

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

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

FOURTEENTH REPORT

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By the Commission: Commissioners McDowell and Pai issuing separate statements.

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I. EXECUTIVE SUMMARY

1. This is the fourteenth report (“14th Report” or “Report”) submitted by the Federal Communications Commission to the United States Congress on the status of competition in the market for the delivery of video programming as required by Section 628(g) of the Communications Act of 1934, as amended (the “Act”).¹ In this Report, we focus on developments in the video marketplace in 2007, 2008, 2009, and 2010.² As described below, the most significant trends since the last report relate to the increased deployment of digital technology, consumers’ rising demands for access to video programming anywhere and anytime, and the evolution of online video from a niche service into a thriving industry.

2. For the first time, we present information and data under a new analytical framework, which is consistent with the framework we have used in the recent wireless and satellite competition reports.³ For this Report, we categorize entities into one of three strategic groups – multichannel video programming distributors (“MVPDs”),⁴ broadcast television stations,⁵ and online video distributors

¹ 47 U.S.C. § 548(g).

² While we focus on these four years, in many instances we find it useful also to recognize some more recent developments based on data that we have collected from third-party sources. *See infra*, ¶ 17.

³ *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 and Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 09-66, Fourteenth Report, 25 FCC Rcd 11407 (2010) (“14th Mobile Wireless Report”); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 and Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket No. 10-133, Fifteenth Report, 26 FCC Rcd 9664 (2011) (“15th Mobile Wireless Report”); *Third Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services, Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services*, IB Docket Nos. 09-16 and 10-99, 26 FCC Rcd 17284 (2011) (“Third Satellite Competition Report”).

⁴ For purposes of this report, MVPDs are companies that offer multiple channels of video programming to consumers for a subscription fee. The term “MVPD” is defined more fully below in Sec. III.A.1.

⁵ We consider broadcast television stations separately for the 14th Report, as we have done in previous reports. Although broadcasters have transitioned to digital transmission and have the capability to offer additional linear channels, they still offer far fewer programs than are available from MVPDs and do not provide a subscription service. The Commission has previously held that broadcast television alone is not sufficiently substitutable with the services provided by MVPDs to constrain attempted MVPD price increases, and hence declined to broaden the MVPD product market. Accordingly, we treat broadcasters as part of a separate group. *See* 47 U.S.C. § 521(1); S. REP. NO. 102-92, at 8-12 (1991). *See also General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee for Authority to Transfer Control*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473, 509, ¶ 75 (2004) (citing *Competition, Rate Deregulation, and the Commission’s Policies Relating to the Provision of Cable Television Services*, MM Docket No. 89-600, Report, 5 FCC Rcd 4962, 5003, ¶ 69 (1990)); *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation (Transferors) and EchoStar Communications* (continued....)

(“OVDs”).⁶ For each of these categories we examine industry structure, conduct, and performance. The following is an overview of our findings.

3. *MVPDs.* Cable MVPDs accounted for almost 60 percent of all MVPD subscribers at the end of 2010. This represents a decline in cable’s share of the MVPD group since the last report. In 2006, cable MVPDs accounted for over 65 percent of all MVPD subscribers. Although the number of cable video subscribers has been falling, cable MVPDs have done well financially by increasing sales of advanced services (e.g., digital cable, Internet access, and telephone) to the remaining customers.

4. The two DBS MVPDs, DIRECTV and DISH Network, accounted for over 33 percent of MVPD subscribers in 2010. This represents an increase in DBS’s share of the MVPD group since 2006 when DBS MVPDs accounted for just over 29 percent of MVPD subscribers.

5. In the MVPD group, the most significant change in the status of competition has been the entry of AT&T and Verizon. These two telephone companies have upgraded their networks to provide video services that compete directly with cable and DBS. At the end of 2010, the video services of Verizon FiOS and AT&T U-verse were available to one-third of U.S. homes and accounted for approximately seven percent of all MVPD subscribers. In 2006, Verizon’s service was available to approximately three percent of all U.S. households.⁷

6. Another significant development within the MVPD category has been the “TV Everywhere” initiative,⁸ which allows subscribers of certain MVPD services to access MVPD video programming on stationary and mobile Internet-connected devices including: televisions, computers, tablets, and smartphones.

7. *Broadcast Television Stations.* Since the last report, full-power television stations completed their transition from analog to digital service. Digital broadcasting gives broadcast stations greater flexibility, allowing them to offer high definition (“HD”) programming, multiple streams of programming of standard definition (“SD”) programming, and/or programming delivered to mobile

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Corporation (Transferee), CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, 20607-09, ¶¶ 109-115 (2002) (“*EchoStar-DIRECTV HDO*”).

⁶ An “OVD” is any entity that offers video content by means of the Internet or other Internet Protocol (IP)-based transmission path provided by a person or entity other than the OVD. An OVD does not include an MVPD inside its MVPD footprint or an MVPD to the extent it is offering online video content as a component of an MVPD subscription to customers whose homes are inside its MVPD footprint. See *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4357, App. A (2011) (“*Comcast-NBCU Order*”). Consumers need a broadband connection to receive video content from OVDs. The issue of whether a certain type of OVD also qualifies as an MVPD under the Act and our regulations has been raised in pending program access complaint proceedings. See, e.g., *VDC Corp. v. Turner Network Sales, Inc., et al.*, Program Access Complaint (Jan. 18, 2007); and *Sky Angel U.S., LLC v. Discovery Communications LLC, et al.*, Program Access Complaint, MB Docket No. 12-80, CSR-8605-P (Mar. 24, 2010). Nothing in this Report should be read to state or imply our determination on that issue. The Media Bureau though is currently seeking comment on the interpretation of the terms “MVPD” and “channel.” See *Media Bureau Seeks Comment On Interpretation of the Terms “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83, Public Notice, 27 FCC Rcd 3079 (MB 2012).

⁷ AT&T began its U-verse service in late 2006 and did not report data for that year.

⁸ “TV Everywhere” refers to an MVPD initiative, which allows subscribers of certain services to access video programming on stationary and mobile Internet-connected devices, including television sets, computers, tablets, and smartphones. MVPDs market their TV Everywhere initiatives under a variety of brand names (e.g., Verizon’s FlexView). See also *infra*, nn. 30 & 31.

devices. With multicasting,⁹ stations can cater to niche audiences with programming from newer networks or can affiliate their multicast streams with established networks to give viewers in smaller markets more over-the-air viewing options.

8. Several major patterns of consumer behavior have emerged which impact broadcast stations. The first is the dramatic increase in the number of households with HD television sets, from 25 percent during the 2007-2008 television seasons to 64 percent during the 2010-2011 television season. The second is the doubling of penetration of digital video recorders (DVRs), from 19 percent during the 2007-2008 television season to 38 percent during the 2010-2011 television season. The availability of DVRs and of broadband and mobile devices has spurred consumers' desire to watch video on a time-shifted basis either on television sets or on other screens. In recent years, broadcast networks have started to explore and develop a variety of alternative outlets and business models for the distribution of their programming, including video-on-demand ("VOD"), online video distribution, and electronic sell-through.¹⁰

9. *OVDs*. Since the last report, OVDs have emerged as significant providers of video content. The OVD marketplace has expanded considerably, with all of the major providers either entering the market over the last few years or dramatically retooling their approach during that time. Today's growing list of OVD providers includes programmers, content owners/producers, and affiliates of online services, manufacturers, retailers, and other businesses.

10. Providers have continued to develop business models for the provision of OVD services. Current business models, which providers often use in combination, include free (often ad supported), subscription, pay-per-program (rental), and electronic sell-through.

11. The amount of professionally produced content available online has expanded considerably since the last report. Today, online viewers can watch television shows (including recently aired episodes); newly released and older movies; sporting events; and other content, including high-quality content produced specifically for online distribution. Online video, like the Internet itself, has migrated beyond the computer to a wide variety of devices since the last report. Consumers now can access OVD service via computers, smartphones, tablets, gaming consoles, smart television sets, Blu-ray players, and a host of consumer electronics products.

II. INTRODUCTION

A. Scope of the Report

12. Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")¹¹ amended the Act and established regulations for the purpose of increasing competition and diversity in multichannel video programming distribution, increasing the availability of satellite delivered programming, and spurring the development of communications technologies.¹² To

⁹ See *infra*, n. 541.

¹⁰ See *infra*, ¶ 290 & n. 929.

¹¹ 1992 Cable Act, Pub. L. No. 102-385, § 19, 106 Stat 1460, 1494 (1992) ("The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.").

¹² Video programming is defined as: "Programming provided by, or generally considered comparable to programming provided by, a television broadcast station that is distributed and is exhibited for residential use." 47 U.S.C. § 522(20); 47 C.F.R. § 79.1(a)(1).

measure progress toward these goals, Congress required the Commission to report annually on “the status of competition in the market for the delivery of video programming.”¹³

13. In 2009, the Commission solicited 2007, 2008, and 2009 data, information, and comment for the period 2007, 2008, and 2009 similar to what the Commission requested for previous reports.¹⁴ Thereafter, the Commission initiated a comprehensive review of the way in which it uses data, including data used for its statutory competition reports.¹⁵ In the course of that review, the Commission determined that the data submitted in response to the 2009 notices of inquiry should be supplemented. Thus, on April 21, 2011, the Commission released a *Further Notice of Inquiry*, requesting additional data for 2009, seeking data for 2010, and encouraging the submission of comparable historical data for 2007 and 2008.¹⁶

14. To present the most useful information concerning competition in the video programming market, this report alters the analytic framework of earlier reports.¹⁷ Importantly, this new framework will also allow the Commission to present competitive data in a uniform manner that is consistent in format with the other Commission competition reports.¹⁸

¹³ See Section 628(g) of the Communications Act of 1934, as amended, 47 U.S.C. § 548(g). The Commission’s previous reports appear at: *Implementation of Section 19 of the 1992 Cable Act and Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442 (1994) (“*First Report*”); 11 FCC Rcd 2060 (1995) (“*Second Report*”); 12 FCC Rcd 4358 (1997) (“*Third Report*”); 13 FCC Rcd 1034 (1998) (“*Fourth Report*”); 13 FCC Rcd 24284 (1998) (“*Fifth Report*”); 15 FCC Rcd 978 (2000) (“*Sixth Report*”); 16 FCC Rcd 6005 (2001) (“*Seventh Report*”); 17 FCC Rcd 1244 (2002) (“*Eighth Report*”); 17 FCC Rcd 26901 (2002) (“*Ninth Report*”); 19 FCC Rcd 1606 (2004) (“*Tenth Report*”); 20 FCC Rcd 2755 (2005) (“*11th Report*”); 21 FCC Rcd 2503 (2006) (“*12th Report*”); and 24 FCC Rcd 542 (2009) (“*13th Report*”).

¹⁴ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Notice of Inquiry, 24 FCC Rcd 750 (2009) (“*Notice of Inquiry*”) (requesting data as of June 2007). The Commission subsequently adopted a Supplemental Notice of Inquiry requesting data as of June 2008 and June 2009. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Supplemental Notice of Inquiry, 24 FCC Rcd 4401 (2009) (“*Supplemental Notice of Inquiry*”). See also *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Order, 24 FCC Rcd 2524 (2009) (announcing, *inter alia*, that the Commission would issue a single report for 2007, 2008, and 2009 to bring its reporting up to date).

¹⁵ See *FCC Launches Data Innovation Initiative* (news release), June 29, 2010, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-299269A1.pdf. The Data Innovation Initiative was launched to modernize and streamline how the FCC collects, uses, and disseminates data. As part of the Data Innovation Initiative, the Commission’s Wireline, Wireless, and Media Bureaus released public notices seeking input on what current data collections should be eliminated, what new ones should be added, and how existing collections can be improved. See, e.g., *Pleading Cycle Established for Comments on Review of Media Bureau Data Practices*, MB Docket No. 10-103, Public Notice, 25 FCC Rcd 8236 (2010). The public notices grew out of an FCC-wide review of FCC systems and processes for data collection, analysis and dissemination led by the Office of Strategic Planning and Policy Analysis. See *FCC Agency Reform*, presentation before the Commission (Aug. 27, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-293108A1.pdf; *FCC Advances Data Innovation Initiative* (news release), Feb. 8, 2011, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304518A1.pdf.

¹⁶ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Further Notice of Inquiry, 26 FCC Rcd 14091 (2011) (“*Further Notice*”).

¹⁷ See *id.* at 14094-96, ¶¶ 4-5.

¹⁸ See 14th *Mobile Wireless Report*; 15th *Mobile Wireless Report*; *Third Satellite Competition Report*, *supra*, n. 3.

B. Analytic Framework

15. Under our new analytic framework, we first categorize entities that deliver video programming into one of three groups:¹⁹ MVPDs, broadcast television stations, and OVDs. This is the first time that the Commission has considered OVDs separately in its analysis.²⁰ Second, we examine industry structure, conduct, and performance, considering factors such as:

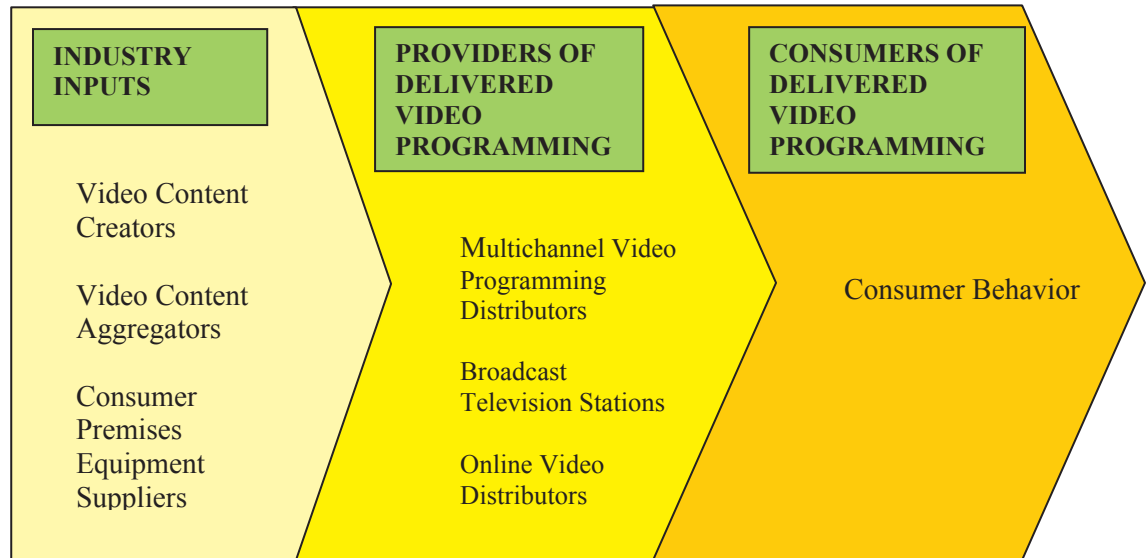
- *Structure*: The number and size of firms in each group, horizontal and vertical integration, merger and acquisition activity, and conditions affecting entry and the ability to compete.
- *Conduct*: The business models and competitive strategies used by firms that directly compete as video programming distributors, including product differentiation, advertising and marketing, and pricing.
- *Performance*: The quantity and picture quality of programming, prices charged for delivered video programming, financial indicators (*e.g.*, revenue and profit margins), and investment and innovation activities.

Third, we look upstream and downstream to examine the influence of industry inputs and consumer behavior on the delivery of video programming. We discuss two key industry inputs: video content creators and aggregators and consumer premises equipment.²¹ Figure 1 below displays the scope of the 14th Report.

¹⁹ We assign entities that deliver video content to one of three groups based on the “strategic group” concept used in strategic management that groups companies within an industry that have similar business models or similar combinations of strategies. See Michael E. Porter, *COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS* 129-155 (Free Press) (1980) (“Porter”). The three groups also may be said to represent the historical development of delivered video where consumers initially had access to over-the-air broadcast television, then a growing number of MVPDs, and most recently the Internet. Our placement of delivered video providers into one of three groups is an organizational convenience to facilitate discussion.

²⁰ We note that, in the past, we reported on web-based Internet video, focusing on the content available over the Internet for downloading and streaming. In this Report, we treat OVDs as a separate group because we have concluded that for most consumers they are not a substitute for MVPD service today, but rather an additional method for viewing video content. See *Comcast-NBCU Order*, 26 FCC Rcd at 4269-72, ¶¶ 79-85.

²¹ As described more fully below in Section V, content creators are firms that produce video programming and content aggregators are entities that assemble packages of video programming for distribution.

