309 U.S. 134, 143 (1940); *City of Angels v. FCC*, 745 F.2d 656, 664 (D.C. Cir. 1984). The "broad procedural authority" in section 4(j) empowers the Commission to make "ad hoc procedural rulings" in specific adjudications, such as an allocation of the burden of proof in a formal evidentiary hearing. *FCC v. Schreiber*, 381 U.S. at 289, 290. And the Commission in turn has delegated authority to allocate the burden of proof in these adjudicatory proceedings to presiding administrative law judges. *See* 47 C.F.R. §§ 0.341(b), 1.243(i). *See generally* 47 U.S.C. § 155(c)(1) (authorizing delegations of authority). *See generally Broadcast Data Corp. v. Kravetz Media Corp.*, 97 FCC 2d 650, 652 (¶ 5) (Rev. Bd. 1984) (*quoting RKO General, Inc.*, 48 FCC 2d 826, 827 (Rev. Bd. 1974)) ("It is well-established that the ALJ has broad power to regulate the course of a hearing, . . . which power is 'plenary' and 'invests him with great latitude.'"). Pursuant to section 5(c)(3) of the Communications Act, an order issued under delegated authority, such as the Presiding Judge's ruling on the allocation of the burden of proof, has "the same force and effect" as an order that is issued by the Commission. 47 U.S.C. § 155(c)(3).

[230] *See, e.g. Schaffer v. Weast*, 546 U.S. 49, 56, (2005) (noting that where the statute is silent the "the ordinary default rule [is] that plaintiffs bear the risk of failing to prove their claims). *See also* 5 U.S.C. § 556(d) (providing in the absence of statutory direction that "the proponent of a rule or order has the burden of proof.)" *See also Director of Office of Workers' Compensation Programs Department of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994).

[231] *See* 47 C.F.R. § 1.301(b) (providing a procedure whereby a party may request permission to challenge a presiding judge's interlocutory ruling).

litigation strategy for presenting evidence at hearing.[232] In addition, a reallocation of the burden at this stage of the proceeding would run contrary to the Commission's mandate that these program complaint cases be adjudicated "consistent with the mandates of fairness and due process."[233] In addition, a change of ruling on burden allocation would contravene the letter and spirit of the statutory command that the agency "conduct its proceedings in such manner as will best conduce to the . . . ends of justice."[234]

59. For these reasons, the burden of proof did not shift to defendants merely because the Media Bureau pronounced that WealthTV had established a *prima facie* case before the case went to hearing. After the *HDO* was issued but before the hearing began, the Presiding Judge ruled explicitly that he would give "*de novo* consideration" to the evidence adduced and would resolve the issues "*solely* [up]on the evidence compiled during the course of the hearing, and not on the basis of how those questions were addressed in the *HDO*."[235] The Presiding Judge's ruling was approved by the Commission, which in its order reinstating the hearing, directed that fact determinations were to be made "in hearings before an Administrative Law Judge, rather than solely through pleadings and exhibits as contemplated by the Media Bureau."[236]

60. The evidence compiled after the completion of the evidentiary hearings is more complete, accurate, and reliable than the evidence before the Media Bureau when it issued the *HDO*. After the *HDO* was issued, the parties obtained additional information through discovery. During the course of the hearing, the direct testimony of the parties, including WealthTV, was tested by searching cross-examination. WealthTV withdrew evidence at hearing immediately prior to cross-examination, such as the written testimony of Ms. McGovern that programming of MOJO deliberately replicated the concepts, genres, formats and targeted audiences of WealthTV.[237] Also, some of the material WealthTV had presented to the Media Bureau, such as

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[232] WealthTV raised a variety of arguments to support its claim that the burden of proof ought to have been placed on the defendants after the Media Bureau issued the *HDO*. *See* WealthTV's Proposed Findings of Fact and Conclusions of Law at 49-50, 51 (¶¶ 227-31, 235). For example, WealthTV asserts that the burden of proof that differential treatment is not based on affiliation or non-affiliation should be borne by defendants because they have "much more ready access to information about their own decision-making than will unaffiliated vendors." *Id.* at 50 (¶ 231). It also points out that a burden-shifting approach was upheld by the Media Bureau in one arbitration proceeding that currently is on review by the Commission (*TCR Sports Broadcasting Holding, L.L.P. d/b/a/ Mid-Atlantic Sports Network v. Time Warner Cable Inc.*, 23 FCC Rcd (MB 2008), application for review) and has been applied in other types of discrimination cases. WealthTV's Proposed Findings of Fact and Conclusions of Law at 49-50 (¶¶ 228-30). Significantly, however, WealthTV does not attempt to justify a *retroactive* shift of the burden of proof to the defendants after the hearing has been concluded and the record has been closed. Moreover, WealthTV in this formal evidentiary hearing had "access to information" necessary to satisfy its burden of proof through discovery, a feature that distinguishes this proceeding from *TCR Sports Broadcasting*.

