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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming of the Commission's Rules	)	CS Docket No. 01-129

COMMENTS OF COMCAST CORPORATION

Comcast Corporation ("Comcast") is pleased to provide the following initial response to the above-captioned Notice of Inquiry.[1] While Comcast expects to provide additional company-specific information in reply comments, for the present we believe three main points must be made to help put the current proceeding in context.

First, in sharp contrast to the marketplace conditions existing when many of the rules governing the cable industry were promulgated, the situation today is that *competition in multichannel video programming distribution ("MVPD") services is mature, robust, and ubiquitous*. Second, over the course of the past few years, the courts have made it increasingly clear that *policymakers must tailor cable regulations narrowly, to address concrete and specific harms, and must respect cable operators' First Amendment rights*. Third, the cable business -- like other communications and information businesses -- is being transformed by digital technologies, the explosive growth of the Internet, the advent of e-commerce, and similar developments. As a result, *competition, innovation, risk, and new services abound*, and consumers are reaping the benefits.

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List A B C D E

[1] FCC 01-191 (released June 25, 2001).

I. MVPD Competition Is Mature, Robust, and Ubiquitous.

Next year will be the tenth anniversary of the Cable Act of 1992. More than five years have already passed since the enactment of the Telecommunications Act of 1996. This year's inquiry therefore provides an ideal opportunity to assess the sweeping changes that have occurred over the past decade (while continuing to tabulate the incremental changes that have occurred since last year's annual video competition report).

Cable Services Bureau Chief Ferree proposed precisely such an approach when he presented the Notice of Inquiry for Commission approval, and Comcast strongly supports this approach. A fresh look, with emphasis on the enormous changes that have occurred since 1992, will establish that the cable industry now operates in a vastly more competitive environment than ever before, and that the putative market failures that previously were addressed by various regulations are now no longer a concern in light of the vigorous competition that has developed.

At the time the Cable Act was passed, cable television service was perceived to enjoy a monopoly position. Today, by contrast, competition is widespread. *The overwhelming majority of Americans have at least three separate facilities-based sources of multichannel video services* -- a local cable operator and two nationwide full-service DBS companies (DirecTV and EchoStar).[2] In addition, numerous locations also have cable overbuilders and OVS providers and MMDS/ITFS companies; some broadcasters are beginning to use their digital spectrum to provide free, over-the-air multichannel services; and new DSL and broadband passive optical

[2] A third DBS provider, Dominion, can be considered more of a "niche" player. *Cf. Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, Seventh Annual Report, FCC 01-1 (rel. Jan. 8, 2001), at Para. 64 ("*7th Video Competition Report*") (highly targeted programming with small number of channels).

networking ("PON")[3] technologies are being deployed to enable additional video service offerings. But even ignoring overbuilders, OVS, MMDS/ITFS, broadcast multicasting, DSL and PON (to say nothing of SMATV and terrestrial wireless), the competition from DirecTV and EchoStar alone creates a radically different environment than the one that prevailed at the time of the Cable Act. Consider:

- DBS subscribership has grown from a mere 40,000 subscribers at the time of the first Video Competition Report[4] to nearly 13 million at the time of the 7th.[5]
- Both DirecTV and EchoStar continue to report rapid growth and together now claim over 16 million customers.[6]
- Cable's market share has declined in each and every year for which statistics were provided in the Commission's video competition report.[7]
- Despite growth in the absolute size of cable companies, the third and seventh largest MVPD providers are not cable multiple system operators ("MSOs") but DBS providers.[8] The new customers EchoStar adds in a single quarter "could spawn the equivalent of the 11th largest cable operator."[9]

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[3] *See* "SBC Begins New Phase of Project Pronto," CLEC-Planet (May 10, 2001), at http://www.clec-planet.com/news/000105/May10sbc.html (visited July 23, 2001) (company plans to use broadband passive optical networking to provide new services, including satellite-quality video, to residential and small business customers).
[4] *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd. 7442, 7475 (1994). At the time, customers who wished to avail themselves of this option were required to pay $699 for home receiving equipment, plus another $150-200 for professional installation. Those who wished to view two different channels on two different television sets were required to purchase both an $899 DSS unit and an additional $649 decoder for the second television set. *Id.* Today, as can be seen in the advertisements in virtually any daily newspaper, consumers who wish to procure service from EchoStar or DirecTV encounter no such expenses.
[5] *7th Video Competition Report*, Appendix C, Table C-1.
[6] "Dish Network Passes 6 Million Customer Milestone," Echostar Press Release (June 11, 2001), at http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=410&layout=-6&item_id=182008 (visited July 16, 2001) (also noting "[t]his achievement comes approximately seven months after surpassing 5 million customers" and claiming that DISH Network remains "fastest growing pay television provider in the United States"); "DIRECTV Reaches 10 Millionth Customer Milestone," DIRECTV Press Release (June 28, 2001) (also noting that "DIRECTV is now the home entertainment service of choice in one of every 10 TV homes in the United States," or, of course, an even higher percentage of MVPD households).
[7] *7th Video Competition Report*, Appendix C, Table C-1 (from roughly 88 percent in 1996 to 80 percent in 2002).
[8] "Cable Slows, DBS Sprints," *Broadcasting and Cable*, at 30 (June 4, 2001).
[9] *Id.*