Figure 1: *Scope of 14th Report*

C. Data Sources

16. The information and data presented in this Report are based, in part, on comments we received from interested parties in response to the notices of inquiry in this proceeding.²² In addition, we also rely on a variety of publicly available sources of industry information and data including: Securities and Exchange Commission filings; data from trade association and government entities; data from securities analysts and other research companies and consultants; company news releases and websites; newspaper and periodical articles; scholarly publications; vendor product releases; white papers; and various public Commission filings, decisions, reports, and data.

17. As we have done for previous reports on the status of competition for the delivery of video programming, we requested data as of June 30 of the relevant year to monitor trends on an annual basis.²³ To continue our time-series analysis, and to the extent possible, we report as of June 30, 2007, June 30, 2008, June 30, 2009, and June 30, 2010. However, because a significant amount of information and data are reported on a calendar year basis we provide year-end data when June 30 information is not readily available. In addition, to the extent we find more recent Commission decisions and industry developments relevant, we include this information.

²² See *supra*, nn. 14 & 16. Appendix A contains a list of commenters.

²³ See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Notice of Inquiry, 21 FCC Rcd 12229, 12230, ¶ 2 (2006); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Notice of Inquiry, 20 FCC Rcd 14117, 14118, ¶ 2 (2005).

III. PROVIDERS OF DELIVERED VIDEO PROGRAMMING

A. Multichannel Video Programming Distributors

1. Introduction

18. As noted above, for purposes of this Report we have categorized entities that deliver video programming into one of three groups.²⁴ We focus in this section on the MVPD group. As defined by statute, an MVPD is an entity that makes available for purchase multiple channels of video programming.²⁵ Thus, the MVPD group includes cable operators,²⁶ DBS operators, and telephone companies that offer multiple channels of video programming. For purposes of this Report, we also include in the MVPD group other entities that sell multiple channels of video programming to consumers, including, home satellite dishes (“HSD”), open video systems (“OVS”), electric and gas utilities, wireless cable systems,²⁷ private cable operators (“PCO”),²⁸ commercial mobile radio services (“CMRS”), and other wireless providers. Inclusion of an entity in the MVPD group is based on the similarity of the video service provided to the consumer, not on the technology used (*e.g.*, coaxial cable, fiber, spectrum) or the identity of the parent company (*e.g.*, cable operator, telephone company), or any regulatory classification (*e.g.*, cable service, open video system). In most cases, the entities we include in the MVPD group represent themselves publicly, in reports to their shareholders and press releases to the news media, as retailers of video packages that include a large number of channels. In total, the MVPD group is comprised of 42 cable MVPDs with over 20,000 subscribers each and over 1,000 cable MVPDs with less than 20,000 subscribers each, two DBS MVPDs (DIRECTV and DISH Network), two large telephone company MVPDs (AT&T and Verizon) and numerous smaller telephone company MVPDs.²⁹

19. Today, the major MVPDs offer hundreds of linear television channels, which are streams of programming that offer video programs on a specific channel at a specific time of day. Many MVPDs also offer thousands of non-linear video-on-demand (“VOD”) programs, including pay-per-view (“PPV”) programs, which allow consumers to select and watch video programs whenever they request them. In this Report, we discuss a broad range of video programming that includes both linear and non-linear video programs.

20. An MVPD may offer services other than delivered video services using the same network infrastructure or through cooperative arrangements with other companies. For example, some MVPDs also offer high-speed Internet access service and telephone service. Although the focus of this Report is delivered video services, these non-video services are important to the business strategies of some

²⁴ See *supra*, ¶ 2 & n. 6.

²⁵ Specifically, Section 602 (13) of the Act, as amended, defines MVPD as “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service (“DBS”), or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.” 47 U.S.C § 522(13). This Report does not address the extent to which wireless providers of video programming other than DBS, wireless cable system operators, home satellite dishes, and private cable operators should be classified as MVPDs under the Act. As previously noted, the Media Bureau is currently seeking comment on the interpretation of the terms “MVPD” and “channel.” See *supra*, n. 6.

²⁶ Large and medium-size cable companies that serve many homes in multiple geographic areas by operating multiple cable systems are often referred to as multiple system operators (“MSOs”).

²⁷ Wireless cable systems use the Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) to transmit video programming to subscribers.

²⁸ Private cable operators were formerly known as satellite master antenna (“SMATV”) systems.

²⁹ See *infra*, n. 32.

MVPDs and may shift the focus of competition from standalone delivered video services to bundles of video, Internet, and telephone services.

21. Although MVPDs have traditionally delivered video programming to television sets, some MVPDs are moving beyond the television and delivering video programming to computer screens, tablets, and smartphones. The expansion of MVPD's delivered video programming from television to other stationary and mobile devices – generally known as TV Everywhere³⁰ – represents a new opportunity for MVPDs that may affect their business models and competitive strategies.³¹

22. When available, this Report uses information and data directly from the MVPDs as reported to the Commission and/or a company's shareholders. For privately held companies we primarily rely on data from SNL Kagan.³² The MVPD group also includes two DBS MVPDs, DIRECTV and DISH Network, and two large telephone company MVPDs, Verizon FiOS and AT&T U-verse. For those four companies we primarily use data found in reports to shareholders.

23. On the other hand, with respect to some other types of MVPDs, including HSD, OVS, PCO, there is little or no publicly or commercially available data. Comments filed for this Report provide limited data on those entities. Considering that the combined market share of these other types of MVPDs represents less than one percent of MVPD subscribers, their relevance to competition in the market for the delivery of video programming is limited.³³ Thus, we do not believe that a lack of data regarding these types of MVPDs will significantly hinder our analysis of competition in the market for delivered video services.

24. Consumers shop for MVPD alternatives in the areas where they live. However, determining which MVPDs offer video service in which geographic areas is difficult as a result of the wide variation in the geographic footprints of MVPDs and the lack of available data that would allow comparison of the geographic coverage of one type of MVPD with another type of MVPD.³⁴ For

³⁰ TV Everywhere is an authentication system whereby certain movies and television shows are accessible online via a variety of display devices including personal computer, mobile, and television – but only if you can prove (or “authenticate”) that you have a subscription to an MVPD. See definition of TV Everywhere, The Interactive TV Institute, http://www.itvdictionary.com/definitions/tv_everywhere_initiative_definition.html (visited Feb. 24, 2012).

³¹ Different MVPDs use different terms to market video services to other stationary and mobile devices. In this Report, we use the term “TV Everywhere” as a generic term for these video services.

³² Over the period 2006 to 2010, Cox Communications Inc., Bright House Networks, LLC, Cequel Communications Holdings I, LLC d/b/a Suddenlink Communications (“Suddenlink”), and Insight Communications Company, Inc. were privately held cable MVPDs. These companies represented four of the ten largest cable MVPDs at the end of 2010. SNL Kagan, <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2010Q4&sortcol=subscribersbasic&sortorder=desc> (visited Feb 24, 2012).

³³ SNL Kagan estimates that at the end of 2011 there are a total of 101.2 million MVPD subscriptions. Of these, cable MVPDs account for 58.3 million subscriptions, DBS accounts for 33.9 million subscriptions, and telephone MVPDs account for 8.3 million subscriptions. Thus, the remaining types of MVPDs account for approximately 0.7 million subscriptions and almost all of these are PCO subscriptions. SNL Kagan, *Cable TV Investor: Deals & Finance*, Sept. 30, 2011, at 2-3.

³⁴ The Commission's Mobile Wireless Report collects data on a census block basis and the Commission's Broadband Report collects data on a census block basis. For video services, however, we do not collect data on a census block basis. *Fifteenth Mobile Wireless Report*, 26 FCC Rcd 9668, ¶ 2 (2011); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, (continued....)

instance, DBS MVPDs provide a nationwide footprint. Cable MVPDs, however, operate in discrete geographic areas defined by the boundaries of their individual systems and provide data to the Commission on a “cable system” basis.³⁵ Similarly, the Commission collects data related to telephone MVPDs only to the extent that they operate under cable franchises, and thus on a cable system basis. As a result, there is no reliable method to match DBS MVPD data with cable MVPD or telephone MVPD data on a common geographic basis. We do not have the data necessary to systematically identifying with respect to any specific geographic area which MVPDs compete for the delivery of video services.

2. MVPD Structure

25. A key element of our analysis of video competition is an examination of the MVPD industry structure, including the various types of companies within the MVPD group and their place in the market for the delivery of video programming. In this section of the Report, we describe the structure of cable, DBS, telephone, and other MVPDs. We then examine horizontal concentration and vertical integration in the market. Next, we describe conditions effecting market entry during the relevant period, including an overview of existing regulations and market conditions that might influence entry decisions. Finally, we describe recent entry in the market.

a. Cable, DBS, Telephone, and Other Providers

26. The major MVPDs now offer hundreds of television channels as well as thousands of video programs through VOD services, many are offered in high-definition (“HD”). The major MVPDs offer delivered video programming as a standalone service or in combination with Internet access and telephone services. Cable MVPDs typically offer video, Internet access, and telephone services using their own facilities. DBS MVPDs offer video services using their own facilities and typically enter into cooperative arrangements with other entities to offer Internet access and telephone services.³⁶ Telephone MVPDs offer video, Internet access, and telephone services using their own facilities where they have upgraded systems. Where they have not upgraded systems, telephone MVPDs usually offer video through cooperative arrangements with DBS MVPDs.

27. *Cable MVPDs.* Historically, cable companies rarely competed with one another in the same geographic area. In some locations, cable operators built cable systems where cable MVPDs already provided video service, but this is the exception, not the rule. The introduction of DBS MVPDs with national footprints in the 1990s changed the competitive landscape and increased competition in the market for the delivery of video programming. In geographic areas that did not have access to cable MVPDs, the DBS companies competed with one another. In geographic areas with access to cable

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Amended by the Broadband Data Improvement Act, GN Docket No. 10-159, Seventh Broadband Progress Report and Order on Reconsideration, 26 FCC Rcd 8008, 8022-23, ¶¶ 23-24 (2011).

³⁵ A large cable MVPD will operate many cable systems of varying sizes. The geographic configuration of a cable system is determined by its physical system, which consists of a cable system technically integrated to a principal headend. The Commission collects cable system data in its Annual Report of Cable Television Systems (FCC Form 325). Only a limited number of cable systems provide data to the Commission. All cable systems with more than 20,000 subscribers are subject to the reporting requirement. The Commission also collects information on a random sample of cable systems with between 5,000 and 20,000 subscribers and a random sample of cable systems with fewer than 5,000 subscribers. Specifically for the filing year 2010, the FCC Form 325 collected data from all 613 cable systems with more than 20,000 subscribers, 279 of the 499 cable systems with 5,000 to 20,000 subscribers, and 170 of the 4,427 cable systems with less than 5,000 subscribers.

³⁶ For example, DISH Network has cooperative arrangements with Verizon, AT&T, CenturyLink, Frontier, and other telephone companies to offer a combination of video, Internet, and telephone services. DISH Network, <http://direct.digitallanding.com/default.aspx?PromoID=5003072&campaign=Online&SID=6c4aed07-a7e0-4135-95fe-be624de06eb6> (visited Jan. 20, 2012).

MVPDs, the DBS companies competed with one another and with the incumbent cable MVPDs. The level of competition increased again with the entry of Verizon in 2005 and AT&T in 2006, two large facilities-based telephone MVPDs, which began offering video service in geographic areas already served by cable MVPDs.³⁷ Today, a small number of geographic areas have as many as five MVPDs (*i.e.*, two cable MVPDs, two DBS MVPDs, and a telephone MVPD) directly competing with one another in the delivery of video programming. At the other end of the spectrum, some geographic areas (*e.g.*, rural areas) have only two MVPDs (*i.e.*, the two DBS MVPDs) directly competing with one another.

28. At the end of 2011, 1,157 cable companies provide MVPD service to 34,005 communities.³⁸ Depending on the number of homes and the geographic size of the community, cable operators use one or more cable systems to provide video service to the community.³⁹ A cable system is a physical system integrated to a principal headend.⁴⁰ Currently there are 5,312 cable systems.⁴¹ In pursuit of efficiencies, cable MVPDs may operate a group of cable systems in a metropolitan area or region. Small cable companies that serve few homes in a single geographic area often operate only one cable system.

29. The geographic reach of cable MVPDs varies from company to company. No cable operator provides nationwide coverage or statewide coverage. There are always geographic areas or populations within a state not served by the cable operator. The largest MVPD, Comcast, offers video programming in parts of 39 states and the District of Columbia.⁴² Some cable MVPDs focus their provision of video programming on a regional basis. For example, Mediacom focuses on serving the smaller cities in 22 states, primarily in the Midwestern and Southeastern regions of the United States.⁴³ BendBroadband, the 38th largest cable MVPD, serves 12 communities in Central Oregon. Sweetwater Cable, the 52nd largest cable MVPD, serves two communities in Wyoming. The majority of cable MVPDs are smaller companies offering video programming to a few communities or a single town.⁴⁴

³⁷ AT&T U-verse service launched commercially in San Antonio, TX on June 26, 2006. AT&T, *AT&T U-verse Timeline*, <http://www.att.com/Common/merger/files/pdf/U-verse%20Timeline41907.pdf> (visited Feb. 24, 2012). Verizon FiOS service launched in September 2005. Mari Sibley, *Timeline: The Evolution of FiOS Tv*, MediaExperiences2Go, <http://connectedhome2go.com/2010/08/19/timeline-the-evolution-of-fios-tv> (visited Feb. 24, 2012).

³⁸ FCC staff analysis of the Cable Operations and Licensing System (COALS) database on Dec. 16, 2011.

³⁹ A cable system is a physical system integrated to a principal headend. Often cable systems are clustered together using some of the same infrastructure to provide cable service to a larger geographic area (*e.g.*, metropolitan area). See 47 U.S.C. § 522(7).

⁴⁰ See *id.*

⁴¹ The Cable Operations and Licensing System (COALS) database shows 5,312 active, registered cable systems on Dec. 14, 2011. This number includes cable systems operated by Verizon.

⁴² Comcast Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 1 (“Comcast 2010 Form 10-K”).

⁴³ Mediacom Communications Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 4 (“Mediacom 2010 Form 10-K”).

⁴⁴ FCC staff analysis of the COALS database on Dec. 16, 2011 shows that of the 1,157 cable operators, 756 cable operators have one cable system, 135 cable operators have two cable systems, and 67 cable operators have three cable systems. For additional information regarding the characteristics of small and medium-sized cable MVPDs, see American Cable Association, http://www.americancable.org/about_us (visited Feb. 24, 2012).

30. The five largest cable MVPDs in 2006 were Comcast, Time Warner Cable, Cox Communications, Charter Communications, and Cablevision Systems.⁴⁵ These same companies were also the five largest cable MVPDs in 2010.⁴⁶ In 2006, the five largest cable MVPDs accounted for approximately 79 percent of all cable MVPD subscribers.⁴⁷ In 2010, these companies accounted for approximately 80 percent of all cable MVPD subscribers.⁴⁸ The ten largest cable MVPDs in 2006 included the top five and Bright House Networks, Suddenlink Communications, Mediacom, Insight Communications,⁴⁹ and Cable One.⁵⁰ These same companies were also the ten largest MVPDs in 2010.⁵¹ In 2006, the ten largest cable MVPDs accounted for approximately 90 percent of all cable MVPD subscribers.⁵² In 2010, these companies accounted for approximately 89 percent of all cable MVPD subscribers.⁵³ The combined shares of all cable MVPDs accounted for approximately 68 percent of MVPD subscribers at the end of 2006.⁵⁴ This fell to approximately 60 percent of MVPD subscribers at the end of 2010.⁵⁵

⁴⁵ SNL Kagan, *Broadband Cable Financial Databook*, 2007 Edition, at 20.

⁴⁶ SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 25.

⁴⁷ At the end of 2006, there were approximately 65.4 million basic cable subscribers and the top five cable MVPDs accounted for approximately 51.5 million subscribers. SNL Kagan, *Broadband Cable Financial Databook*, 2007 Edition, at 11 & 20.

⁴⁸ At the end of 2010, there were approximately 59.8 million basic cable subscribers and the top five cable MVPDs accounted for approximately 47.9 million subscribers. SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 12 & 25.

⁴⁹ Time Warner Cable recently purchased Insight Communications. *See Applications Filed for the Transfer of Control of Insight Communications Company, Inc. to Time Warner Cable Inc.*, WC Docket No. 11-148, Memorandum Opinion and Order, 27 FCC Rcd 497 (IB, WCB, WTB 2012). *See also* Time Warner Cable, Inc., *Time Warner Cable Completes Acquisition of Insight Communications* (press release), Feb. 29, 2012.

⁵⁰ SNL Kagan, *Broadband Cable Financial Databook*, 2007 Edition, at 20.

⁵¹ SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 25.