[233] *Reinstatement Order*, 24 FCC Rcd at 1581 (¶ 2).

[234] 47 U.S.C. § 154(j).

[235] *Nov. 20, 2008 Order* at 3 (¶ 6) (emphasis in original).

[236] *Reinstatement Order*, 24 FCC Rcd at 1581 (¶ 2).

[237] Tr. at 3715-25 (McGovern).

the written declaration of WealthTV's expert, Mr. Mark Kersey, was found to be unreliable at the hearing and was rejected.[238]

61. For these reasons, the Presiding Judge reaffirms the *October 23 Order* ruling that WealthTV bears the burden of proceeding with the introduction of evidence and the burden of proof. [239] Proof of carriage violations requires a showing that defendants have discriminated against the programming of WealthTV "on the basis of affiliation or non-affiliation." WealthTV, *inter alia*, thus has the affirmative burden of proving that such discrimination occurred. And, contrary to WealthTV's burden shifting argument, the defendants did not have any burden at hearing to prove that their business decisions on programming were not made on the basis of affiliation or non-affiliation. Defendants certainly need not rebut what WealthTV has not proven.

62. In the final analysis, the manner in which the burden of proof is allocated becomes immaterial to the decision. Whatever the allocation of burdens, the preponderance of the evidence, viewed in its entirety, demonstrates that the defendants never violated section 616 of the Act or section 76.1301(c) of the rules.

C. Discrimination on the Basis of Affiliation or Non-Affiliation

63. Recall that a video programming vendor seeking to satisfy its burden of proving a violation of sections 616 and 76.1301(c) must first establish that a MVPD discriminated against it in the selection, terms, or conditions of carriage "on the basis of the affiliation or non-affiliation."[240] Congress did not intend the Commission "to create new standards for conduct in determining discrimination" but instead directed that the Commission be guided by "the extensive body of law . . . addressing discrimination in normal business practices."[241] In order to establish disparate treatment,"[242] *i.e.* that the litigant has suffered discrimination "on the basis of" a proscribed consideration, the litigant must prove that the proscribed factor "actually motivated the decision." [243] The litigant must show that the proscribed trait "actually played a role in th[e]

[238] Among the evidence before the Media Bureau was the declaration of Mr. Mark Kersey concerning the tabulation of a survey of WealthTV customers. On the day before Mr. Kersey was expected to be cross-examined WealthTV attempted to change substantial data in Mr. Kersey's written testimony, an attempt that was nipped in the bud. Mr. Kersey's declaration was deemed unreliable. Mr. Kersey was not permitted to testify. Tr. at 3699-3700 (Presiding Judge).

[239] *Oct 23 Order* at 2.

[240] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c). *See* paragraphs 52-56, above.

[241] H.R.Rep. No. 102-628, 102nd Cong., 2d Sess. 110 (1992), 1992 WL 166238 ("House Report"). *See Second Report*, 9 FCC Rcd at 2644 n.6.

[242] *See Ricci v. DeStefano*, 129 S.Ct. 2658, 2672-74 (2009). In addition to "disparate treatment" cases, some anti-discrimination statutes prohibit forms of unintentional discrimination that have a disparate impact on a protected class. *Id.* at 2673. *See, e.g.,* 42 U.S.C. § 200e-2(k)(1)(A)(i). Sections 616 and 76.1301(c) do not speak in terms of disparate impact.

[243] *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) (*quoting Hazan Paper Co. v. Biggins*. 507 U.S. 604, 610 (1993)). *See Ricci v. DeStefano*, 129 S.Ct. 2658, 2672 (2009) (*quoting Watson v. Forth Worth*

process and had a determinative influence on the outcome."[244] The litigant can make that showing by direct evidence, such as statements showing a discriminatory intent, or by circumstantial evidence,[245] such as uneven treatment of similarly situated entities. WealthTV failed completely to make that showing in these cases.