One useful way to think about competition in multichannel video services is to envision a comparable level of competition in a different context: local telephone services. Difficult as it may be to visualize, imagine that the vast majority of Americans can choose from among at least three separate facilities-based local telephone providers. Imagine further that the new entrants in the business have already accumulated 16 million customers and are still growing at a rate of an additional million customers every four months. Imagine too that incumbents and new entrants alike are investing tens of billions of dollars in upgrading their facilities and in rolling out new and desirable services to the public. And imagine finally that one competitive local exchange carrier is already bigger than all but two of the incumbent local telephone companies.

Needless to say, such developments would be welcomed -- by policymakers and by consumers -- as a fulfillment of statutory goals of greater competition and greater consumer choice. Legislators would justly receive accolades for successfully replacing monopoly with competition. Regulators too would join in the celebration. Most importantly, the public would surely enjoy the ability to change from one provider to another at will, the availability of an ever-growing array of service packages, and the increased service quality, consumer responsiveness, and innovation that competition invariably brings.

Needless to say, the scenario depicted above does *not* accurately characterize the local telephone market. But it *does* accurately characterize the market conditions for multi-channel video programming distribution services, in the areas Comcast serves and elsewhere across the nation.

In 1992, when Congress passed the Cable Act, Congress recognized the superiority of competition to regulation as a means of promoting the public interest, but it felt that the then-

existing levels of competition were inadequate.[10] Accordingly, Congress intended the legislation, among other things, "to encourage competition [to cable] from alternative and new technologies, including competing cable systems, wireless cable, direct broadcast satellite, and satellite master antenna systems."[11] Now, this goal has been achieved, and the Commission should not hesitate to acknowledge this radical change in circumstances. Nor should it hesitate to ease those regulatory policies and practices that are predicated on the lack of competition, given that this deficiency has now been eliminated.

II. The Legal Rights of Cable Operators Must Be Protected.

Over the past several years, the courts have demonstrated an increasing awareness of the legal rights of cable operators. They have applied rigorous scrutiny both to Acts of Congress and (even more so) to regulations promulgated by the Commission. They have been particularly attentive to -- and protective of -- cable operators' rights under the First Amendment.

The litigation over the must-carry rules[12] is especially informative, for there the Supreme Court affirmed that cable operators are speakers whose freedoms of speech and of the press must be respected. The more recent cases involving horizontal ownership restrictions[13] yield additional insights, especially regarding the invalidity of restrictions based on conjectural harms and the need for any Commission rulemaking to take full account of the competition that now exists for MVPD services.

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[10] Pub.L. 102-385, 106 Stat. 1460, approved Oct. 5, 1992 (§2(a)&(b)).
[11] *See* House Committee on Energy and Commerce, H.R. Rep. No. 102-628, at 27 (1992); *see also* Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 102-92, at 18 (1991).
[12] *Turner Broadcasting System, Inc. v. United States*, 512 U.S. 622 (1994) ("*Turner I*"); *Turner Broadcasting System, Inc. v. United States*, 520 U.S. 180 (1997)("*Turner II*").
[13] *Time Warner Entertainment v. United States*, 211 F.3d 1313 (D.C. Cir. 2000) ("*Time Warner I*"); *Time Warner Entertainment v. United States*, 240 F.3d 1126, 1134 (D.C. Cir. 2001) ("*Time Warner II*").

Turner I is important, first and foremost, because it conclusively resolved that cable operators engage in and transmit speech and are therefore entitled to freedom of speech and freedom of the press under the First Amendment. 512 U.S. at 636. The case rejects the notion that cable operators may be subject to broadcast-style regulation. 512 U.S. at 639-640. It makes clear that restrictions on speech, even when they qualify for intermediate rather than strict scrutiny, cannot be justified on the basis of hypothetical concerns; rather, the Commission "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." 512 U.S. at 664 (plurality).

Turner II illustrates that only the barest majority of the Supreme Court was willing to affirm an explicit congressional constraint on cable operators' speech and press freedoms, and then only because of a unique and unlikely-ever-to-be-repeated combination of factors. Among the factors relied upon by the majority were (1) the substantial deference owed to Congress in amassing and evaluating vast amounts of data bearing on legislative questions, 520 U.S. at 195-196; (2) the detailed record amassed in three years of prelegislative hearings, 520 U.S. at 187, 199-213; (3) the "considerable and growing market power" over video programming that cable operators had in 1992 (but no longer have, as discussed above), 512 U.S. at 197, and (4) the Court's belief that the "actual effects [of the analog must-carry requirement were] modest," because they did not require cable operators to significantly modify their behavior, 520 U.S. at 214. Even under this unique combination of circumstances, four justices voted *not* to sustain the analog must-carry requirements. 520 U.S. 229-258.