⁵² At the end of 2006, there were approximately 65.4 million basic cable subscribers and the top ten cable MVPDs accounted for approximately 58.6 million subscribers. SNL Kagan, *Broadband Cable Financial Databook*, 2007 Edition, at 11 & 20.

⁵³ At the end of 2010, there were approximately 59.8 million basic cable subscribers and the top ten cable MVPDs accounted for approximately 53.3 million subscribers. SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 12 & 25.

⁵⁴ At the end of 2006, there were approximately 95.8 million MVPD subscribers and cable MVPDs accounted for approximately 65.4 million subscribers. SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx?startYear=2006&endYear=2006> (visited Apr. 30, 2012).

⁵⁵ At the end of 2010, there were approximately 100.1 million MVPD subscribers and cable MVPDs accounted for approximately 59.8 million subscribers. SNL Kagan, *Special Report, U.S. Multichannel Subscriber Update and Geographic Analysis*, June 2011, at 1.

31. *DBS MVPDs.* The two DBS MVPDs, DIRECTV and DISH Network,⁵⁶ offer video service to most of the land area and population of the United States.⁵⁷ DIRECTV is the second largest MVPD in the United States with over 19 million subscribers.⁵⁸ DISH Network is the third largest MVPD with over 14 million subscribers.⁵⁹ The combined shares of the two DBS MVPDs account for approximately 34 percent of MVPD subscribers.⁶⁰

32. *Telephone MVPDs.* The two largest telephone MVPDs, AT&T and Verizon, have constructed systems for delivering video services in some of the areas where they have offered traditional landline telephone services. Verizon FiOS has registered with the Commission as a cable system whereas AT&T U-verse has not. The geographic footprints for Verizon FiOS and AT&T U-verse do not overlap. It is almost always the case, however, that the geographic footprints for AT&T U-verse and Verizon FiOS overlap areas already served by incumbent cable MVPDs. At the end of 2010, telephone MVPDs had 6.9 million video subscribers and AT&T and Verizon accounted for nearly 6.5 million,⁶¹ Verizon FiOS being the seventh largest MVPD with approximately 3.5 million subscribers and AT&T U-verse the ninth largest with approximately 3.0 million subscribers.⁶² We estimate that telephone MVPDs accounted for approximately seven percent of all MVPD subscribers.

33. The remaining telephone MVPDs are small by comparison with AT&T and Verizon. SureWest Communications is the third largest telephone MVPD with 61,800 video subscribers.⁶³ Consolidated Communications is fourth with 29,200 video subscribers. Cincinnati Bell is the fifth with 24,000 video subscribers. Hickory Technology is the sixth with 10,600 video subscribers. The remaining telephone MVPDs account for approximately 335,800 video subscribers.⁶⁴ CenturyLink offers video service through cooperative arrangements with DBS MVPDs, but recently began offering video service in limited geographic areas using its own upgraded facilities. Similar to the largest telephone MVPDs, some smaller telephone MVPDs register with the Commission as cable systems while others do not. Cincinnati Bell and SureWest have registered with the Commission while CenturyLink has not.

⁵⁶ Sky Angel, a DBS MVPD, ceased its DBS operations on April 1, 2008, and began offering its subscription video content online.

⁵⁷ We recognize that some homes are not able to receive DBS signals and DBS does not provide coverage to some land areas in Alaska.

⁵⁸ DIRECTV, *SEC Form 10-K for the Year Ended December 31, 2010*, at 2 (“DIRECTV 2010 Form 10-K”).

⁵⁹ DISH Network, *SEC Form 10-K for the Year Ended December 31, 2010*, at 1 (“DISH Network 2010 Form 10-K”).

⁶⁰ At the end of 2010, there were approximately 100.1 million MVPD subscribers and DBS MVPDs accounted for approximately 33.4 million subscribers. SNL Kagan, *Special Report, U.S. Multichannel Subscriber Update and Geographic Analysis*, June 2011, at 1.

⁶¹ *Id.*

⁶² Verizon 6/8/11 Comments at 5-6; AT&T 6/8/11 Comments at 2-3.

⁶³ On February 6, 2012, Consolidated Communications Holdings, Inc. and SureWest Communications entered into a definitive agreement under which Consolidated will acquire all the outstanding shares of SureWest in a cash and stock transaction. See SureWest, *Consolidated Communications to Acquire SureWest Communications* (press release), Feb. 6, 2012. Consolidated and SureWest consummated the deal on July 2, 2012. See Consolidated Communications Holdings, Inc., *Consolidated Communications Completes Acquisition of SureWest Communications* (press release), July 2, 2012.

⁶⁴ SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 42.

34. Little data exists regarding other telephone MVPDs. A recent survey conducted by the National Telecommunications Cooperative Association, (“NTCA”), however, estimates that in 2010, 252 NTCA members offered MVPD service using legacy coaxial cable technology. This is down from 2007, when 276 provided the service. Cooperative arrangements that bundle Internet access and telephone services offered by NTCA members with the video services of DBS MVPDs have also declined from 106 in 2007 to 66 in 2010. In contrast, MVPD service using Internet Protocol Television (“IPTV”) technology has grown from 61 rural telephone companies in 2007 to 159 in 2010. Rural Associations state that the ability to offer a quality MVPD service is viewed as a key driver of broadband deployment in rural areas.⁶⁵

35. *Other MVPDs.* We received few comments and there is little or no publically available data for home satellite dishes (“HSD”), open video systems (“OVS”), electric and gas utilities, wireless cable systems, PCO, CMRS and other wireless providers. With the exception of CMRS,⁶⁶ most of these other types of MVPDs serve few subscribers and their subscriber base is declining.⁶⁷ Data for September 2011, suggest that these other types of MVPDs collectively account for approximately 0.7 percent of all MVPD subscribers.⁶⁸ PCO’s accounts for the overwhelming bulk of the alternative MVPD subscribers, with approximately 650,000 subscribers.⁶⁹ This represents a decline from 900,000 subscribers in 2006.⁷⁰ The HSD, or large dish, segment of the satellite industry is the original satellite-to-home service offered to consumers. In the last report, we estimated that there were approximately 110,000 HSD subscribers in June 2006.⁷¹ Today, there are fewer entities offering HSD subscription service. In December 2010, National Programming Service, LLC, a provider of HSD programming, announced that it would cease providing HSD programming at the end of 2010. A company called Skyvision currently appears to offer HSD service during limited hours of each day.⁷² However, according to SNL Kagan, there are currently no reported HSD subscribers.⁷³

⁶⁵ Rural Associations 6/8/11 Comments at 2-3. NTCA states, “As video delivery moves to an IP format, video demand will spur broadband deployment and broadband availability will increase video demand. The two are intrinsically linked.” NTCA 5/19/2009 Comments at 2.

⁶⁶ We do not discuss CMRS in this Report because all aspects of CMRS and the larger mobile wireless industry are covered in the *Fifteenth Mobile Wireless Report*. Here we simply note that subscribers to a mobile wireless data plan may receive delivered video programming for viewing on some mobile wireless devices.

⁶⁷ SNL Kagan states, “Alternative multichannel providers, which include multichannel multipoint distribution service and wireless cable services, count a negligible 0.7% of the total multichannel universe. The outlook for the segment calls for a steady and gradual decline in subscribers, which should reduce the number of customers relying on those services to about 300,000 by the end of 2021.” SNL Kagan, *Cable TV Investor: Deals & Finance*, Sept. 30, 2011, at 5.

⁶⁸ *Id.*

⁶⁹ *Id.* at 2.

⁷⁰ *13th Report*, 24 FCC Rcd at 609, ¶ 140.

⁷¹ *Id.* at 589, ¶ 94. We previously measured the number of HSD subscribers in terms of the number of households subscribing to a programming service, although we recognized that some HSD households simply relied on unscrambled programming that was available without a subscription to a program service.

⁷² Skyvision, <http://www.skyvision.com/> (visited Nov. 30, 2011).

⁷³ SNL Kagan, *Cable TV Investor: Deals & Finance*, Sept. 30, 2011, at 2.

36. With respect to OVS, we recognized in the last report that new OVS activity has been limited.⁷⁴ Although some entities have subsequently filed for certifications to operate OVS systems, we suspect that most OVS subscribers are included in cable MVPD subscriber data and we have no way to count them separately. Although there may be some companies still offering wireless cable service, SNL Kagan data show that there are not any subscribers.⁷⁵ Because the alternative MVPDs account for such a small and shrinking share of the market for the delivery of video programming, and because data for these alternative MVPDs are not available, we focus our MVPD discussion on cable, DBS, and telephone MVPDs.

37. Table 1 shows estimates of the number of homes passed by cable, DBS, and telephone MVPDs for year-end 2006, 2007, 2008, 2009, and 2010. Cable MVPDs have built out and to a large extent upgraded their systems.⁷⁶ In 2006, cable MVPD service was available to 121.6 million homes (96.0 percent of the 126.7 million U.S. homes). By 2010, cable MVPD service was available to 128.8 million homes (98.5 percent out of 130.8 million U.S. homes). We assume that DBS MVPDs are available to all homes, but recognize that this slightly overstates the actual availability of DBS.⁷⁷ Telephone MVPDs greatly expanded their reach between 2006 and 2010. In 2006, facilities-based telephone MVPD service was available to approximately six million homes (4.7 percent). By 2010, telephone MVPD service had become available to 42.9 million homes (32.8 percent).

⁷⁴ 13th Report, 24 FCC Rcd at 607, ¶ 135.

⁷⁵ Watch Communications is a wireless cable system that serves 10,000 homes in Northwest Ohio. See Watch Communications, <http://www.watchtv.net/?p=about> (visited Jan. 13, 2012). See also W.A.T.C.H. TV 5/20/2009 Comments; W.A.T.C.H. TV 7/29/2009 Comments. See also SNL Kagan, *Cable TV Investor: Deals & Finance*, Sept. 30, 2011, at 2; NCTA 5/20/2009 Comments at 8.

⁷⁶ The upgrading of cable systems often includes increasing bandwidth capacity to provide additional channels, more HD channels, and faster Internet service. In addition, in their upgrades, cable MVPDs have included the use of data over cable service interface specifications (“DOCSIS”), which is a standard interface for cable modems that handle incoming and outgoing data signals between cable MVPDs and computers or television sets. See SearchNetworking, <http://searchnetworking.techtarget.com/definition/DOCSIS> (visited Feb. 24, 2012).

⁷⁷ We recognize that physical features (e.g., tall buildings, cliffs, trees) can prevent some homes from receiving DBS signals.

Table 1: Homes Passed by MVPDs (in millions)

Year	2006	2007	2008	2009	2010
Cable⁷⁸	121.6	123.9	125.6	127.1	128.8
Comcast	47.4	48.5	50.6	51.2	51.9
Time Warner	26.1	26.5	26.8	27.1	27.5
Cox	9.3	9.5	9.7	9.8	9.9
Charter	11.8	11.7	11.9	11.9	11.8
Cablevision	4.6	4.7	4.7	4.8	5.5
Bright House	4.0	4.1	4.1	4.2	4.2
Suddenlink	2.8	2.6	2.6	2.6	2.7
Mediacom	2.8	2.8	2.8	2.8	2.8
All Other Cable ⁷⁹	12.8	10.9	12.3	12.5	12.5
DBS⁸⁰	126.7	128.6	129.4	130.6	130.8
DIRECTV	126.7	128.6	129.4	130.6	130.8
DISH Network	126.7	128.6	129.4	130.6	130.8
Telephone⁸¹	6.0	17.3	29.7	38.2	42.9
AT&T U-verse ⁸²	N/A ⁸³	8.0	17.0	22.8	27.3
Verizon FiOS ⁸⁴	6.0	9.3	12.7	15.4	15.6

⁷⁸ Cable homes passed excludes overlap from overbuilders (defined as companies that build additional cable systems “over” one that already exists and offer customers a competitive alternative). Data for cable and cable companies come from SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 16, 2011).

⁷⁹ We estimate cable homes passed by all other cable operators by subtracting the number of cable homes passed by the eight largest cable operators from total cable homes passed.

⁸⁰ For simplification, we assume that DBS is available to every housing unit. The number of housing units is from U.S. Census Bureau and SNL Kagan estimates. SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 16, 2011). A housing unit is a house, an apartment, a mobile home or trailer, a group of rooms, or a single room that is occupied, or, if vacant, is intended for occupancy as separate living quarters. Both occupied and vacant housing units are included in the housing unit inventory, except recreational vehicles, boats, vans, tents, railroad cars, etc. are included only if occupied as a usual place of residence. Vacant mobile homes are included if intended for occupancy on site. Vacant mobile homes on dealer sales lots, at the factory, or in storage yards are excluded from the housing unit inventory.

⁸¹ For telephone, we simply add the estimates for AT&T U-verse and Verizon FiOS. We do not have reliable estimates for the number of homes passed by other telephone companies offering their own facilities-based video services.

⁸² AT&T, Inc., *2006 Annual Report* at 31; *2007 Annual Report* at 38; *2008 Annual Report* at 35; *2009 Annual Report* at 43; *2010 Annual Report* at 42.

⁸³ At year-end 2006, AT&T was providing U-verse services, including U-verse TV (IPTV) video, in limited parts of 11 markets. AT&T, *2006 Annual Report* at 31.

⁸⁴ Verizon Communications, *2006 Annual Report* at 19; *2007 Annual Report* at 18; *2008 Annual Report* at 14; *2009 Annual Report* at 14; *2010 Annual Report* at 15.

b. Horizontal Concentration

38. High market concentration may suggest the potential for competitive concerns. However, an analysis of other factors, such as entry conditions and the degree of price and non-price rivalry, may suggest that even a highly concentrated market does not raise competitive concerns. As noted above, the Commission does not collect data for cable, DBS, and telephone MVPDs on a uniform geographic basis and, therefore, cannot compare the availability of one type of MVPD with another in a particular geographic area.⁸⁵ Instead, we estimate here the number of homes on a nationwide basis that have access to two, three, or four MVPDs.

39. As a general rule, the geographic footprint of a cable MVPD rarely overlaps the geographic footprint of another cable MVPD. As such, cable MVPDs rarely compete with one another for the same video subscriber. The situation is similar for telephone MVPDs. The geographic footprint of one telephone MVPD rarely overlaps the geographic footprint of another telephone MVPD, so telephone MVPDs rarely compete with one another for the same video subscriber. In contrast, the geographic footprints of both DBS MVPDs are national and they almost always compete with one another for the same video subscriber. We also assume that a cable MVPD or a telephone MVPD almost always competes with both DBS MVPDs for the same subscriber. Finally, we assume that the two largest telephone MVPDs offer video service in geographic areas already served by incumbent cable companies and, therefore, almost always compete with a cable MVPD for the same subscriber. We have little data on additional telephone MVPDs and other types of MVPDs, and we have no means of determining the geographic footprints of these entities and, therefore, no means of determining whether they do or do not compete with incumbent cable systems. We do not include these other MVPDs in our estimates and recognize that their absence may marginally understate access to MVPDs.⁸⁶

40. Using our assumptions and the data from Table 1 above, we estimate MVPD concentration nationwide – specifically, the number of homes that have access to two, three, or four MVPDs. Our estimates are shown in Table 2.

In 2006,

- There were 126.7 million homes in the United States.
- Approximately 5.1 million homes had access to the two DBS MVPDs only.⁸⁷
- Approximately 115.6 million homes had access to three MVPDs only (*i.e.*, a cable MVPD and two DBS MVPDs, but not a telephone MVPD).⁸⁸
- Approximately 6.0 million homes had access to at least four MVPDs (*i.e.*, a cable MVPD, two DBS MVPDs, and a telephone MVPD).⁸⁹

In 2010,

- There were 130.8 million homes in the United States.
- Approximately 2.0 million homes had access to the two DBS MVPDs only.

⁸⁵ See *supra*, ¶ 24.

⁸⁶ For example, the presence of RCN (a cable overbuilder) in Montgomery County, Maryland, provides some households with access to five MVPDs. Montgomery County 7/8/11 Reply at 10.

⁸⁷ We assume that all homes have access to the DBS MVPDs. Our estimate is derived by subtracting the number of homes that have access to cable MVPDs from the number of homes that have access to the DBS MVPDs.

⁸⁸ We assume that homes that have access to a cable MVPD also have access to DBS MVPDs.

⁸⁹ We assume that homes that have access to one of the two largest telephone MVPDs also have access to a cable MVPD and the DBS MVPDs.

- Approximately 85.9 million homes had access to three MVPDs only (*i.e.*, a cable MVPD and two DBS MVPDs, but not a telephone MVPD).
- Approximately 42.9 million homes had access to at least four MVPDs (*i.e.*, a cable MVPD, two DBS MVPDs, and a telephone MVPD).