64. The evidence of record establishes that the defendants decided in 2003 to carry INHD (the channel that subsequently was re-branded MOJO) for legitimate, non-discriminatory business purposes.[246] In order to keep up with competing MVPDs, such as DirecTV and EchoStar, the defendants faced a business need to offer additional HD content through an additional HD channel to appeal to "early adopters" of HD sets.[247] The defendants also needed the flexibility to preempt scheduled programming of the MOJO channel depending upon the regional or local programming interests of its viewers.[248] They additionally wanted the flexibility to drop the MOJO channel when HD versions of programming of existing cable networks with their established brands and audiences programming of became available.[249]

65. In 2003, there was very little HD programming available.[250] When the iN DEMAND managers proposed the creation of INHD to satisfy their owners' short-term need for channels that provided HD programming that they could preempt at will, the defendants — the owners of iN DEMAND — approved this plan.[251] In other words, the defendants created and carried INHD because it furthered specific, non-discriminatory business objectives. There is no credible evidence that the defendants, in deciding to carry INHD, discriminated against WealthTV or any other independent programming vendor on the basis of affiliation or non-affiliation. For example, WealthTV did not show that defendants had denied carriage to a non-affiliated vendor that could have better served defendants' business objectives than INHD. Indeed, because *WealthTV had not yet launched at the time the defendants decided to carry INHD*,[252] carriage of WealthTV (instead of INHD) was not available to the defendants in 2003.

Bank & Trust, 487 U.S. 977, 986 (1988) ("A disparate-treatment plaintiff must establish 'that the defendant had a discriminatory intent or motive'" for its action.).

[244] *Hazan Paper Co.*, 507 U.S. at 610. *Accord Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2350 (2009); *Kentucky Retirement Systems v. EEOC*, 128 S.Ct. 2361, 2367 (2008).

[245] *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98-100 (2003).

[246] *See* paragraphs 11-13, *supra.*

[247] Cox Exh. 84 (Testimony of David Asch) at 6 (¶ 20); Cox Exh. 79 (Testimony of Robert C. Wilson) at 9-10; Comcast Exh. 3 (Testimony of Madison Bond) at 7; Tr. at 4291-93 (Asch).

[248] Cox Exh. 84 (Testimony of David Asch) at 8 (¶ 27); Cox Exh. 79 (Testimony of Robert C. Wilson) at 9-10; Comcast Exh. 3 (Testimony of Madison Bond) at 7; Tr. at 4308 (Asch).

[249] Cox Exh. 79 (Testimony of Robert C. Wilson) at 10 (¶ 34); Cox Exh. 84 (Testimony of David Asch) at 8-9 (¶ 28); Cox Exh. 3; Tr. at 4310-11 (Asch).

[250] Cox Exh. 84 (Testimony of David Asch) at 4 (¶ 12); TWC Exh. 81 (Testimony of Melinda Witmer) at 7 (¶ 16); Cox Exh. 79 (Testimony of Robert Wilson) at 8 (¶ 26). Tr. at 4290-91 (Asch), 4870, (Wilson).

[251] Cox Exh. 84 (Testimony of David Asch) at 6 (¶¶ 17, 18); Tr. at 4916 (Wilson)

[252] WealthTV Exh. 144 (Testimony of Charles Herring) at 1-2.

66. WealthTV argues that iN DEMAND in 2007 launched what WealthTV characterizes as "a new channel, MOJO,"[253] and that each of the defendants discriminated unlawfully against WealthTV by carrying MOJO instead of WealthTV. As shown in paragraphs 16-17, however, the defendants did not launch MOJO as a new channel in 2007. Instead the record evidence shows that the re-branding of INHD into MOJO consisted of incremental changes over many months resulting in no significant change in the network's target demographic or general content. That re-branding constituted an evolutionary re-focus of an existing channel rather than the independent launch of a new network.

67. The preponderance of the evidence establishes that WealthTV's status as an independent programming vendor played no role in the defendants' individual decisions not to provide full linear carriage to WealthTV.[254] Because there are more programming vendors seeking linear carriage than bandwidth capacity to carry them, MVPDs simply cannot carry all channels that seek carriage.[255] The record evidence shows that defendants based their separate decisions not to carry WealthTV on a linear basis for non-discriminatory business reasons that included not only their evaluation of WealthTV's programming but also their perception that WealthTV lacked an established brand with a proven record of appeal to their subscribers; that WealthTV had not obtained carriage with a number of competing MVPDs; that WealthTV's owners were inexperienced in launching networks; that bandwidth necessary to carry WealthTV could be used for better purposes; that WealthTV lacked outside financing; and that WealthTV's proposed terms and conditions of carriage were unfavorable.[256] There is no credible or reliable evidence proving that any defendant refused to carry WealthTV for any purpose of enhancing the competitive position of the affiliated programming vendor, MOJO. Overall, there is no credible or reliable evidence that any of the defendants considered MOJO at all in deciding whether or not to carry WealthTV.