The skepticism with which courts now view constraints on cable operators' First Amendment freedoms is further illustrated by the litigation over horizontal ownership limits. While *Time Warner I* upheld the facial constitutionality of a statutory requirement that the

Commission establish horizontal ownership limits for cable operators, *Time Warner II* shows that specific FCC rules that constrain cable operators will be carefully reviewed to ensure that they are solidly grounded in current market conditions and not addressed to "conjectural" harms. In particular, the D.C. Circuit faulted the Commission for focusing on market share, while ignoring the "*availability* of competition," including the fact that DBS services are now almost universally available as alternatives. 240 F.3d at 1134 (emphasis in original).

Given the court's admonition that the FCC must take account of "the substantial changes in the cable industry since . . . 1999," *id.*, it is now crystal clear that regulations based on a decade-old mind-set -- as some parties, in a variety of proceedings, currently advocate -- would be subject to the most severe scrutiny.

III. The Nature of the Cable Business Is Being Transformed.

It is not clear that it ever was accurate to define multichannel video services as a distinct "market" for antitrust or regulatory purposes, but in any event any such market definition has been obliterated by the events of the past several years. Putting aside the competition discussed in Section I above, Comcast and other cable companies compete -- and face competition -- in a variety of ways that are radically different than previously.

The biggest change, of course, is digitization -- and this affects not only the services provided by cable operators like Comcast but also the services provided by our competitors. Although much of the capacity of cable systems continues to be reserved for analog channels, Comcast (like most cable operators) is investing billions of dollars to add additional capacity, almost all of which is being devoted to digital services (a related change is that transmissions over the cable plant are now two-way, not one-way-only). Today, Comcast routinely offers consumers packages of digital video channels and individual pay-per-view channels, and video-

on-demand services are now beginning to appear as well. These offerings compete with each other, as well as with videotape and DVD sales and rentals, and with DBS, MMDS, SMATV, OVS, cable overbuilders, multichannel digital broadcasters, and so on. All delivery, display, and processing media either are digital already (as DBS is) or are migrating to digital.

Meanwhile, the Internet is increasingly competing for consumers' time and attention -- and their pocketbooks too. At the time the first commercial browser was introduced in 1994, average Americans made very little use of the Internet. Yet now, over 100 million Americans use the Internet, with this growth continuing,[14] and they are connecting in large numbers to high-speed services and to a growing extent consuming streaming audio and video programming along with text messages and graphics. Meanwhile, the success of toll-free numbers and telemarketing has spread to "e-commerce" (commerce using the Internet), and now "t-commerce" (a form of interactive television) and "m-commerce" (using mobile communications) are poised for growth as well.

In this new environment, service providers are increasingly providing their customers with packages, or bundles, of services. A single provider may now offer multi-channel video services, telephone services, and high-speed Internet services as a unitary offering, or with the prices for any one group of services highly discounted to those who also buy other services.

As a result of these and many other changes, information, entertainment, messaging, and commerce services are more innovative and dynamic than ever before. In virtually every consumer sector, competition flourishes. Massive investments are being made; and, for most businesses, exposure to risk is growing too.

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[14] "More Online, Doing More," Press Release of the Pew Research Center (Feb. 18, 2001), at http://www.pewinternet.org/releases/release.asp?id=15 (visited July 27, 2001) (also notes that U.S. Internet population increased by 16 million in second half of 2000 and that well over 50 million people in U.S. use Internet every day).

Comcast and other cable companies are delivering fully on the promise and potential of the Telecommunications Act. Tens of billions of dollars have been invested in new facilities and new services. As a result of this investment, digital cable and high-speed cable Internet service are now increasingly ubiquitous; Comcast had 1.84 million customers for the former, and 675,000 for the latter as of June 30, 2001, and expects these numbers to rise to 2.2 million and 950,000, respectively, by year end (much higher than previously expected). In the near future, we also expect that cable-based IP telephony will make it possible for Comcast and other cable companies to fulfill the long-standing public policy objective of widespread residential telephone competition.

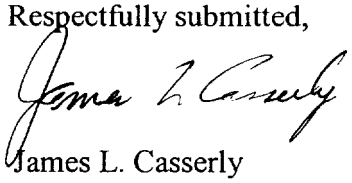
The 8th annual video competition report should acknowledge these changes and the many benefits that these changes are bringing to American consumers. It should, accordingly, set the stage for continued reduction in the regulatory burden on cable operators.

IV. Conclusion

This year's video competition inquiry provides an ideal opportunity for the Commission to formally recognize how radically different video competition is today than it was at the time of the 1992 Cable Act. Then, Congress envisioned an environment in which competition rather than regulation protects consumers. Now, this vision has become reality.

The FCC has already begun to take account of these changes, as shown by its decisions not to regulate the characteristics of cable Internet services and to proceed cautiously (with an inquiry, rather than a rulemaking) on interactive television. We urge the Commission to continue to tread lightly where competition is working so well.

Respectfully submitted,



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