These estimates are only approximations due to the limits of available data, but they highlight the fact that with the entry of large telephone MVPDs into the market for video services, almost 43 million homes have access to four MVPDs. This entry represents a significant increase in competition in the market for the delivery of video programming. Specifically, between 2006 and 2010, we transitioned from a market structure where only 4.7 percent of homes had access to a fourth MVPD, to a market structure where one-third of U.S. homes have access to a fourth MVPD.

Table 2: Access to Multiple MVPDs

	Homes 2006	Percent of Homes 2006	Homes 2010	Percent of Homes 2010
Access to Two MVPDs Only	5.1 million	4.0%	2.0 million	1.5%
Access to Three MVPDs Only	115.6 million	91.2%	85.9 million	65.7%
Access to at Least Four MVPDs	6.0 million	4.7%	42.9 million	32.8%

41. Because we do not have geographic data for all MVPDs on any common geographic basis, we cannot calculate a Herfindahl-Hirschman Index (“HHI”), the traditional metric for measuring horizontal concentration.⁹⁰ We, however, can state with some degree of confidence that in geographic

⁹⁰ The HHI is calculated by summing the squares of the individual market shares of all the participants. For example, a market consisting of four firms with market shares of 30 percent, 30 percent, 20 percent and 20 percent has an HHI of 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI ranges from 10,000 (in the case of a pure monopoly) to a number approaching zero (in the case of an atomistic market). Lack of information about small firms is not critical to the calculation because such firms do not affect the HHI significantly. See Horizontal Merger Guidelines, U.S. Department of Justice and the Federal Trade Commission, August 19, 2010, <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>, at 18-19 (“Horizontal Merger Guidelines”).

The Commission has applied an HHI screen in its analysis of transactions involving MVPDs. See, e.g., *EchoStar-DIRECTV HDO*, 17 FCC Rcd at 20614-16, ¶¶ 133-39 (2002). See also *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, MB Docket No. 05-192, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8239-43, ¶¶ 75-83 (2006) (“2006 Adelphia, Comcast, Time Warner Cable MO&O”).

In addition, in past reports, we have estimated a national MVPD HHI for purposes of analyzing concentration in the market for the purchase of video programming. See, e.g., *13th Report*, 24 FCC Rcd at 627-28, ¶ 179; *id.* at 689, Table B-4. In the market for the purchase of video programming, our economic concern was one of monopsony power where few or large buyers could drive down the prices received by the owners of video programming. In this Report, our focus is the market for the delivery of video programming and our economic concern is one of monopoly power where few sellers of MVPD video services could drive up the prices paid by subscribers.

areas where homes have access to four MVPDs, the HHI is over 2500.⁹¹ Likewise, in geographic areas where homes have access to three MVPDs, the HHI is over 3333, and in geographic areas where homes have access to two MVPDs, the HHI is over 5000. Although these HHI may appear high, the entry of DBS in the 1990s and the more recent entry of telephone MVPDs have resulted in an ongoing reduction in MVPD market concentration. Stated differently, since the Commission's first report on the status of competition in the market for the delivery of video programming in 1995, almost no subscriber has fewer MVPD choices and most subscribers have more MVPD choices.

c. Vertical Integration

42. Our examination of vertical integration in the MVPD industry focuses on common ownership of entities that deliver video programming and entities that supply video programming. Vertical relationships may have beneficial effects,⁹² or they may deter competitive entry in the video marketplace or limit the diversity of video programming.⁹³ In 1992, Congress enacted various provisions related to vertical integration between cable operators and programming networks (e.g., program access, channel occupancy limit).⁹⁴ In 1992, a large number of the most popular cable programming networks were owned by cable operators. Congress was concerned that cable operators had the ability and incentive to thwart the competitive development of additional programming networks by refusing to carry unaffiliated networks, by insisting on an ownership stake in return for carriage, or by withholding their most popular programming networks from competing MVPDs.⁹⁵

43. In the last report, for 2006, the Commission identified 565 satellite-delivered national programming networks and found that 84 were affiliated with at least one cable MVPD.⁹⁶ Five of the top seven cable operators – Comcast, Time Warner, Cox, Cablevision, and Advance/Newhouse – held ownership interests in 84 satellite-delivered national programming networks. Time Warner had ownership interests in 39 national networks, Cox had ownership interests in 26 national networks, Advance/Newhouse (owner of cable operator Bright House) had ownership interests in 24 national

⁹¹ For a given number of firms, the value of the HHI increases as the inequality in subscriber shares increases. For example, if four firms are identified as participants in the relevant markets and each firm accounts for 25 percent of total sales, the value of HHI would be 2500 $[(25)^2 \times 4]$. If there are still only four firms but the top firm has a 40 percent subscriber share while each of the remaining three firms has 20 percent, the value of HHI increases from 2500 to 2800 $[(40)^2 + ((20)^2 \times 3)]$.

⁹² Beneficial effects can include efficiencies in the production, distribution, and marketing of video programming, as well as the incentive to expand channel capacity and create new programming by lowering the risks associated with program production ventures. See, e.g., H.R. REP. NO. 862, 102nd Congress, 2d Sess. (1992), at 41-43.

⁹³ Possible detrimental effects can include unfair methods of competition, discriminatory conduct, and exclusive contracts that are the result of coercive activity. See *Second Report*, 11 FCC Rcd at 2135, ¶ 157; *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 Vertical Ownership Limits*, MB Docket No. 92-264, 10 FCC Rcd 7364, 7365, ¶ 4 (1995).

⁹⁴ See 47 U.S.C. §§ 533, 548.

⁹⁵ See 47 U.S.C § 521(5).

⁹⁶ *13th Report*, 24 FCC Rcd at 629-30, ¶ 184. Because of the difficulty we find in identifying all networks, we are not providing this information in our 14th Report. However, we believe the number of networks is approximately 800. See *Revision of the Commission's Program Access Rules, News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control, Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporations (and Subsidiaries, debtor-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, MB Docket Nos. 12-68, 07-18, and 05-192, Notice of Proposed Rulemaking, 27 FCC Rcd 3413 (2012) ("Program Access NPRM").

networks, Comcast had ownership interests in 18 national networks, and Cablevision had ownership interests in 26 national networks.⁹⁷ In addition, the report identified 23 national networks without any ownership interest by a cable operator that were affiliated with a DBS provider (*e.g.*, News Corp. and Dominion Video Satellite).⁹⁸

44. Our review of vertical integration in early 2012 identified 127 national networks (49 of these are HD networks) affiliated with the top five cable MVPDs. Comcast has ownership interests in 78 national networks (30 are HD), Time Warner Cable has ownership interests in 12 national networks (four are HD), Cox has ownership interests in seven national networks (three are HD), Cablevision has ownership interests in five national networks (two are HD), and Bright House has ownership interests in 25 national networks (10 are HD).⁹⁹ In addition, our most recent review identifies 54 national networks that are affiliated with a DBS MVPD (21 are HD).¹⁰⁰

45. In addition to the creation of new networks between 2006 and 2010, especially HD networks, a couple of transactions had a significant impact on vertical integration. Between 2006 and 2010, News Corporation sold its interests in DIRECTV¹⁰¹ and Time Warner Inc. spun off Time Warner Cable.¹⁰² Both of these transactions severed ties between a number of networks and MVPDs.¹⁰³ In 2011,

⁹⁷ *13th Report*, 24 FCC Rcd at 630-31, ¶ 186.

⁹⁸ *Id.* at 629-30, ¶ 184. In addition, in 2006, another 24 national networks without any attributable cable ownership were affiliated with a company that had interests in a DBS provider (*e.g.*, Liberty Media). On February 21, 2008, the Commission approved the transfer of license and authorization that resulted in Liberty Media Corporation (“Liberty”) acquiring a *de facto* controlling interest in DIRECTV. On November 19, 2009, Liberty, through a series of transactions, transferred its interest in DIRECTV, three RSNs and GSN to a wholly owned subsidiary called DIRECTV Group, Inc. We list these networks as affiliated with this media company since Liberty and DIRECTV share common ownership, officers, and directors.

⁹⁹ For a list of the national networks owned by each of the top five cable MVPDs, *see* Appendix B, Table B-1.

¹⁰⁰ For a list of the national networks owned by DBS MVPDs, *see* Appendix B, Table B-1. Most of these networks we list as affiliated with Liberty Media. On February 21, 2008, the Commission approved the transfer of license and authorization that resulted in Liberty Media Corporation (“Liberty”) acquiring a *de facto* controlling interest in DIRECTV. On November 19, 2009, Liberty through a series of transactions transferred its interest in DIRECTV, three RSNs and GSN to a wholly owned subsidiary called DIRECTV Group, Inc.

¹⁰¹ *See News Corporation and The DirecTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control*, MB Docket No. 07-18, Memorandum Opinion and Order, 23 FCC Rcd 3265 (2008) (“*News Corp-DirecTV Order*”).

¹⁰² *See Applications for Consent to Assignment and/or Transfer of Control of Licenses, Time Warner Inc., and its subsidiaries, Assignor/Transferor, to Time Warner Cable Inc., and its subsidiaries, Assignee/Transferee*, MB Docket No. 08-120, WC Docket No. 08-157, Memorandum Opinion and Order, 24 FCC Rcd 879 (MB, WC 2009). *See also* Time Warner Inc., *Time Warner and Time Warner Cable Agree to Separation* (press release), May 21, 2008; Time Warner Inc., *Time Warner Inc. Distributes Time Warner Cable Shares to Its Stockholders of Record and Effects One-for-Three Reverse Stock Split* (press release), Mar. 27, 2009.

¹⁰³ The News Corp. sale of DIRECTV separated the following national networks from DIRECTV: Big Ten Network, BTN HD, FOX Business Network, FOX Business Network HD, FOX College Sports, FOX College Sports HD, FOX Deportes, FOX Movie Channel, FOX News Channel, FOX News Channel HD, FOX Soccer Channel, FOX Soccer Channel HD, FOX Soccer Plus, FOX Sports Net, FOX Sports Net HD, FUEL TV, FUEL TV HD, FX Network, FX Network HD, Nat Geo WILD, Nat Geo WILD HD, National Geographic Channel, National Geographic Channel HD, SPEED Channel, SPEED HD, TV Guide Network.

In addition, the News Corp. sale of DIRECTV separated the following regional networks from DIRECTV: FOX Sports Arizona, FOX Sports Arizona HD, FOX Sports Carolinas, FOX Sports Carolinas HD, FOX Sports Detroit, , (continued....)

however, Comcast consummated a joint venture with General Electric, which joined a number of networks with that MVPD.¹⁰⁴ These three transactions had a significant impact on vertical integration.¹⁰⁵ A summary of MVPD ownership of programming networks is included in Appendix B, Table B-1; Appendix C, Table C-1; and Appendix D at the end of this Report.

d. Entry Conditions

46. MVPD entry decisions are determined primarily by entry conditions and expected profitability.¹⁰⁶ Entry conditions are important in understanding the degree to which incumbent firms may or may not possess market power.¹⁰⁷ Entry occurs in the context of underlying market and regulatory conditions that directly influence the total number of firms that can compete successfully in a market. Such conditions are relevant for determining if, and when, actual entry will occur. Both market conditions and regulatory conditions are important for facilitating competition in the marketplace.

(Continued from previous page) _____

FOX Sports Detroit HD, FOX Sports Florida, FOX Sports Florida HD, FOX Sports Houston, FOX Sports Houston HD, FOX Sports Indiana, FOX Sports Indiana HD, FOX Sports Kansas City, FOX Sports Kansas City HD, FOX Sports Midwest, FOX Sports Midwest HD, FOX Sports North, FOX Sports North HD, FOX Sports Ohio, FOX Sports Ohio, HD, FOX Sports Oklahoma, FOX Sports Oklahoma HD, FOX Sports South, FOX Sports South HD, FOX Sports Southwest, FOX Sports Southwest HD, FOX Sports Tennessee, FOX Sports Tennessee HD, FOX Sports West, FOX Sports West HD, FOX Sports Wisconsin, FOX Sports Wisconsin HD, Sun Sports, Sun Sports HD.

Time Warner Cable's spinoff from Time Warner, Inc. separated the following national networks from Time Warner Cable: @Max, @Max HD, 5 Star Max, 5 Star Max HD, Action Max, Action Max HD, Boomerang, Cartoon Network/Adult Swim, Adult Swim HD, Cinemax, Cinemax HD, CNN, CNN HD, CNN Airport, CNN Headline News, CNN International, HBO, HBO HD, HBO2, HBO2HD, HBO Comedy, HBO comedy HD, HBO Family, HBO Family HD, HBO Signature, HBO Signature HD, HBO Zone, HBO Zone HD, More Max, More Max HD, NBA, NBA HD, Outer Max, Outer Max HD, TBS, TBS HD, TMC, TMC HD, Thriller Max, Thriller Max HD, TNT, TNT HD, Tru TV, Tru TV HD, WMAX, WMAX HD.

¹⁰⁴ See *Comcast-NBCU Order*, *supra*, n. 6. Comcast's transaction with General Electric added the following cable programming networks to Comcast: A&E, A&E HD, Bravo, Bravo HD, Chiller, Chiller HD, CNBC, CNBC HD, CNBC World, CNBC World HD, MSNBC, MSNBC HD, MUN2, Oxygen, Oxygen HD, ShopNBC, Sleuth, SyFy, SyFy HD, The Weather Channel, The Weather Channel HD, Universal HD, Universal Sports, USA, and USA HD. *Comcast-NBCU Order*, 26 FCC Rcd at 4410-13, Appendix D. See also *infra*, Appendix B, Table B-1.

Letter from Michael H. Hammer, Counsel for Comcast Corp., to Marlene H. Dortch, Secretary, FCC (Feb. 1, 2011). Comcast Corp., *Comcast and GE to Create Leading Entertainment Company* (press release), Dec. 3, 2009; Comcast Corp., *Comcast and GE Complete Transaction to Form NBCUniversal, LLC* (press release), Jan. 29, 2011.

¹⁰⁵ We recognize that there were other transactions that involved MVPDs buying, selling, or creating networks during the period. Collectively, however, these other transactions did not have a substantive impact on vertical integration, relative to the three "big" transactions.

¹⁰⁶ High economic profits encourage entry to the market, low economic profits discourage entry, and prolonged negative economic profits induce exit from the market. See Hal R. Varian, *INTERMEDIATE MICROECONOMICS: A MODERN APPROACH* 394-95, 503 (W. W. Norton and Company) (1999) ("*Intermediate Microeconomics*"); Dennis W. Carlton & Jeffrey M. Perloff, *MODERN INDUSTRIAL ORGANIZATION* 61-76 (Addison, Wesley, Longman, Inc.) (4th ed. 2005).

¹⁰⁷ Market power for a seller is the ability profitably to maintain prices above competitive levels for a significant period of time. Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service, or innovation. For a discussion of market power, see *Horizontal Merger Guidelines*, *supra*, n. 90.

Because the Commission oversees the regulatory conditions potentially affecting entry, we discuss these first.¹⁰⁸ We then discuss some of the market (“non-regulatory”) conditions potentially affecting entry.

(i) Regulations Influencing Entry

47. *Franchising and Licensing.* MVPDs must obtain the proper regulatory authority before providing video services. Section 621(a)(1) of the Act gives local governments the authority to control the entry of cable operators into their respective markets through franchise agreements, but prevents them from granting an exclusive franchise or unreasonably refusing to award competitive franchises.¹⁰⁹ Each state determines which political jurisdiction (*e.g.*, state, county, city, or town) has the authority to grant local franchises for cable service. In 2007 though, the Commission released a Report and Order adopting rules under its Section 621(a)(1) authority to eliminate the unreasonable entry barriers for competitive franchises imposed by local franchising authorities (“LFAs”) and to encourage the investment in broadband facilities.¹¹⁰ In addition, as we previously reported, 20 states have enacted video franchising laws revoking the ability of local governments to grant franchises.¹¹¹ Instead, these states have allowed cable operators and other MVPDs to receive statewide franchises in an effort to streamline the delivery of video services.¹¹² In addition to franchise agreements, cable operators may need licenses or authorizations from the Commission to deliver their programming to consumers.¹¹³

¹⁰⁸ The regulatory process, itself, may hinder entry if the process is characterized by unnecessary delay. One example of a regulatory delay would be the time a cable franchising authority may take to make a decision regarding an application. Economists argue that some operating licenses and other legal restrictions that serve to limit access to the market are barriers to entry, *i.e.*, they create positive economic profits for incumbents that are not bid away by new entry. See Jean Tirole, *THE THEORY OF INDUSTRIAL ORGANIZATION* 305 (MIT Press) (1988). See also *Intermediate Microeconomics* at 395.