68. WealthTV argues brashly that the defendants had a double standard for program carriage as compared to unaffiliated vendors.[257] WealthTV claims that defendants gave automatic carriage to INHD and MOJO without entering into a written carriage agreement,[258] and denied carriage to WealthTV based upon a enumerated criteria , *inter alia*, the experience of the video programming vendor's management team, the video programmer's financial strength, price and terms of carriage, video programming service carried by competitors, price and terms of carriage, bandwidth constraints.[259] WealthTV posits that if defendants had applied those criteria evenhandedly, MOJO would not have satisfied many of them.[260] That argument is unavailing because it is unsupported by the evidence of record.

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[253] WealthTV's Proposed Findings at 9 (¶ 33).

[254] *See* paragraphs 35-51, *supra*.

[255] TWC Exh. 86 (Testimony of Howard B. Homonoff) at 5 (¶ 10).

[256] *Id.*

[257] WealthTV Proposed Findings at 12-23 (¶¶ 46-84).

[258] *Id* at 12-14 (¶ 48-55).

[259] *Id* at 14-22 (¶ 56-812).

[260] *Id* at 14-16 (¶¶ 56, 57, 79).

69. In order to establish an inference of affiliation-motivated discrimination that was based on defendants' disparate treatment of WealthTV and MOJO, WealthTV bears the threshold burden of showing that WealthTV and MOJO are similarly situated.[261] WealthTV has not satisfied that burden. As shown above, the preponderance of the record evidence demonstrates that WealthTV and MOJO were not similarly situated networks.[262] The two networks aired different types of programming and targeted different demographic groups.[263] And contrary to WealthTV's intimation, the disparate treatment of two networks by itself does not establish violations of sections 616 and 76.1301(c). To establish those violations, a complainant must affirmatively establish a nexus between the disparate treatment and the programming vendor's affiliation or non-affiliation with the MVPD. Each of the defendants in these cases decided to carry INHD/MOJO for business reasons that are independent of and unrelated to their affiliation with INHD/MOJO.[264] And each of the defendants decided not to carry WealthTV on a linear basis for business reasons that are unrelated to their lack of affiliation with WealthTV. The defendants are not obligated to employ identical criteria in their carriage decisions; they are only required not to discriminate on the basis of affiliation or non-affiliation.[265] WealthTV has not satisfied its burden of proving discrimination on the basis of affiliation or non-affiliation in these carriage complaint cases.[266]

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[261] *See, e.g., Shah v. General Electric Co*, 816 F.2d 264, 268 (6th Cir. 1987). *See generally Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977).

[262] *See* paragraphs 20-34, *supra*

[263] *See* paragraphs 20-34, *supra.*

[264] As noted previously, the defendants carried the channel that became MOJO for a specific business purpose, *i.e.*, obtaining HD programming attractive to the younger adult male "early adopters" of HD television sets while reserving the right to preempt the network's programming when it suited its business needs and ultimately to drop the channel when more desirable HD programming became available. *See* 4 12-14, 62, *supra.* WealthTV has not shown that its carriage by defendants would have served that business purpose. The record shows, that WealthTV did not specifically target the younger adult male "early adopters" of HD sets, the very group that defendants sought to attract by carrying INHD/MOJO. And nothing in the record shows that WealthTV would have permitted its programming to be preempted at will.

[265] Contrary to WealthTV assertion, the defendants did not automatically carry MOJO because it was an affiliate. As noted above, the defendants made their decision to carry the channel that became MOJO in 2003 for business purposes that were unrelated to its status as an affiliated company. *See* paragraphs 12-14, 64, *supra.* And the defendants dropped that channel (notwithstanding its affiliation) when carriage no longer served a business purpose. Cox Exh. 84 (Testimony of David Asch) at 23-25 (¶¶ 84-91).

[266] WealthTV's reliance on evidence that INHD/MOJO and the defendants had no written contract for carriage is misplaced. It is generally considered in the industry that the lack of a written affiliation agreement places the video programmer in a disadvantageous position. Tr. at 4069-70 (Witmer). For example, it gives an MVPD the ability abruptly to alter the terms of carriage to suit its own business purposes, to preempt the network's programming at will, and to drop the network whenever it suited their business needs. Mr. Bond testified that Comcast did not want to enter into an affiliation agreement with iN DEMAND when INHD was launched because Comcast "did not really know if [INHD] had a future" and Comcast thought it "might end up going away at some point in time with the proliferation of [other HD channels]." Tr. at 4562-63 (Bond). Thus, there is no decisional significance to the absence of a written contract.

