



incumbents no longer have market power – in fact the standards set forth by Congress for assessing “effective competition” preclude such a conclusion.

First, an observation of cable pricing still shows that cable has not lost its ability to raise its prices above prevailing or competitive levels, which is, as NCTA-sponsored testimony points out, a hallmark of market power.<sup>3</sup> Not only do cable price increases still outstrip inflation, they also build on increases that have outpaced inflation for years.<sup>4</sup> Significantly, NCTA acknowledges that cable price increases exceeded the rate of inflation again in the last fifteen months, and is reduced to arguing that they outpaced inflation only by a little bit.<sup>5</sup>

On the whole, cable operators are still not aggressively competing on price. By contrast, in keeping with its long-standing effort to offer consumers a lower-priced alternative to cable, EchoStar recently announced its “I Like 9” program, reducing the price of EchoStar’s most popular programming package, the America’s Top 100 package, to only \$9 per month for the first year for new subscribers that purchase their DBS equipment.<sup>6</sup> In comparison, the only

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<sup>3</sup> See *id.*, App. C at 3 (describing “market power” as “the presumed ability . . . to increase profits by raising prices above prevailing or competitive levels . . .”).

<sup>4</sup> The Commission’s 2000 Competition Report found, for example, that between June 1999 and June 2000, cable prices rose 4.8 percent compared with a 3.2 percent increase in inflation. *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 00-132, 16 FCC Rcd. 6005, at ¶ 9 (2001) (“2000 Competition Report”).

<sup>5</sup> See NCTA Comments at 14 (reporting that cable rates exceeded inflation by “less than one percent” in the past fifteen months). The cable industry’s lengthy commentary on its investment in programming and infrastructure also sounds like an alternative argument offered to justify or excuse its price hikes. See *id.* at 25-34.

<sup>6</sup> “I Like 9” program details are available at [www.dishnetwork.com/content/promotions/like9/index.shtml](http://www.dishnetwork.com/content/promotions/like9/index.shtml).

price promotion, local or national, mentioned in the cable industry's comments is an AT&T Broadband offer to reduce the price of basic cable to \$19.95 per month through the end of this year.<sup>7</sup> Such "reduced" price promotions offer a price twice that of EchoStar's "I Like 9" offer, and sometimes for significantly fewer channels. EchoStar's aggressive pricing also exposes as dubious the cable industry's continued incantation of programming costs as justification for higher prices – if anything, EchoStar faces much higher programming costs than do cable operators.

Second, Congress has prescribed the types of evidence needed to establish the presence of "effective competition" in a particular local market.<sup>8</sup> The cable industry never explains why it has not been able to make the required showings except for a minority of markets. In the past two years, for example, the Commission affirmatively found effective competition to exist in a negligible portion of the country.<sup>9</sup> Under the scheme of the 1992 Cable Act, therefore, the inevitable conclusion is that effective competition does not exist in most markets, and it would be impermissible for the Commission to reach a different conclusion.

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<sup>7</sup> See NCTA Comments at 16.

<sup>8</sup> See 47 C.F.R. § 76.905 (explaining criteria for demonstrating existence of effective competition by reference to particular "franchise areas.") The cable operators allege that the "effective competition" standard is met for the nation as a whole, ignoring the fact that the statutory standard applies market by market. See NCTA Comments at 9.

<sup>9</sup> Comments of EchoStar Satellite Corporation (filed Aug. 3, 2001) at 7-8 ("EchoStar Comments"). The Commission reported that for the twelve month period ending June 30, 2000, it made determinations of effective competition from Local Exchange Carriers affecting "more than 150" communities – out of a total of 33,000 cable community units nationwide. 2000 Competition Report at ¶ 238. And the intervening months have produced less than 30 more (involving LECs as well as other types of entrants). See EchoStar Comments at 8.

Third, the evidentiary showing that cable operators do purport to make is speculative. Elasticity of supply, for example, is of course relevant,<sup>10</sup> but the bare proposition that DBS providers have infinite elasticity of supply is flawed for many reasons. That proposition ignores, for example, that the marginal cost of adding localized programming for an additional city is greater by several orders of magnitude for DBS providers than it is for cable operators: for every local channel, a DBS provider has to expend bandwidth in a broader geographical region. The cost of adding national programming is also greater for satellite carriers compared to cable systems with digital capabilities, as the satellite carriers are more bandwidth-constrained than those systems. Indeed, if the supply elasticity argument were enough to justify a finding that cable operators lack market power, it is no more true today than it was in 1997, 1996, or 1992, and Congress and the Commission would have reached such a conclusion then.

The cable industry tries to use its claims of lack of market power as a first step towards its request that the Commission allow the sunset of the current prohibition on exclusive deals for cable-affiliated programming. Comcast's conduct in Philadelphia, and Cablevision's conduct in New York, afford the Commission a good idea of what would happen on a massive scale if it were to accept that invitation. Comcast and Cablevision have locked DBS providers out of their affiliated sports programming based on the slenderest of legal reeds – their decision to use terrestrial delivery (for allegedly unrelated business reasons) and their claim that terrestrial delivery automatically exempts that programming from the program access laws. To judge by

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<sup>10</sup> See NCTA Comments at 34 & App. C at 7-11.

the actions of those operators, all of the cable-affiliated programming could move to exclusive deals in a “New York minute” as soon as such deals were to become legal.

### **CONCLUSION**

EchoStar urges the Commission to take the foregoing reply comments into account in its next annual report and focus its attention on the all-important question of program access.

Respectfully submitted,

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