¹⁰⁹ 47 U.S.C. §§ 522(10), 541(a)(1).

¹¹⁰ See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007), *aff’d sub nom. Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008). See also *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Second Report and Order, 22 FCC Rcd 19633 (2007).

¹¹¹ See Charles B. Goldfarb, Cong. Research Serv., Public, Educational, and Governmental (PEG) Access Cable Television Channels: Issues for Congress 2 (Oct. 7, 2011) (“*PEG CRS Report*”). See also *13th Report*, 24 FCC Rcd at 660, ¶ 249, n.837. The states that have adopted statewide video franchise are: California, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Missouri, Nevada, New Jersey, North Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia, and Wisconsin. See *PEG CRS Report* at 2, n.10. The United States Court of Appeals for the Fifth Circuit recently concluded that the provisions in Texas’s video franchising law barring the state’s incumbent cable operators from obtaining a state franchise until the expiration of their municipal licenses violated the First Amendment. See *Time Warner Cable, Inc. v. Paul Hudson*, 667 F.3d 630 (5th Cir. 2012).

¹¹² See *PEG CRS Report* at 2.

¹¹³ For example, many cable operators hold licenses under Part 78 of the Commission’s rules for CARS stations, which enable them to distribute programming to microwave hubs where it is impossible and too expensive to run cables and cover live events. See *Amendment of Part 101 of the Commission’s Rules to Facilitate the Use of Microwave for Wireless Backhaul and Other Uses and to Provide Additional Flexibility to Broadcast Auxiliary Service and Operational Fixed Microwave Licenses*, WT Docket No. 10-153, Report and Order, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order, 26 FCC Rcd 11614, 11620, ¶ 10 (2011). See also *Revisions to Broadcast Auxiliary Service Rules in Part 74 and Conforming Technical Rules for Broadcast Auxiliary Service, Cable Television Relay Service and Fixed Services in Parts 74, 78 and 101 of the Commission’s Rules*, ET Docket No. 01-75, Report and Order, 17 FCC Rcd 22979, 22980, n.1 (2002).

48. Satellite carriers must obtain Commission authorizations to operate their satellites and earth stations prior to offering video services.¹¹⁴ Similarly, LECs providing video services through the OVS framework must secure certification from the Commission prior to initiating service.¹¹⁵ Wireless cable systems and other wireless providers using spectrum to transmit video programming must comply with the Commission's spectrum licensing policies, as well as the appropriate interference and technical rules.¹¹⁶ The Commission also maintains the authority to review any business arrangements involving the transfer and control of its licenses or authorizations.¹¹⁷

49. *Effective Competition.* Under Section 623(a) of the Act, cable operators subject to effective competition in the communities they serve are exempt from regulation of their basic cable service.¹¹⁸ LFAs therefore are permitted to regulate cable operators' basic cable service rates unless the Commission has granted a petition for effective competition.¹¹⁹ A cable operator is subject to effective competition in a local community when one of four tests are met: (1) fewer than 30 percent of the households subscribe to the operator's cable programming service; (2) the operator and at least one other MVPD provide comparable services to at least 50 percent of the households in the community and at least 15 percent of households subscribe to service of MVPDs other than the largest one; (3) a municipality offers MVPD service to at least 50 percent of households; or (4) an LEC or its affiliate, or an entity using the facilities of an LEC or its affiliate, offers MVPD service by means other than DBS service in an area that an unaffiliated cable operator also serves.¹²⁰

50. *Program Access.* Without access to video program content, new entrants cannot successfully enter into the marketplace. Sections 628(b), 628(c)(1), and 628(d) grant the Commission broad authority to prevent cable operators from engaging in unfair acts that have the purpose or effect of significantly hindering or preventing an MVPD from providing satellite-delivered programming to consumers.¹²¹ Section 628(c)(2) of the Act ensures that competitive MVPDs obtain access to satellite programming affiliated with a cable operator.¹²² Specifically, the Commission's program access rules prevent a cable operator with an attributable interest in a satellite-delivered programming vendor from improperly influencing the vendor in the sale or delivery of its programming to a competing MVPD. In addition, a cable-affiliated satellite-programming vendor may not discriminate in the price, terms, and conditions of sale for its programming among competing MVPDs. Cable operators also are generally

¹¹⁴ 47 C.F.R. § 25.102(a).

¹¹⁵ 47 U.S.C. § 573(a)(1); 47 C.F.R. § 76.1502. It is left to the discretion of the LFA whether to require an OVS operator to negotiate a franchise for the service area or to impose no franchise obligation on the OVS operator. See *City of Dallas Texas v. FCC*, 165 F.3d 341 (5th Cir. 1999).

¹¹⁶ See 15th *Mobile Wireless Report*, 26 FCC Rcd at 9714, ¶ 57.

¹¹⁷ 47 U.S.C. § 310(d).

¹¹⁸ 47 U.S.C. § 543(a)(2).

¹¹⁹ 47 U.S.C. § 543(a)(2)(A); 47 C.F.R. §§ 76.905(a), 76.907. LFAs, though, must obtain certification from the Commission prior to regulating the basic service tier. 47 U.S.C. § 543(a)(3)-(4); 47 C.F.R. § 76.910. The basic level of cable service the Act requires for cable operators subject to rate regulation includes at a minimum: (1) all commercial and noncommercial local broadcast stations entitled to carriage under the Act's must-carry provisions; (2) any public, educational, and governmental access channels the LFA requires; and (3) any other local broadcast station provided to any subscriber. 47 U.S.C. § 543(b)(7)(A).

¹²⁰ 47 C.F.R. § 76.905(b).

¹²¹ 47 U.S.C. § 548(b), (c)(1), (d).

¹²² 47 U.S.C. § 548(c)(2).

prohibited from entering into exclusive programming agreements with cable-affiliated satellite-programming vendors. MVPDs may allege violations of the program access rules by initiating an adjudicatory proceeding with the Commission through the filing of a program access complaint.¹²³

51. In 2007, the Commission released a Report and Order extending the prohibition on exclusive contracts between cable operators and cable-affiliated satellite-programming vendors until October 5, 2012.¹²⁴ The *2007 Program Access Order* also modified the program access complaint procedures and included a Notice of Proposed Rulemaking.¹²⁵ Among other revisions, the current program access rules provide for party-to-party discovery and permit the parties in a program access dispute to engage in voluntary arbitration during the pendency of the complaint.¹²⁶

52. Pursuant to Section 628(b), in 2010, the Commission adopted rules preventing cable operators from engaging in unfair acts with respect to affiliated programming that is terrestrially delivered.¹²⁷ The United States Court of Appeals for the District of Columbia (“D.C. Circuit”) later upheld substantially all of this order.¹²⁸ In 2011, the Commission found that MSG and Cablevision violated both Section 628(b) and the Commission’s rules when they denied AT&T and Verizon access to the terrestrially delivered HD version of the MSG and MSG+ networks.¹²⁹ According to some commenters, access to programming remains a concern in the MVPD marketplace and is a key driver in

¹²³ 47 C.F.R. §§ 76.1001-04.

¹²⁴ See *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-29, MB Docket No. 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17792-93, ¶ 1 (2007) (“*2007 Program Access Order*”), *aff’d sub nom. Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010). In March 2012, the Commission adopted a Notice of Proposed Rulemaking seeking comment on proposed revisions to both its exclusive contracts prohibition for satellite-delivered, cable-affiliated programming and its program access rules in order to better remedy alleged rule violations, including possible discriminatory volume discounts and uniform price increases. See *Program Access NPRM*, 27 FCC Rcd at 3414-15, ¶ 1.

¹²⁵ See *2007 Program Access Order*, 22 FCC Rcd at 17793-94, ¶¶ 1-2.

¹²⁶ 47 C.F.R. § 76.1003(i)-(j). See also *2007 Program Access Order*, 22 FCC Rcd at 17847-59, ¶¶ 83-113. The program access rules also allow a complainant seeking renewal of an existing program contract to request that the terms and conditions of its existing contract remain in place pending resolution of the complaint. 47 C.F.R. § 76.1003(l).

¹²⁷ See *Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, First Report and Order, 25 FCC Rcd 746, 792-93, ¶¶ 69-70 (2010) (“*2010 Program Access Order*”), *aff’d in part and vacated in part sub nom. Cablevision Systems Corp. et al. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011).

¹²⁸ See *id.* at 699. The court vacated one part of the *2010 Program Access Order* – the Commission’s decision to treat certain acts involving terrestrially delivered, cable-affiliated programming as categorically “unfair.” See *id.* at 719-23. Despite this holding, the court did not prevent the Commission from addressing on a case-by-case basis whether certain acts are “unfair.” See *id.* at 723.

¹²⁹ See *Verizon Tel. Cos. et al.*, Order, 26 FCC Rcd 13145 (MB 2011) (concluding that withholding the MSG HD and MSG+ HD Regional Sports Networks from Verizon is an “unfair act” that has the “effect” of “significantly hindering” Verizon from providing satellite cable programming and satellite broadcast programming to subscribers and consumers in New York and Buffalo), *aff’d Verizon Tel. Cos. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15849 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2d Cir.). See also *AT&T Servs. Inc. et al.*, Order, 26 FCC Rcd 13206 (MB 2011) (reaching the same conclusion with respect to AT&T in the State of Connecticut), *aff’d AT&T Servs. Inc. et al.*, Memorandum Opinion and Order, 26 FCC Rcd 15871 (2011), *appeal pending sub nom. Cablevision Sys. Corp. et al. v. FCC*, No. 11-4780 (2d Cir.).

creating a competitive environment.¹³⁰ Other commenters maintain, however, that the competitiveness of the MVPD marketplace has removed the need for program access regulations.¹³¹

53. *Program Carriage.* MVPDs must be able to reach carriage agreements with video programming vendors in order to provide a competitive video service product. As a means to foster competition, Congress adopted Section 616 of the Act, which required the Commission to establish rules governing the program carriage agreements and related practices between cable operators or other MVPDs and video programming vendors.¹³² The Commission's rules prohibit cable operators or other MVPDs from requiring a financial interest in a video programming vendor or obtaining exclusive rights to programming as conditions for carriage.¹³³ MVPDs also are prevented from discriminating against video programming vendors on the basis of affiliation in the selection, terms, or conditions of carriage to the extent the effect of such conduct is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly.¹³⁴ An aggrieved MVPD or video programming vendor may file a complaint for alleged violations.¹³⁵

54. The Commission in 2011 released a Second Report and Order clarifying the program carriage complaint process. In particular, this order codified the requirements for establishing a *prima facie* program carriage violation; established deadlines for action by the Media Bureau and Administrative Law Judges in response to a complaint; extended the deadline for a defendant to respond to a complaint; and implemented procedures for the Media Bureau to consider requests seeking a temporary standstill of an existing programming contract pending the resolution of a complaint.¹³⁶ The Commission also issued a Notice of Proposed Rulemaking seeking comment on further revisions to the procedural and substantive program carriage rules in order to assist the resolution of carriage disputes.¹³⁷

¹³⁰ See, e.g., AT&T 7/8/11 Reply at 1-2; DIRECTV 7/8/11 Reply at 2-3; AT&T 6/8/11 Comments at 7; Verizon 6/8/11 Comments at 16; Consumer Union 7/29/09 Comments at 3-4; AT&T 6/20/09 Reply at 2-4; DIRECTV 5/20/09 Comments at 17. Small and rural MVPDs also indicate that they face difficulties in obtaining access to video content under competitive prices and terms. These concerns are raised in Section IV of this Report.

¹³¹ See, e.g., NCTA 6/8/11 Comments at 16-17; Comcast 6/8/11 Comments at 36-39.

¹³² 47 U.S.C. § 536. Congress enacted Section 616 after finding that some cable operators were requiring non-affiliated programmers to grant them exclusive rights to programming or provide them with a financial interest in it as a condition for carriage. See *13th Report*, 24 FCC Rcd at 639, ¶ 202.

¹³³ 47 C.F.R. § 76.1301(a)-(b).

¹³⁴ 47 C.F.R. § 76.1301(c).

¹³⁵ 47 C.F.R. § 76.1302(a). In October 2011, the Game Show Network ("GSN") filed a program carriage complaint against Cablevision alleging that the cable operator violated the anti-discrimination provision of the program carriage rules when it repositioned GSN from an expanded basic tier to a sports tier. GSN argues that this move separates it from its primarily female audience and is advantageous for WE tv and Wedding Central, two networks affiliated with Cablevision. See *Game Show Network, LLC v. Cablevision Systems Corp.*, Program Carriage Complaint, CSR-8529-P (filed Oct. 12, 2011). The Media Bureau issued a Hearing Designation Order for the complaint in May 2012. See *Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 27 FCC Rcd 5113 (MB 2012).

¹³⁶ See *Revision of the Commission's Program Carriage Rules; Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB Docket No. 11-131, MB Docket No. 07-42, Second Report and Order and Notice of Proposed Rulemaking, 26 FCC Rcd 11494, 11495-96, 11500-01, ¶¶ 2, 8 (2011) ("*2011 Program Carriage Order and NPRM*"). This order is currently on appeal in the Second Circuit. See *Time Warner Cable Inc. v. FCC*, No. 11-4138 (2d Cir.).

¹³⁷ See *2011 Program Carriage Order and NPRM*, 26 FCC Rcd at 11496-97, 11521-22, ¶¶ 3, 37.

55. Several commenters indicate that independent programmers have difficulty obtaining carriage on video distribution systems at reasonable terms because of increasing vertical integration in the video market.¹³⁸ Commenters suggest this increasing vertical integration has forced out independent programmers, especially those programmers who are minority-owned or offer minority-targeted programming, because vertically integrated MVPDs want to promote their own programming in order to increase revenues.¹³⁹ These commenters encourage the Commission to continue to reform the program carriage complaint process to create a “level playing field.”¹⁴⁰ Some MVPDs, on the other hand, allege that the Commission’s program carriage provisions no longer serve a useful purpose. They contend that only a small number of channels on a cable operator’s channel lineup are owned by that operator or any other cable operator. In addition, these MVPDs argue that non-affiliation is no longer the reason why independent programmers are not gaining carriage on their respective systems. Instead, the more likely reason is that the non-affiliated network is perceived by the MVPD to add little value or diversity.¹⁴¹

56. *Retransmission Consent and Must Carry.* The ability of an MVPD to offer its subscribers local broadcast programming affects its entry into the video services marketplace.¹⁴² In 1992, Congress enacted Sections 325, 614, and 615 of the Act to facilitate cable operators’ carriage of local broadcast television stations¹⁴³ and subsequently adopted a similar carriage regime for DBS providers in 1999.¹⁴⁴ Pursuant to Section 325 of the Act, MVPDs may not retransmit a local broadcaster’s signal without their express permission.¹⁴⁵ Cable operators are required to carry local television stations in every market they serve. DBS operators need not carry any local television signals, but where a DBS operator chooses to carry such stations, it must carry all stations in that market (“carry one, carry all”).¹⁴⁶ Under this regime, broadcasters maintain control over their signals and commercial broadcasters may request compensation from MVPDs for the carriage of their signals.¹⁴⁷

57. In local television markets, as defined by The Nielsen Company’s (“Nielsen’s”) designated market areas (“DMAs”),¹⁴⁸ commercial television stations must elect every three years between the right

¹³⁸ See Free Press 8/28/09 Reply at 9-10; Written Ex Parte Submission of WealthTV (filed July 23, 2009) at 1 (“WealthTV 7/23/09 Ex Parte”); HDNet 6/20/09 Reply at 1-2.

¹³⁹ See Free Press 8/28/09 Reply at 9-10; WealthTV 7/23/09 Ex Parte at 4-6.

¹⁴⁰ See Consumers Union 7/29/09 Comments at 5; WealthTV 7/23/09 Ex Parte at 1-4.

¹⁴¹ See NCTA 6/8/11 Comments at 17-18.

¹⁴² For a complete description of the retransmission consent and must-carry provisions, see *In-State Broadcast Programming: Report to Congress Pursuant to Section 304 of the Satellite Television Extension and Localism Act of 2010*, MB Docket No. 10-238, Report, 26 FCC Rcd 11919 (MB 2011) (“STELA Report”); *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, MB Docket No. 05-28 (Sept. 8, 2005), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260936A1.doc (“SHVERA Report”).

¹⁴³ 47 U.S.C. §§ 325(b), 534, 535.

¹⁴⁴ The Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (1999) (“SHVIA”).

¹⁴⁵ 47 U.S.C. § 325(b).

¹⁴⁶ 47 C.F.R. § 338(a)(1); 47 C.F.R. § 76.66.

¹⁴⁷ See *STELA Report*, 26 FCC Rcd at 11922-23, ¶ 7.