D. Unreasonable Restraints on WealthTV's Ability to Compete Fairly

70. In order to establish a violation of sections 616 and 76.1301(c), a video programming vendor also must show that the effect of the MVPD's discriminatory conduct is to "unreasonably restrain" its "ability to compete fairly."[267] Relying on an antitrust analysis, the defendants argue that this statutory and regulatory language requires a video programming vendor to prove the existence of a restraint that is "'unreasonably restrictive of competitive conditions.'"[268] The defendants claim that WealthTV cannot satisfy that antitrust standard because WealthTV could compete successfully by securing carriage on MVPDs that are unaffiliated with the defendants. Specifically, defendants argue that WealthTV by obtaining carriage agreements on other MVPDS, including DirectTV and Dish, could have gained access to 50 million subscribers, and thus could not be restrained in its ability to compete.[269] Cox and BHN separately argue that they could not have violated sections 616 and 76.1301(c) given their low percentage of total subscribers, and the small percentage of interest in iN DEMAND.[270]

71. Defendants' arguments that antitrust standards are encased in sections 616 and 76.1301(c) are unpersuasive. The antitrust laws are designed to protect competition and not competitors.[271] The legislative objective underlying sections 616 and 76.1301(c), in contrast, is to protect a specific group of competitors — independent video programming vendors from discrimination in carriage decisions by MVPDs based upon affiliation or non-affiliation.[272] The legislative history of section 616 specifies that the purpose of sections 616 is to "ensure" that a vertically integrated MVPD "does not discriminate against an unaffiliated video programming vendor in which it does not hold a financial interest."[273] The defendants' construction of sections 616 and 76.1301(c) would permit MVPDs to discriminate against unaffiliated video programming vendors — indeed, permit MVPDs to engage even in intentional and significant discrimination — simply by showing that they have a relatively small percentage of overall subscribers or that a large proportion of viewers subscribe to MVPDs that are not vertically integrated. Such a construction undermines the very purpose underlying sections 616 and 76.1301(c). It also is totally at odds with the legislative history which shows that Congress

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[267] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

[268] "Defendants Joint Proposed Findings of Fact and Conclusions of Law," (June 2, 2009) at 150 (¶ 26) (*quoting Standard Oil Co. v. United* States, 221 U.S. 58 (1911).

[269] *Id.* at 151-52 (¶¶ 29, 30).

[270] *Id.* at 152 (¶ 31). Cox has 3.4 million subscribers and BHN has 2.5 million subscribers out of a total of 95 million subscribers. Cox and BHN respectively have 12 percent and 5 percent interest in iN DEMAND. BHN Exh. 8 (Expert Report of Januz Ordover) at 5 (¶ 9); Cox Exh. 44 (Expert Report of Januz Ordover) at 6 (¶ 9).

[271] *See, e.g., Brown v. United States,* 370 U.S. 294, 320 (1962).

[272] *See Second Report*, 9 FCC Rcd at 2643 (¶ 2).

[273] House Report at 110. *See Second Report*, 9 FCC Rcd at 2643 (¶ 2).

intended section 616 to "provide new remedies" separate from those available under the antitrust laws.[274]

72. The defendants further err in claiming that an insufficient showing of competitive impact on WealthTV alone demonstrates that WealthTV failed to establish a violation of sections 616 and 76.1301(c). Defendants Comcast, TWC, Cox, and BHN serve approximately 24.6 million, 13.3 million, 5.4 million and 2.3 million subscribers, respectively.[275] By denying linear carriage on all of its systems, each defendant made it more difficult for WealthTV to gain access to millions of customers,[276] which in turn had a negative competitive impact on WealthTV.[277] The denial of carriage had the effect of impairing the growth in WealthTV's subscription revenues, making it more difficult for WealthTV to attract advertisers, and preventing WealthTV from spreading its costs across a larger subscriber base.[278] Contrary to the defendants' argument, WealthTV's ability to secure carriage from other MVPDs by itself does not establish that the actions of the defendants in this case could not have unreasonably restrained WealthTV's ability to compete fairly within the meaning of sections 616 and 76.1301(c).[279] If defendants' argument were to prevail, virtually no MVPD ever would be found to have violated sections 616 and 76.1301(c).