¹⁴⁸ A DMA is a Nielsen-defined television market consisting of a unique group of counties. The U.S. is divided into 210 DMA markets. Nielsen identifies television markets by placing each U.S. county (except for certain counties in Alaska) in a market based on measured viewing patterns and by MVPD distribution. Typically, each U.S. county is (continued....)

to grant retransmission consent or the right to mandatory carriage.¹⁴⁹ If a station elects retransmission consent, the broadcaster and an MVPD negotiate a carriage agreement, which may include monetary or other types of compensation in return for the right to carry the broadcast signal.¹⁵⁰ Where a station elects must carry, it is generally entitled to carriage but it is prohibited from receiving compensation.¹⁵¹ Qualified local noncommercial educational (“NCE”) stations have a right to mandatory carriage within the same must-carry market, but do not have retransmission consent rights.¹⁵² Cable operators also are permitted to negotiate for retransmission consent with any other broadcast station they seek to carry irrespective of the station’s television market.¹⁵³

58. In recent years, some MVPDs’ and broadcasters’ negotiations have resulted in public retransmission consent disputes, leading a coalition of MVPDs and consumer groups to file a rulemaking petition with the Commission in 2010.¹⁵⁴ The petitioners argue that the Commission’s retransmission consent regulations are outdated and harmful to consumers.¹⁵⁵ The Commission issued a Notice of Proposed Rulemaking in 2011 seeking comment on several proposed revisions to its retransmission consent regime.¹⁵⁶ Among other things, the Commission sought comment on modifying the good faith negotiation standards to include additional negotiation violations, revising the “totality of the circumstances” standard used to determine whether actions in the negotiation process are undertaken in good faith, and altering the consumer notice requirements for retransmission consent disputes.¹⁵⁷

59. Several commenters indicate that securing access to local and network broadcast programming is a critical component of a competitive MVPD market.¹⁵⁸ In particular, some commenters argue that the current retransmission consent regime provides each network-affiliated station with a monopoly over network programming within its local market.¹⁵⁹ This market power, commenters claim, allows broadcasters to exact substantial retransmission consent fees and to withhold such programming

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assigned to only one market according to the market whose stations receive the preponderance of the audience in that county. Yet in a few cases where a county is large and viewing patterns differ significantly between parts of the county, a portion of the county is assigned to one television market and another portion of the county is assigned to another market. Several counties in Alaska, however, are not assigned to any DMA. *See STELA Report*, 26 FCC Rcd at 11921, ¶ 5 & n.10.

¹⁴⁹ 47 U.S.C. § 325(b)(3)(B); 47 C.F.R. §§ 76.56(b), 76.64.

¹⁵⁰ 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. § 76.64. *See also STELA Report*, 26 FCC Rcd at 11923, ¶ 8.

¹⁵¹ 47 C.F.R. § 76.60.

¹⁵² 47 U.S.C. § 325(b)(2)(A).

¹⁵³ 47 U.S.C. § 325(b); 47 C.F.R. § 76.64. These carriage arrangements might be limited though by other contractual restrictions, such as network affiliation arrangements. *See STELA Report*, 26 FCC Rcd at 11923, n. 22.

¹⁵⁴ *See Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Docket No. 10-71, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2725-27, ¶¶ 13-16 (2011) (“*Retransmission Consent NPRM*”).

¹⁵⁵ *See id.* at 2725, ¶ 13.

¹⁵⁶ *See id.* at 2719, ¶ 1.

¹⁵⁷ *See id.* at 2729-38, ¶¶ 20-37.

¹⁵⁸ *See* DISH Network 6/8/11 Comments at 8; AT&T 6/8/11 Comments 8-9; DIRECTV 6/8/11 Comments at 25-26; RCN 8/28/09 Reply at 6-7; DIRECTV 5/20/09 Comments at 17-18. Small and rural carriers also raised retransmission consent concerns, which we address in Section IV.

¹⁵⁹ *See* DIRECTV 6/8/11 Comments at 26; DISH Network 6/8/11 Comments at 8-9; New Jersey 7/8/11 Reply at 9; DIRECTV 5/20/09 Comments at 18.

when their terms and conditions are not met.¹⁶⁰ Consequently, they welcome the Commission's review of its retransmission consent regime and encourage the Commission to reform its regulatory framework for retransmission consent.¹⁶¹

60. NAB and broadcast station licensees urge the Commission to refrain from adopting substantial changes to the existing retransmission consent rules,¹⁶² or repealing any broadcasting-related exclusivity rules.¹⁶³ They argue that retransmission consent fees are necessary to help broadcasters sustain their ability to offer programming, particularly news that is relevant to their communities.¹⁶⁴ Furthermore, they state that historically broadcasters have not received cash compensation for their signals,¹⁶⁵ and even the fees paid by MVPDs today are significantly lower than the fees paid to cable networks with comparable or lower ratings.¹⁶⁶ NAB states that retransmission consent fees represent only a small fraction of MVPD programming costs.¹⁶⁷

61. *Exclusivity Rules.* MVPDs carry local broadcast stations pursuant to the Commission's rules protecting a broadcast station's exclusive distribution rights in its respective market.¹⁶⁸ With respect to cable operators, the Commission's network non-duplication rules allow a local broadcast station to request that the duplicated programming be blacked out when carried on another station imported by the

¹⁶⁰ See DISH Network 6/8/11 Comments at 8-9; AT&T 6/8/11 Comments 8-9; DIRECTV 6/8/11 Comments at 26-27; Verizon 6/8/11 Comments at 18; RCN 8/28/09 Reply at 7; DIRECTV 5/20/09 Comments at 18-19.

¹⁶¹ See DIRECTV 6/8/11 Comments at 27; DISH Network 6/8/11 Comments at 9; Verizon 6/8/11 Comments at 18-20; AT&T 6/8/11 Comments at 8.

¹⁶² See NAB 6/8/11 Comments at 17-18; NAB 7/8/11 Reply, Attachment A at iii (resubmitting its comments filed in MB Docket No. 10-71). See also, e.g., CBS Television Network Affiliates Association Comments, MB Docket No. 10-71 (filed May 27, 2011) ("CBS Affiliates 10-71 Comments"); Sinclair Broadcast Group, Inc. Comments, MB Docket No. 10-71 (filed May 27, 2011) ("Sinclair 10-71 Comments"); Belo Corp. Comments, MB Docket No. 10-71 (filed May 27, 2011) ("Belo 10-71 Comments").

¹⁶³ See NAB 7/8/11 Reply, Attachment B at 53-61; CBS Affiliates 10-71 Comments at 2-3; Gilmore Comments, MB Docket No. 10-71 (filed May 27, 2011) at 16; Joint Comments of Barrington Broadcasting Group, LLC, Bonten Media Group, LLC, Dispatch Broadcast Group, Gannett Co., Inc., Newport Television, LLC, Post-Newsweek Stations, Inc., and Raycom Media, Inc., MB Docket No. 10-71 (filed May 27, 2011) at 3-4; Belo 10-71 Comments at 2, 29-30.

¹⁶⁴ See, e.g., NAB 7/8/11 Reply, Attachment A at 7-10; CBS Affiliates 10-71 Comments at 1; CBS Corporation Comments, MB Docket 10-71 at 11 (filed May 27, 2011) ("CBS Corp. 10-71 Comments"); Sinclair 10-71 Comments at 14; Belo 10-71 Comments at 6.

¹⁶⁵ See, e.g., NAB 7/8/11 Reply, Attachment B at 16-17; Joint Comments of Gilmore Broadcasting Corp., Landmark Television, LLC, and Rockfleet Broadcasting, Inc., MB Docket No. 10-71 (filed May 27, 2011) at 6; CBS Affiliates 10-71 Comments at 15; Nexstar Broadcasting, Inc. Comments, MB Docket No. 10-71 (filed May 27, 2011) at 4; The Walt Disney Company Comments, MB Docket No. 10-71 (filed May 27, 2011) at 8-9; Allbritton Communications Corporation Comments, MB Docket No. 10-71 (filed May 27, 2011) at 2.

¹⁶⁶ See NAB 7/8/11 Reply, Attachment A at 15-18; Sinclair 10-71 Comments at 11 (citing Dr. Michael G. Baumann, *Proposal for Reform of the Retransmission Consent Good Faith Bargaining Rules: An Economic Analysis*; Economists Incorporated, May 27, 2011, at 7, attached as Exhibit 1 to the Sinclair Comments); CBS Affiliates 10-71 Comments at 14.

¹⁶⁷ See NAB 7/8/11 Reply, Attachment B at 2.

¹⁶⁸ See generally *SHVERA Report*, *supra*, n. 142, for a more detailed description of these rules.

system into the local station's zone of protection.¹⁶⁹ Similarly, the Commission's syndicated exclusivity rules allow a broadcaster to assert its right to black out syndicated programming for which it holds exclusive rights when carried by a cable operator within its zone of protection.¹⁷⁰ The Commission's sports blackout rule protects a sports team's or sports league's distribution rights to a live sporting event occurring in a local market. The rule prevents a cable operator from providing the live sporting event on a distant signal to a market where the game is blacked out on the local broadcast station.¹⁷¹ As mandated by Congress, the Commission's network non-duplication and syndicated exclusivity rules and the sports blackout rule apply to satellite carriers.¹⁷² The Commission has sought comment on the elimination of the network non-duplication and syndicated exclusivity rules as they apply to cable¹⁷³ and on a Petition for Rulemaking requesting the Commission to eliminate the sports blackout rule.¹⁷⁴

62. *Ownership Limits.* Section 613(f) of the Act requires the Commission to establish reasonable limits on the number of subscribers a cable operator may serve nationwide ("horizontal" limit) and the number of channels a cable operator may dedicate to its affiliated programming networks ("vertical" limit).¹⁷⁵ Although the Commission adopted rules placing limitations on the horizontal and vertical ownership of cable operators,¹⁷⁶ these rules were struck down by the D.C. Circuit.¹⁷⁷

63. *Public Interest Programming.* Pursuant to Sections 611 and 621 of the Communications Act, local franchising authorities may require cable operators to dedicate a portion of their channel capacity and provide financial support to public, educational, and governmental ("PEG") channels.¹⁷⁸

¹⁶⁹ 47 C.F.R. § 76.92. For purposes of this rule, a broadcast station's zone of protection is 35 miles (or 55 miles in smaller markets). 47 C.F.R. § 73.685(m).

¹⁷⁰ 47 C.F.R. § 76.101. For purposes of this rule, a broadcast station has a 35-mile geographic zone of protection. 47 C.F.R. § 73.685(m).

¹⁷¹ 47 C.F.R. § 76.111.

¹⁷² 47 U.S.C. § 339(b); 47 C.F.R. §§ 76.122-23, 76.127. In 1999, Congress directed the Commission to extend the network non-duplication and syndicated exclusivity rules to satellite carriers, but only with respect to the retransmission of nationally distributed superstations. It also required the Commission to extend the sports blackout rules to the carriage of nationally distributed superstations and network stations. See SHVIA, P.L. No. 106-113, 113 Stat. 1501A-534.

¹⁷³ See *Retransmission Consent NPRM*, 26 FCC Rcd at 2740-43, ¶¶ 42-45.

¹⁷⁴ See *Commission Seeks Comment on Petition for Rulemaking Seeking Elimination of the Sports Blackout Rule*, MB Docket No. 12-3, Public Notice, 27 FCC Rcd 260 (MB 2012).

¹⁷⁵ 47 U.S.C. § 533(f).

¹⁷⁶ See *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, Second Report and Order, 8 FCC Rcd 8565, 8567, ¶¶ 3-4 (1993). See also 47 C.F.R. §§ 76.503(a), 76.504(a)-(b).

¹⁷⁷ See *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1136, 1139 (D.C. Cir. 2001). In 2008, the Commission once again adopted a horizontal limit preventing an individual cable operator from serving more than 30 percent of MVPD subscribers nationwide, using more recent empirical data to reach the result. See *The Commission's Cable Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, Fourth Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, 2135, ¶ 1 (2008). The Commission also sought additional comment on its vertical ownership limit. See *id.* at 2187-96, ¶¶ 125-45. Despite the inclusion of more recent data, the D.C. Circuit struck down the revised horizontal ownership limit in 2009 for being arbitrary and capricious. See *Comcast Corp. v. FCC*, 579 F.3d 1, 10 (D.C. Cir. 2009).

¹⁷⁸ 47 U.S.C. §§ 531(a)-(b), 541(a)(4)(B). Comcast is subject to heightened PEG requirements after its merger with NBCU. In the *Comcast-NBCU Order*, the Commission reaffirmed the importance of PEG programming and (continued....)

The statute further requires cable operators to carry any PEG channels on their basic service tier.¹⁷⁹ In spite of these statutory requirements, some state video franchising laws have removed or reduced the PEG requirements provided in local franchising agreements, which has led to a reduction in PEG funding and support.¹⁸⁰

64. Commenters express concern with the state of public interest programming. They indicate that PEG channels have suffered in recent years due to state franchising laws, anti-competitive conduct by cable and wireless companies, and the Commission's recent changes to its franchising rules.¹⁸¹ Montgomery County, Maryland ("Montgomery County") contends that cable operators have not used advances in technology and service delivery to benefit PEG programming and that the required number of PEG channels has not kept pace with the increase in channel capacity on cable systems.¹⁸²

65. The Alliance for Community Media ("ACM") submits a study with its comments finding that, among other things, PEG Access Centers in at least 100 communities have closed since 2005.¹⁸³ In addition, the study indicates that new state franchising laws and/or decisions by local governments are the primary reasons for reductions in funding and in-kind resources for PEG Access Centers.¹⁸⁴ Based on the study, ACM argues that PEG channels will disappear without increased regulatory support.¹⁸⁵

66. Some commenters therefore encourage the Commission to issue a declaratory ruling concerning the Cable Act's carriage rules for PEG channels.¹⁸⁶ In 2009, the Commission received two petitions seeking a declaratory ruling clarifying the statutory rules and responsibilities of MVPDs with respect to the carriage of PEG channels. These petitions argue that AT&T's delivery of PEG programming on its U-verse system violates the Act. In particular, the petitioners' claim that AT&T's placement of PEG programming on a singular channel in its U-verse system is a violation of the Act

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imposed requirements on Comcast to protect the public interest as well as preserve diversity and localism in the video services marketplace. *See Comcast-NBCU Order*, 26 FCC Rcd at 4326, ¶ 213. The conditions prohibit Comcast from migrating PEG channels to a digital tier until all channels are converted to a digital format. They require carriage of all PEG channels on Comcast's digital starter tier. Comcast may not change the method by which it delivers PEG channels if the change would result in the material degradation of signal quality or impair viewer reception of PEG channels. *See id.* at 4326-27, 4376-77, ¶ 214 & App. A, § XIV. Comcast further agreed to develop a platform for hosting PEG content On Demand and On Demand Online within three years of closing the transaction. *See id.* at 4327, 4376-77, ¶ 215 & App. A, § XIV.

¹⁷⁹ 47 U.S.C. § 543(b)(7)(A)(ii); 47 C.F.R. § 76.901(a).

¹⁸⁰ *See PEG CRS Report* at 2-3.

¹⁸¹ *See* ACM 6/8/11 Comments at 3; Anne Arundel 6/8/11 Comments at 12; Ohio Community Board 6/8/11 Comments at 2; Marin 6/8/11 Comments at 2; Oxnard Elementary 6/8/11 Comments at 2-3; Oxnard College 6/8/11 Comments at 1-2.

¹⁸² *See* Montgomery County 7/8/11 Reply at 33; Montgomery County 5/20/09 Comments at 24.

¹⁸³ *See Analysis of Recent PEG Access Center Closures, Funding Cutbacks and Related Threats* at 2, submitted with ACM 6/8/11 Comments.

¹⁸⁴ *See id.*

¹⁸⁵ *See* ACM 6/8/11 Comments at 3.