73. WealthTV cannot satisfy its burden to establish that each defendant's conduct "unreasonably restrain[ed]" its "ability to compete fairly"[280] merely by showing that the defendants' individual carriage decisions adversely affected its competitive position in the marketplace. As shown by the plain language: (1) the only restraints proscribed by sections 616 and 76.1301(c) are those that are "unreasonabl[e]," and (2) such restraints must impair the video

[274] House Report at 111.

[275] TWC Exh. 75.

[276] Contrary to WealthTV's intimation, *see* WealthTV Findings at 63 (¶ 137), the defendants' *collective* subscriber base is not relevant in assessing whether or not each *individual* defendant unreasonably constrained WealthTV's ability to compete fairly.

[277] Cox and Bright House presented the expert testimony of Dr. Ordover, who concluded that WealthTV had not shown that any "acts by Cox or Bright House have resulted in any exclusion or foreclosure of WealthTV from competing in the relevant marketplace." BHN Exh.8 (Direct Testimony of Januz Ordover) at 3 (¶ 6). Dr. Ordover points out that WealthTV could have achieved distribution to millions of subscribers by entering into affiliation agreements with MVPDs other than defendants or by accessing subscribers with alternative methods of distribution. According to Dr. Ordover, "[t]o show anticompetitive foreclosure, WealthTV must explain why it could not have achieved viability by gaining sufficient carriage" on other systems. BHN Exh.8 (Expert Report of Januz A. Ordover) at 6 (¶ 9); Cox Exh. 44 (Expert Report of Januz A. Ordover) at 6-7 (¶ 9). This defensive boot-strapping of antitrust analysis overlooks the relevant legal test under sections 616 and 76.1301(c), which is not whether the video programmer is excluded or foreclosed from competition, or whether in the absence of affiliation-based discrimination WealthTV could obtain viability, but rather whether it is unreasonably restrained from competing fairly.

[278] WealthTV Exh. 152 (Testimony of Sandy McGovern) at 11-12 (¶¶ 18-22).

[279] *See HDO*, 23 FCC Rcd at 14798, 14802, 14807, 14813 (¶¶ 19, 30, 42, 54).

[280] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

programming vendor's ability to compete "fairly."[281] The analysis of the record evidence demonstrates that each of the defendants made a decision not to carry WealthTV on the basis of reasonable and legitimate business reasons that were within the bounds of fair competition. Thus, WealthTV has failed to satisfy its burden of proving by a preponderance of the evidence that any of the defendant's actions *unreasonably* restrained WealthTV's ability to compete *fairly* under the second part of the standard of sections 616 and 76.1301(c).

ULTIMATE CONCLUSIONS

74. Based on foregoing findings of fact and conclusions of law, it is concluded that WealthTV has not satisfied its burden of proving that any of the defendants engaged in discrimination in the selection, terms or conditions of carriage on the basis of WealthTV's non-affiliation.

75. Based on foregoing findings of fact and conclusions of law, it is further concluded that WealthTV has not satisfied its burden of proving that any of the defendants unreasonably restrained WealthTV's ability to compete fairly.

76. In light of the ultimate conclusions reached in paragraphs 74 and 75, above, *HDO* Issue No. 1 is resolved in the defendants' favor and *HDO* Issue No. 2 is moot.

RECOMMENDED DECISION

77. IT IS RECOMMENDED that the complaints filed by Herring Broadcasting, Inc. d/b/a WealthTV in MB Docket No. 08-214 BE DENIED.[282]

FEDERAL COMMUNICATIONS COMMISSION[283]

Richard L. Sippel

Richard L. Sippel
Chief Administrative Law Judge

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[281] *Id.*

[282] Section 5 of the Communications Act authorizes an aggrieved person to seek Commission review of "any" actions issued under delegated authority, including this recommended decision.. *See* 5 U.S.C. § 155(c)(4). The parties may seek Commission review of this recommended decision by filing exceptions in accordance with sections 1.276 and 1.277 of the Commission's rules governing appeals for Initial Decisions. 47 C.F.R. §§ 1.276, 1.277.

[283] Copies of this Recommended Decision are e-mailed to counsel for each party upon issuance.

CABLEVISION

THOMAS M. RUTLEDGE
Chief Operating Officer

November 20, 2009

BY ELECTRONIC MAIL AND U.S.MAIL

The Honorable Henry Waxman
Chairman, Committee on Energy and Commerce
United States House of Representatives
2125 Rayburn House Office Building
Washington, DC 20515-6115

Dear Chairman Waxman:

Pursuant to your November 6 request enclosing questions from Congresswoman Mary Bono Mack, I enclose my responses for the record following the Subcommittee's October 22 hearing, "Video Competition in a Digital Age."

Please contact me if I can provide any additional information.

Very Truly Yours,

Thomas M. Rutledge

Enclosure

cc: Congresswoman Mary Bono Mack

Mr. Early Green, Chief Clerk, House Committee on Energy and Commerce (via email and first class mail)

1111 Stewart Avenue, Bethpage NY 11714-3581
516 803-1010 Fax 516 803-1183
rutledge@cablevision.com

1. Mr. Rutledge, The National Cable Television Cooperative, was created by small cable operators to pool their resources together for bargaining leverage with programmers. Prior to 2005 NCTC was comprised of approximately 15.8%, or 14.4million, households. Today large cable operators such as Charter, Cox, Verizon Fios, and most recently your company Cablevision have all become a member of NCTC, bringing the total number of households they represent to 26.7million or 21% of current MVPD subscribers.

Last month in a very public dispute with a small independent programmer, the Tennis Channel, Cablevision called off negations when it couldn't reach an agreement and in turn joined NCTC solely for the purpose of electing carriage of this channel for coverage of the U.S. Open.

As the newest member of NCTC, should Congress be concerned that a large operator like Cablevision who already has significant leverage over independent programmers will now have even more leverage if they are permitted to join NCTC and collectively bargain with hundreds of other cable operators?

Response:

No. Cablevision is concerned about rising cable prices and is committed to delivering programming its subscribers want at competitive prices. This approach guided Cablevision's approach to negotiations to make Tennis Channel available to Cablevision's subscribers pursuant to Cablevision's valid agreement with NCTC.

The New York metropolitan area where Cablevision operates is the most competitive market in the country. Consumers in Cablevision's service area have a choice of as many as four multichannel distributors in addition to Cablevision, depriving Cablevision or any other distributor of leverage by ensuring that programmers have multiple outlets for their services. Programmers denied carriage have recourse to the FCC's program carriage rules if they believe that the inability to reach agreement violated those rules.

2. What will the storage limit be per subscriber? 160MB - as represented to the District court? Is Cablevision considering offering additional storage at an additional fee?

Cablevision has announced plans to conduct a limited trial of a remote storage digital video recorder ("RS-DVR") but has not announced plans for the retail availability of the product. In the trial, Cablevision plans to offer 160 MB of storage capacity per trial participant. Based on the trial and other factors, Cablevision will evaluate whether any changes to the planned per customer 160 MB storage capacity are appropriate.

3. Is there a mechanism in place to automatically overwrite any stored programming on a first-in first-out basis when a subscriber requests to store a program that puts it over the 160MB limit?

Yes, the RS-DVR planned for Cablevision's trial will automatically overwrite stored programming on a first in first-out basis, if a previously scheduled recording will put the customer over the 160 MB limit.

4. Do you currently have sufficient server storage space to allocate 160MB for each of your subscribers? If not, to what percentage of subscribers do you have the capacity to provide this service?

While there are no "subscribers" because the product is not released, the RS-DVR planned for Cablevision's trial will allocate 160 MB of storage capacity per trial participant.

5. Does the current Cablevision DVR allow recording of all channels received by Cablevision customer?

Cablevision's current set top box DVR allows customers to record all linear programming within the specific tier of programming to which the customer has subscribed (which includes prescheduled pay per view but not video on demand or non-traditional interactive services).

6. Will you be offering all channels received by Cablevision to RS-DVR subscribers? If not, how will you decide which channels to offer?

The RS-DVR planned for Cablevision's trial allows recording to the same extent as Cablevision's current set top box DVR: all linear programming within the specific tier of programming for which the trial participant has paid (which includes prescheduled pay per view but not video on demand or non-traditional interactive services).

7. Is the system set up to only initiate a copy of a program at the request of a subscriber?

Yes.

8. How will the system ensure that a unique copy of a TV program is made for each subscriber who asked to have that program recorded and also ensure that the unique copy is used only to support "playback" of the program to that subscriber alone?

The RS-DVR planned for Cablevision's trial is designed so that the recording and subsequent play back are entirely automated, once initiated by the subscriber through his or her remote control. The subscriber records and plays back his or her own unique copy that was created as a result of his or her record command. Each recording made by a subscriber is accompanied by information uniquely associating the recording with that subscriber and thus can be played back only by that subscriber.

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115

MAJORITY (202) 225-2927
FACSIMILE (202) 225-2525
MINORITY (202) 225-3641

energycommerce.house.gov

November 6, 2009

Mr. Thomas Rutledge
Chief Operating Officer
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NY 11714

Dear Mr. Rutledge:

Thank you for appearing before the Subcommittee on Communications, Technology, and the Internet on October 22, 2009, at the hearing entitled "Video Competition in a Digital Age".