¹⁸⁶ *See* Anne Arundel 6/8/11 Comments at 12-13; New Orleans 5/20/09 Comments at 16-17.

because it results in inferior PEG channel accessibility, functionality, and signal quality in comparison to other basic and non-basic channels on AT&T's U-verse system.¹⁸⁷

67. In response, AT&T encourages the Commission not to establish federal requirements for PEG programming. It argues that the Act provides the Commission with narrow authority with respect to PEG programming. AT&T also asserts that the Act does not require the provision of PEG programming, but simply permits franchising authorities to require cable operators to set aside capacity for PEG programming.¹⁸⁸

68. With regard to DBS MVPD carriage of public interest programming, in 1992, Congress established a public interest programming requirement that requires DBS operators to dedicate between four and seven percent of their capacity to public interest programming.¹⁸⁹ Under the Commission's rules, DBS operators must reserve four percent of their channel capacity for qualified programmers providing "noncommercial programming of an educational or informational nature."¹⁹⁰ DISH Network reports providing 24 channels of public interest programming.¹⁹¹ DIRECTV carries several channels of public interest programming.¹⁹²

69. *Leased Access.* Section 612 of the Communications Act requires cable operators to designate a portion of their channel capacity for commercial use by unaffiliated parties.¹⁹³ The requirement is intended to provide competition and diversity in the delivery of video programming.¹⁹⁴

¹⁸⁷ See *Petition for Declaratory Ruling that AT&T's Method of Delivering Public, Educational and Government Access Channels over its U-verse System is Contrary to the Communications Act of 1934, as amended, and Applicable Commission Rules*, MB Docket No. 09-13, Petition of ACM et al. (filed Jan. 30, 2009); *Petition for Declaratory Ruling on Requirements for a Basic Service Tier and for PEG Channel Capacity Under Sections 543(b)(7), 531(a) and the Commission's Ancillary Jurisdiction Under Title I*, MB Docket No. 09-13, Petition of the City of Lansing, MI (filed Jan. 27, 2009). See also *Entities File Petitions for Declaratory Ruling Regarding Public, Educational, and Governmental Programming*, MB Docket 09-13, Public Notice, 24 FCC Rcd 1340 (MB 2009). These petitions remain pending before the Commission.

¹⁸⁸ See AT&T 6/20/11 Reply at 9-10.

¹⁸⁹ 47 U.S.C. § 335(b)(1)(A). Qualified DBS providers may alter dedicated capacity to between 3.5 and 7 percent if they provide state public affairs networks to their subscribers in at least 15 states. 47 U.S.C. § 335(b)(1)(B).

¹⁹⁰ 47 C.F.R. § 25.701(f). In order to qualify, programmers need to be: (1) organized for a noncommercial, nonprofit purpose; (2) a national educational programming supplier; and (3) responsible for 50 percent of the direct costs the DBS provider occurs in making the programming available. See *id.* See also *13th Report*, 24 FCC Rcd at 652, ¶ 231.

¹⁹¹ DISH Network carries the following public interest programming channels: 3ABN, Almaxvision, Baby First, Brigham Young University, C-SPAN, Christian Television Network, Classic Arts Showcase, EWTN, Free Speech TV, HITN, Impact Network, Kids & Teens Television, KBS World, Link Media Inc., NASA Channel, Pentagon Channel, Trinity Broadcasting Network, and V-ME. See DISH Network 7/29/09 Comments at 4, n. 3. DISH Network provided updated information to Media Bureau staff on Feb. 27, 2012.

¹⁹² Among others, DIRECTV offers the following channels: World Harvest Television, C-SPAN 1 and 2, Daystar, Trinity Broadcasting Network, the WORD Network, BYU TV, LINK TV, NASA TV, TCT, Once Mexico, EWTN, HITN, NRB, MHz, V-Me, CTN, Gem Net, Hope Channel, JLTN, Enlace, Golden Eagle Broadcasting, Free Speech TV, GOD TV, and numerous local PBS channels. See DIRECTV 6/8/11 Comments at 13.

¹⁹³ 47 U.S.C. § 532(b).

¹⁹⁴ 47 U.S.C. § 532(a).

The Commission regulates the prices, terms, and conditions for access to these channels and reviews petitions for relief from aggrieved parties.¹⁹⁵

70. Section 612 also provides that: (1) “at such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States” and (2) “are subscribed to by 70 percent of the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources.”¹⁹⁶ In previous reports, the Commission examined whether the “70-70 benchmark” had been met.¹⁹⁷ While the Commission did find in the *13th Report* that the first prong of the benchmark had been met, based on the data collected for that report, the Commission held it was less clear whether the second prong had been met.¹⁹⁸ Thus, the Commission, at that time, required cable operators to submit data to determine whether the 70-70 benchmark had been met.¹⁹⁹ In particular, the Commission stated that it would require each cable operator to submit certain information for each cable system on a zip code basis for 2006 and 2007.²⁰⁰ To implement this new data collection requirement, the Media Bureau sought comment on a proposed new form.²⁰¹ Although the Commission did initiate the Office of Management and Budget (“OMB”) approval process for that form, it did not ultimately submit the matter to OMB.²⁰² We now find, using data that is currently available to us, that incumbent cable systems’ penetration (that is, the percentage of homes passed that subscribe to cable) is declining. Specifically, the 2010 data from the Annual Report of Cable Television Systems (FCC Form 325) indicate that incumbent cable systems pass well over 70 percent of households. The FCC Form 325 data, however, also indicate that only 45.3 percent of households passed by incumbent cable systems subscribe to these systems, compared to 56.3 percent reported in the *13th Report*.²⁰³ Thus, we conclude that because the available data indicate that the second prong of the 70-70 benchmark is not met, it is not necessary to impose a new data collection

¹⁹⁵ 47 C.F.R. §§ 76.970-78. In 2008, the Commission released a Report and Order modifying the leased access rules. See *Leased Commercial Access*, MB Docket No. 07-42, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2909 (2008). The Report and Order was stayed by the U.S. Court of Appeals for the Sixth Circuit. See *Order, United Church of Christ Office of Communications, Inc. v. FCC*, No. 08-3245 (6th Cir. 2008). The Report and Order included rule changes requiring approval by the Office of Management and Budget which was denied on July 9, 2008. No further action has been taken by the Commission to date and the rule changes remain in abeyance.

¹⁹⁶ 47 U.S.C. § 532(g). This provision was added to the Communications Act by the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

¹⁹⁷ See, e.g., *13th Report*, 24 FCC Rcd at 557-61, ¶¶ 33-43; *12th Report*, 21 FCC Rcd at 2512-15, ¶¶ 31-36.

¹⁹⁸ See *13th Report*, 24 FCC Rcd 559-60, ¶¶ 40-41.

¹⁹⁹ See *id.* at 560-61, ¶ 43.

²⁰⁰ Specifically, the *13th Report* identified the following information: (1) the total number of homes the cable operator currently passes; (2) the total number of homes the cable operator currently passes with 36 or more activated channels; (3) the total number of actual subscribers, including all subscribers in MDUs; and (4) the total number of subscribers with 36 or more activated channels. See *13th Report*, 24 FCC Rcd at 560-61, ¶ 43.

²⁰¹ See *Media Bureau Seeks Comment on a Cable Subscribership Survey for the Collection of Information Pursuant to Section 612(g) of the Communications Act*, MB Docket No. 07-269, Public Notice, 24 FCC Rcd 217 (MB 2009).

²⁰² See FCC, *Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested*, 74 Fed. Reg. 4437 (2009). Before formally submitting an information collection to OMB for approval, the Commission is required to seek comments on its proposal under the Paperwork Reduction Act of 1995, P.L. 104-13 (44 U.S.C. 3506(c)(4)).

²⁰³ See also *infra*, ¶ 142 & Table 6 (showing a similar decline based on SNL Kagan data).

requirement on all cable operators regarding this subject. Accordingly, we will not require cable operators to provide the data requested in the *13th Report* or pursue approval of this proposed reporting requirement.²⁰⁴

71. *Access to Multiple Dwelling Units.* At one time, competitive MVPDs faced difficulty obtaining access to multiple dwelling units (“MDUs”) due to long-term exclusive contracts between building owners and incumbent providers.²⁰⁵ The Commission addressed this concern in 2007 by adopting rules to prevent the use of exclusive contracts for the provision of video services to MDUs and other centrally managed residential real estate developments.²⁰⁶ In particular, the Commission prohibited the enforcement of existing exclusivity clauses and the execution of new ones by cable operators, common carriers, and OVSs.²⁰⁷ The Commission found that exclusivity clauses were a barrier to both new entry into the MVPD marketplace and to broadband deployment, as well as an unfair act under Section 628(b).²⁰⁸

72. *Inside Wiring.* Pursuant to Section 624(i) of the Act, the Commission promulgated rules providing subscribers with the opportunity to purchase the wiring inside their homes after the termination of cable service and before the removal of such wiring.²⁰⁹ The Commission later adopted rules which (1) provided for the sale, or transfer, of “home run” wiring in an MDU by an incumbent provider who is ceasing provision of service; (2) gave competitive MVPDs access to molding in an MDU that contains wiring of an incumbent provider for installation of the competitive MVPD’s inside wiring; and (3) gave subscribers access to existing inside wiring prior to the termination of service in order to avoid interruptions in service.²¹⁰ In 2007, the Commission issued a Report and Order and a Declaratory Ruling

²⁰⁴ This decision does not affect the data collection requirements of FCC Form 325, to which cable operators remain subject.

²⁰⁵ See, e.g., *13th Report*, 24 FCC Rcd at 660-62, ¶¶ 250-54; *12th Report*, 21 FCC Rcd at 2597, ¶¶ 207-08. These long-term exclusive contracts were especially harmful to competition given that 30 percent of Americans lived in MDUs in 2007, with that figure predicted to increase over time. See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20235-36, ¶ 1 (2007) (“*MDU Order and FNPRM*”), *aff’d sub nom. Nat’l Cable & Television Ass’n v. FCC*, 567 F.3d 659 (2009).

²⁰⁶ See *MDU Order and FNPRM*, 22 FCC Rcd at 20235-36, 20238, ¶¶ 1-2, 7. See also 47 C.F.R. § 76.2000. In 2010, the Commission released a Second Report and Order building on its *MDU Order and FNPRM*. See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Second Report and Order, 25 FCC Rcd 2460 (2010). In this Second Report and Order, the Commission determined that MVPDs are permitted to use bulk billing arrangements – those arrangements in which one MVPD offers video service to every resident of an MVPD at a substantial discount than what each individual resident would pay if he or she contracted with the MVPD individually. See *id.* at 2463-71, ¶¶ 10-28. In addition, the Commission determined that MVPDs are allowed to enter exclusive marketing agreements with MDU owners. See *id.* at 2471-73, ¶¶ 29-37.

²⁰⁷ See *MDU Order and FNPRM*, 22 FCC Rcd at 20251, ¶ 30.

²⁰⁸ See *id.* at 20248-49, ¶¶ 26-27. The pending Further Notice of Proposed Rulemaking seeks comment on extending the MDU exclusivity ban to DBS providers, private cable operators, and other MVPDs not subject to Section 628. See *id.* at 20264, ¶¶ 61-62.

²⁰⁹ 47 U.S.C. § 544(i); 47 C.F.R. §§ 76.801-02. See also *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, MM Docket No. 92-260, Report and Order, 8 FCC Rcd 1435 (1993).

²¹⁰ 47 C.F.R. §§ 76.804-06. See also *Telecommunications Services Inside Wiring; Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*; CS Docket No. 95-184; MM (continued....)

that classified inside wiring behind sheet rock as physically inaccessible given the significant cost and physical damage to accessing wiring behind sheet rock, thereby facilitating the transfer of the ownership of that wiring when an incumbent provider is ceasing service.²¹¹

73. *Over-the-Air Reception Devices.* Pursuant to the Act, the Commission has adopted a rule preempting restrictions that impair viewers from receiving video services using over-the-air reception devices (“OTARD”).²¹² The rule applies to direct broadcast satellite antennas that are one meter or less in diameter, or any size in Alaska; antennas that are one meter or less in diameter or diagonal measurement and are designed to receive or transmit either video programming services through multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, or fixed wireless signals other than via satellite; and antennas designed to receive television broadcast signals.²¹³ For the rule to apply, the antenna must be installed “on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property.”²¹⁴ The rule prohibits restrictions impairing the installation, maintenance, or use of antennas to receive video programming on property within the exclusive control of the antenna user.²¹⁵ The rule bars restrictions that: (1) unreasonably delay or prevent installation, maintenance, or use; (2) unreasonably increase the cost of installation, maintenance, or use; and (3) preclude reception or transmission of an acceptable quality signal.²¹⁶ DBS operators maintain that continued enforcement of this rule is critical to ensuring their competitiveness in the video market.²¹⁷

(ii) Market Conditions Influencing Entry

74. In addition to regulatory conditions, a number of market conditions may also influence if, and when, entry occurs. Economies of scale, capital requirements, and the reaction of competitors to new entrants all affect a firm’s ability to enter into a market. Economies of scale appear to produce cost advantages, especially with respect to the cost of acquiring programming and consumer premise equipment,²¹⁸ and thus may play a major role in profitability and the willingness to enter the MVPD (Continued from previous page)

Docket No. 92-260, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 (1997). “Home run” wiring is the wiring which runs from just outside an MDU resident’s unit back to that point where the provider’s wiring becomes devoted to that resident. 47 C.F.R. § 76.800(d).

²¹¹ See *Telecommunications Services Inside Wiring Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring; Clarification of the Commission’s Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers’ Inside Wire Subloop*, CS Docket No. 95-184, MM Docket No. 92-260, WC Docket No. 01-338, Report and Order and Declaratory Ruling, 22 FCC Rcd 10640, 10646-61, ¶¶ 12-47 (2007), *aff’d sub nom. Nat’l Cable & Television Ass’n v. FCC*, No. 07-1356, 2008 WL 4808911 (D.C. Cir. Oct. 23, 2008).

²¹² 47 U.S.C. § 303 note. See also Telecommunications Act of 1996, Pub. L. No. 104-04, § 207, 110 Stat. 56, 114 (1996) (“1996 Act”).

²¹³ 47 C.F.R. § 1.4000(a)(1)(i)-(iii).

²¹⁴ 47 C.F.R. § 1.4000(a)(1).

²¹⁵ *Id.* The antenna user must have a direct or indirect ownership interest, or leasehold interest, in the property. *Id.*

²¹⁶ 47 C.F.R. § 1.4000(a)(3).

²¹⁷ See DISH Network 6/20/09 Reply at 9-10; DIRECTV 5/20/09 Comments at 23-24. DIRECTV and DISH Network have petitioned the Commission for a declaratory ruling on the legitimacy of a Philadelphia ordinance restricting the placement of satellite dishes. See *Media Bureau Seeks Comment on Petition for Declaratory Ruling That An Ordinance of the City of Philadelphia, Pennsylvania is Preempted By The Commission’s Over-The-Air Reception Device Rule*, CSR-8541-O, Public Notice, 26 FCC Rcd 16074 (MB 2011).

²¹⁸ For a discussion of market-based conditions that influence entry, see Porter, *supra*, n. 19, at 7-17.

industry. Capital requirements, especially large fixed costs, and first-mover advantages, may also influence if and when MVPD entry takes place. The expected reaction from existing competitors, especially in terms of price competition, also influences entry.²¹⁹ Each of these elements is discussed in turn below.

75. *Economies of Scale.* The term “economies of scale” refers to the situation where there is a decline in unit costs as the total number of units per period increases. Economies of scale may deter entry if new MVPDs must enter the market at a large scale in order to obtain cost advantages similar to incumbent MVPDs.²²⁰ Statements from MVPDs suggest that scale economies affect the cost of acquiring programming and consumer premise equipment, such as set-top boxes. In their reports to shareholders, some MVPDs emphasize the value of scale economies. For example, Comcast stressed the importance of achieving scale in both content and distribution in its transaction with NBC-Universal.²²¹ When discussing the rising cost of video programming, DIRECTV explained that the company would manage increasing costs of programming by continuing to use its considerable scale to leverage fair deals for programming at the negotiating table.²²² On the other hand, the American Cable Association (“ACA”) calls attention to the higher prices paid for video programming by small cable operators that lack scale economies.²²³

76. *Capital Requirements.* The need to invest large financial resources in order to compete may also influence MVPD entry, especially in a mature market where most customers wanting MVPD service already subscribe to an MVPD. Large fixed costs and an entrant’s recognition that most of its subscribers would need to switch from an incumbent MVPDs may delay the entrance of a new MVPD. For example, Verizon explained that it expected to invest \$23 billion from 2004 to 2010 deploying its FiOS network.²²⁴

77. *First Mover Advantages.* First mover advantages may represent another condition influencing entry.²²⁵ Years of advertising and customer relationships may provide incumbents with a degree of brand identification and customer loyalty.²²⁶ Entrants must often spend heavily to win customers from incumbents, which often involves start-up losses and takes an extended period of time.²²⁷ Given the maturity of the MVPD market, new MVPDs recognize that they must win customers from incumbents.²²⁸ If it costs more to get a subscriber to switch than it costs the incumbent to get the customer initially, this constitutes a first-mover advantage that deters entry.

²¹⁹ *Id.* at 17-23.

²²⁰ *Id.* at 7-9.

²²¹ Comcast, *2010 Annual Review*, Letter to Shareholders at 1.

²²² DIRECTV, *2010 Annual Report*, Message to Shareholders.

²²³ ACA 7/29/09 Comments at 2, 11-12.