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions and include the text of the question with your response, using separate pages for responses to each Member.

Please provide your responses by November 20, 2009, to Earley Green, Chief Clerk, in Room 2125 of the Rayburn House Office Building and via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman

Henry A. Waxman
Chairman

Attachment

The Honorable Mary Bono Mack

1. Mr. Rutledge, The National Cable Television Cooperative, was created by small cable operators to pool their resources together for bargaining leverage with programmers. Prior to 2005 NCTC was comprised of approximately 15.8%, or 14.4million, households. Today large cable operators such as Charter, Cox, Verizon Fios, and most recently your company Cablevision have all become a member of NCTC, brining the total number of households they represent to 26.7million or 21% of current MVPD subscribers.

   Last month in a very public dispute with a small independent programmer, the Tennis Channel, Cablevision called off negations when it couldn't reach an agreement and in turn joined NCTC solely for the purpose of electing carriage of this channel for coverage of the U.S. Open.

   As the newest member of NCTC, should congress be concerned that a large operator like Cablevision who already has significant leverage over independent programmers will now have even more leverage if they are permitted to join NCTC and collectively bargain with hundreds of other cable operators?

2. What will the storage limit be per subscriber? 160MB - as represented to the District court? Is Cablevision considering offering additional storage at an additional fee?

3. Is there a mechanism in place to automatically overwrite any stored programming on a first-in first-out basis when a subscriber requests to store a program that puts it over the 160MB limit?

4. Do you currently have sufficient server storage space to allocate 160MB for each of your subscribers? If not, to what percentage of subscribers do you have the capacity to provide this service?

5. Does the current Cablevision DVR allow recording of all channels received by Cablevision customer?

6. Will you be offering all channels received by Cablevision to RS-DVR subscribers? If not, how will you decide which channels to offer?

7. Is the system set up to only initiate a copy of a program at the request of a subscriber?

8. How will the system ensure that a unique copy of a TV program is made for each subscriber who asked to have that program recorded and also ensure that the unique copy is used only to support "playback" of the program to that subscriber alone?

LAWRENCE JOURNAL-WORLD
Mediaphormedia
INTERACTIVE DIVISION OF THE WORLD COMPANY

THE WORLD COMPANY
Patrick Knorr
CHIEF OPERATING OFFICER

sunflower BROADBAND
FREE STATE COMMUNICATIONS

November 20, 2009

Earley Green
Chief Clerk
Room 2125
Rayburn House Office Building
Earley.Green@mail.house.gov

In response to questions from the Honorable Mary Bono Mack in reference to testimony on October 22nd, 2009:

1) How much does Sunflower Broadband charge its customers per month for Lifeline Basic and what are the per-month program costs for that service?

Sunflower Broadband currently charges $20.95 per month for our Lifeline equivalent video service; Broadcast Basic service.

I think it is important to understand the cost of programming in context with our other expenses to provide Broadcast Basic. All items are approximate costs on a per subscriber per month basis:

Cost for programming: (Note this includes retransmission fees and has more than doubled from two years ago and is expected to more than double again in two years)	$1.66
Cost for maintenance and service:	$2.11
Cost for customer service and billing:	$2.34
Cost for overhead:	$2.00
Cost to build facilities: (Based on $1,200 per customer cost spread over 10 years)	$10.00
Total cost:	$20.11
Profit margin:	$0.84

2) How much does Sunflower Broadband charge its customers per month for Expanded Basic and what are the per-month program costs for that service?

Sunflower Broadband currently charges $55.90 per month for our Expanded Basic service including a basic digital box.

I think it is important to understand the cost of programming in context with our other expenses to provide Expanded Basic. All items are approximate costs on a per subscriber per month basis:

Cost for programming:	\$24.18
Cost for maintenance and service:	\$3.20
Cost for customer service and billing:	\$3.97
Cost for overhead:	\$5.59
Cost to build facilities: (Based on \$1,500 per customer cost spread over 10 years)	\$12.50
Cost of digital box: (Based on \$200 per box spread over 4 years)	\$4.16
Total cost:	\$53.60
Profit margin:	\$2.30

As you can see, this shows there is very little room to absorb increases in programming costs without passing them through to subscribers. Unless a customer takes several services that spread out the cost of building facilities there is very little profit in our video service due to the high cost of programming and capital investment. Above does not include the cost of capital.

Sincerely,

Patrick Knorr
Chief Operating Officer
The World Company