²²⁴ Verizon 5/20/2009 Comments at 6.

²²⁵ For a discussion of first-mover advantages, see David Montgomery & Marvin Lieberman, *First-Mover Advantages*, STRATEGIC MANAGEMENT JOURNAL, Summer 1988, at 41-58.

²²⁶ Porter at 9.

²²⁷ *Id.*

²²⁸ DISH Network says that “as the pay-TV industry matures, we and our competitors increasingly must seek to attract a greater proportion of new subscribers from each other’s existing subscriber bases rather than from first-time purchasers of pay-TV services.” DISH Network 2010 Form 10-K at 42.

78. *Reaction from Existing Competitors.* A potential entrant's expectations regarding the reaction from incumbent MVPDs may influence entry. For instance, the possibility of "predatory pricing," where an incumbent lowers price in an effort to discourage entry or drive an entrant from the market before it can establish itself, may inhibit market entry.²²⁹ Statements from analysts in the MVPD industry suggest, however, that incumbents and entrants prefer to avoid price wars and compete on other features of the MVPD service.²³⁰

e. Recent Entry

79. There are different types of entry in the MVPD market and each has a potentially different impact on competition in market for the delivery of video programming. Meaningful entry that substantially increases competition requires bringing new capacity, upgraded capacity, or efficiencies into the market with a desire to gain market share.²³¹ The deployment of video delivery systems by new MVPDs has had the most impact on competition in the MVPD market. The deployment of new video delivery systems by AT&T U-verse and Verizon FiOS are recent examples of this type of entry. Another type of entry involves the acquisition of an existing video delivery system followed by investment to upgrade the system. Although this type of entry does not, by itself, increase the number of competitors, investments to upgrade an existing video system contributes to a strengthening of competition by adding capacity and changing the technology to provide more channels and advanced video services, such as digital television, HD, VOD, and DVR. The acquisition of Adelphia by Comcast and Time Warner Cable in 2005 is an example of this type of entry.²³² Entry that involves buying an existing video system but not investing in new capacity or changing the way the company operates will have the least impact on competition. This type of entry does not increase the number of competitors or otherwise strengthen competition. The various types of entry highlight the view that it is investment in new capacity, upgrading existing capacity, or elevating efficiency that provides meaningful entry.

²²⁹ For a discussion of predatory pricing, see, Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239 (2000), <http://www0.gsb.columbia.edu/faculty/pbolton/PDFS/BBRPrincetonDP.pdf> (visited Jan. 17, 2012).

²³⁰ See, e.g., David Roisen, *Investor Concerns of Pay-TV Price Wars are Overblown, Say Analysts*, SNL Kagan, Oct. 16, 2008, <http://www.snl.com/interactivex/article.aspx?id=8538777&KPLT=6> (visited Jan. 17, 2012). In the article, Sanford C. Bernstein analyst Craig Moffett said, "I've been hearing about the probability of price wars in this sector forever and ever and ever," and Insight Research Corp. analyst and president Bob Rosenberg, said "Price wars are always possible, but it's not clear what the precipitating event would be . . .". Mr. Rosenberg expressed his belief that price is unlikely to become the main point of contention among pay-TV competitors anytime soon. See also, John Eggerton, *Whitacre Sees No Video Price War*, BROADCASTING & CABLE, June 2, 2006, <http://www.broadcastingcable.com/article/104399-Whitacre-Sees-No-Video-Price-War.php> (visited Jan. 17, 2012). In the article, AT&T Chairman Edward Whitacre tried to assure Wall Street that "the entry of telcos into the video space would not lead to price cuts in video service." Mr. Whitacre said "I don't think there's going to be a price war. I think it's going to be a war of value and of services."

²³¹ Porter at 7.

²³² Comcast and Time Warner Cable claimed that they would upgrade Adelphia's systems to enable the delivery of new or improved advanced services and to speed and expand the rollout of advanced services that already have been introduced. *2006 Adelphia, Comcast, Time Warner Cable MO&O*, 21 FCC Rcd at 8310-16, ¶¶ 246-262. Adelphia's cable systems are being upgraded but the process has taken longer than Comcast executives hoped, according to Marc Goodman, a Comcast spokesman. See Jon Chesto, *Comcast's Adelphia Conversion is Taking Longer than Expected to Complete*, THE PATRIOT LEDGER, Sept. 4, 2010, <http://blogs.wickedlocal.com/massmarkets/2010/09/04/comcasts-adelphia-conversion-is-taking-longer-than-expected-to-complete/#axzz1nc2ejUMN> (visited Feb. 27, 2012).

80. Since the last report, the deployment of MVPD systems by AT&T and Verizon had the most significant impact on competition in the MVPD market.²³³ This type of entry, however, is rare when compared to the number of transactions involving the buying and selling of existing MVPD systems. Although most transactions do not change the number of competitors, some have resulted in MVPD system upgrades. In addition, a number of acquisitions stem from cable MVPD efforts to shed geographically disparate systems and grow regional clusters of systems.²³⁴

81. *Cable MVPD Transactions.* In previous reports, we have provided information regarding cable transactions.²³⁵ Although the buying and selling of MVPD properties does not necessarily affect competition, transactions provide useful information regarding the value of different MVPD properties. According to SNL Kagan, cable mergers and acquisitions reveal that the marketplace places a premium on larger-sized cable systems, on systems with dense footprints, systems that have been upgraded, and systems with a high penetration of Internet access services.²³⁶

82. In 2006, cable merger and acquisition activity was the slowest since 1990. The cable systems sold in 2006 involved approximately 500,000 subscribers and the total value of the transactions was \$1.6 billion – only five percent of the 2005 total.²³⁷ Most of the transactions in 2006 involved small rural cable systems.²³⁸ These systems sold at prices that reflected 9.3 times cash flow and the average value per subscriber was \$2,794.²³⁹

83. The cable systems sold in 2010 involved approximately almost 1.6 million subscribers and the total value of the transactions was \$5.4 billion.²⁴⁰ Merger and acquisitions among smaller rural cable systems continued to make up the majority of the transactions in 2010.²⁴¹ Almost two-thirds of these transactions involved cable systems with fewer than 5,000 subscribers and these systems sold at an average price of \$1,762 per subscriber, which was down from 2006 but up from the 2009 low of \$635.²⁴² Transactions involving cable systems with 5,000 to 10,000 subscribers sold at an average price of \$2,538 per subscriber, transactions involving systems with 50,000 to 100,000 subscribers sold at an average price of \$3,068 per subscriber, and transactions involving systems with 100,000 to 500,000 subscribers sold at an average price of \$3,904 per subscriber.

²³³ SNL Kagan, *Cable TV Investor: Deals & Finance*, Oct. 31, 2011, at 7-8.

²³⁴ SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition at 91.

²³⁵ See, e.g., *13th Report*, 24 FCC Rcd at 565-66, ¶ 49 & Table 6.

²³⁶ For example, SNL Kagan data show that, over the 10-year period from 2000 to 2010, cable transactions for systems with fewer than 100,000 subscribers sold for prices that reflect 8.9 to 9.9 times cash flow while cable transactions for systems larger than 100,000 subscribers sold for prices that reflect 12.6 to 15 times cash flow. Similarly, the average value per subscriber for systems with fewer than 100,000 subscribers ranged from \$1,700 to \$2,800 while the average value per subscriber for systems with between 100,000 and 500,000 subscribers averaged \$3,842 and the average value per subscriber for systems with over 500,000 averaged \$4,214. SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 91.

²³⁷ SNL Kagan, *Broadband Cable Financial Databook*, 2007 Edition, at 150.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 91.

²⁴¹ *Id.*

²⁴² *Id.*

84. SNL Kagan explains that there has been a steady increase in cable system values as cable MVPDs have transitioned from video services to a combination of video, Internet, and telephone services, which provide a diversified revenue stream and higher revenue per subscriber.²⁴³ Other SNL Kagan data, however, show that the average price per subscriber in all cable MVPD mergers and acquisitions has been erratic.²⁴⁴ One explanation for the variance in the average price per subscriber is that the metric is sensitive to the inclusion or the absence of mergers and acquisitions of large cable systems. Stated differently, in years where no large cable systems are traded, the average price per subscriber reflects the value of smaller cable systems. And in years where large cable systems are traded, the average price per subscriber reflects the value of large systems. In short, the buying and selling of large cable systems in any given year heavily influences the average price per subscriber and, as noted above, large cable systems trade at a premium, relative to small cable systems.

3. MVPD Conduct

85. In addition to industry structure, a second key element of our analysis of MVPD competition is an examination of the conduct of MVPDs – in particular, the business models and competitive strategies of MVPDs. MVPDs choose from a variety of business models and competitive strategies to attract and retain subscribers and generate profits. In this section of the Report, we discuss MVPD competition in terms of both price and non-price rivalry. We then provide an overview of the current business models and competitive strategies of a sample of MVPDs.

a. Price Rivalry

86. Pricing represents one component of every MVPDs' competitive strategy. Some MVPDs market themselves as "premium" services while others market themselves as "value" services. In recent years, MVPDs have offered low introductory or promotional prices for delivered video services or bundles of video, Internet access, and voice services to attract new subscribers. Over time, MVPDs have altered their pricing in response to changes in the competitive landscape. For example, with a maturing MVPD market, some of the largest MVPDs have begun experimenting with both higher-priced and lower-priced video packages.²⁴⁵

87. Today, the largest and most mid-sized MVPDs offer one or more high-end pricing plans that include hundreds of channels and a complement of HD, DVR, VOD services, and some mix of premium channels. In addition, these MVPDs offer one or more mid-priced video service plan that includes fewer channels and a smaller complement of video services. MVPDs offer, but are less likely to market, lower-priced video service plans with fewer channels and few, if any, additional video services.²⁴⁶ An MVPD may charge different prices in the different cities and towns it serves. These differences may reflect system upgrades or differences in the number of channels or advanced video services offered from one city to the next. They also may reflect differences in the number of competitors or differences in the competitive strategies used by competitors from one city to the next.

²⁴³ SNL Kagan, *Broadband Cable Financial Databook*, 2007 Edition, at 150.

²⁴⁴ The average price per subscriber for all cable merger and acquisition activity was \$2,811 in 2006, \$3,378 in 2007, \$1,593 in 2008, \$1,981 in 2009, and \$3,451 in 2010. SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition at 93.

²⁴⁵ Time Warner Cable in 2010 began targeting higher-end demographics with an enhanced bundle of video, Internet access, and telephone services; and a video-only service targeting budget-conscious homes. Time Warner Cable, *SEC Form 10-K for the Year Ended December 31, 2010*, at 6 ("Time Warner Cable 2010 Form 10-K").

²⁴⁶ Marketing includes the information prominently displayed on the MVPD's website. Our review of the websites of a number of MVPDs suggests that it is often much easier to find the higher-priced video service plans than it is to find the lowest price video service plan offered by the MVPD.

88. *Discounts for New Subscribers.* One of the most common pricing strategies among MVPDs takes the form of discounts for new subscribers. For example, DISH Network explains that it often offers free programming and/or promotional pricing during introductory periods for new subscribers.²⁴⁷ Typically, these new subscriber discounts are for a limited time (e.g., six months or a year) and often include additional video services (e.g., premium channels) or bundles of video, Internet access, and telephone service. At the end of introductory period, promotional materials usually indicate that prices will rise to the “normal” price. Similarly, DIRECTV offers five video packages ranging from \$29.99 per month to \$89.99 per month for 12 months after rebate with a 24-month agreement.²⁴⁸ According to DIRECTV, the offer is available only to new customers and represents a savings of \$35 per month for the first year and \$20 per month in the second year.²⁴⁹ A promotion by Verizon offers FiOS TV Prime HD, Internet (15/5 Mbps), and unlimited calling for \$89.99 per month with a two-year contract.²⁵⁰ According to Verizon, the offer is available only to new customers and represents a savings of \$600 over the two-year period.²⁵¹ Cox offers new customers who order online a bundle of video, Internet access, and telephone services for \$90 per month for 12 months.²⁵² The offer is available only to new customers and the regular price of \$147.97 per month applies after the 12 month promotional period. According to Cox, this offer represents a first-year savings of \$695.64. The above examples are snapshots and may not reflect current service offerings and prices available to new subscribers. MVPD advertisements typically state that prices rise at the end of the promotional period. For example, a Cox advertisement offers new customers a video service for \$39 for six months. The advertisement states, “After six months, then current rates apply.”²⁵³ Although cable MVPDs show their current rates and prices, some existing subscribers may be paying less than those shown. In statements to shareholders, DISH Network states that it has incurred significant costs to retain existing customers, mostly by upgrading their equipment to HD and DVR receivers.²⁵⁴ In certain circumstances, DISH Network also has offered free programming and/or promotional pricing for limited periods for existing customers in exchange for a contractual commitment.²⁵⁵

b. Non-Price Rivalry

89. Central to every MVPD business model is its selection of the technology the company will use to deliver video programming. As described below, in the MVPD industry, the primary technologies available are coaxial cable, spectrum, and most recently xDSL and fiber. Within these parameters MVPDs have adopted various competitive strategies that include transition to digital service,

²⁴⁷ DISH Network 2010 Form 10-K at 4.

²⁴⁸ DIRECTV, http://www.directv.com/DTVAPP/new_customer/base_packages.jsp?footernavtype=-1 (visited Feb. 10, 2012).

²⁴⁹ *Id.*

²⁵⁰ Verizon, http://program.verizon.com/offers/mlp.aspx?pattern=fiosTv_Triple&CMP=KNC-CON_Z_ZZ_FT_Z_Z_R_Z353&bkw=verizon+fios+and+tv&se=Bing&009=e&004=383370664&005=9618581188&011=verizon+fios+tv&006=1059372363&002=2181541 (visited Feb. 10, 2012).

²⁵¹ *Id.*

²⁵² Cox, https://secure.cox.com/Service/Store/OrderNow.aspx?campcode=tile-bundle_1_browse (visited Feb. 10, 2012).

²⁵³ Cox, http://ww2.cox.com/residential/northernvirginia/pricing-and-special-offers/tv-deal.cox?campcode=rl_tv_tv_tv-deal_splash_010312_btn_nva_1#promo-terms (visited Feb. 26, 2012).

²⁵⁴ DISH Network 2010 Form 10-K at 4.

²⁵⁵ *Id.* Data on DISH Network’s free programming or promotional prices for existing customers is not available.

product differentiation, delivery of video to diverse geographic locations, delivery of video to a variety of in-home or mobile devices, and implementation of marketing tactics.

90. Each specific technology has its own set of incumbent advantages and disadvantages. Moreover, technologies change over time and the competitive advantages of one technology may fade as new technologies are introduced. Originally, the MVPD market was defined by coaxial cable. When DIRECTV and DISH Network began offering MVPD service in the 1990s, the digital DBS systems provided significantly greater channel capacity compared to existing analog cable systems.²⁵⁶ Cable MVPDs responded to DBS's technology lead by upgrading their cable systems.²⁵⁷ These upgrades included incorporating more optic fiber into their coaxial network and transitioning from analog to digital technology.²⁵⁸ More recently, Verizon built a fiber-to-the-home system and transitioned to all digital technology.²⁵⁹ DBS technology continues to successfully deliver linear video programming, but the DBS MVPDs acknowledge that their systems cannot deliver VOD services and other two-way services like Internet access and telephone services that play an ever larger role in the business models of MVPDs.²⁶⁰

91. As a significant competitive strategy, cable MVPDs are replacing their analog video services and transitioning to all-digital video services. Comcast, for example, has been reclaiming bandwidth from analog video services to deliver more digital channels and more HD channels. By June 2011, Comcast had transitioned its expanded basic tier analog channels to digital in 85 percent of its footprint.²⁶¹ Subscribers with analog televisions use a set-top box with a digital terminal adapter to convert digital signals to analog signals.

92. Some cable operators are implementing another competitive strategy, the deployment of switched digital video ("SDV") as a solution for near-term capacity concerns.²⁶² Rather than broadcasting all available channels to viewers at once, SDV combines the bandwidth efficiencies of compressed digital content with switching to enable content to be streamed to viewers only upon request.²⁶³ Time Warner Cable explains that this technology expands network capacity by transmitting only those digital video channels that are being watched within a given grouping of homes at any given moment.²⁶⁴ According to Time Warner Cable, it is unlikely that all channels are being watched at all times within a given group of

²⁵⁶ NCTA 6/8/11 Comments at 3.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 3-4.

²⁵⁹ Verizon began offering FiOS services using both analog and digital technologies but transitioned to all-digital technology in 2008. Verizon 5/20/09 Comments at 7.

²⁶⁰ DIRECTV discusses the risk factors associated with competing in the MVPD industry against cable and telephone MVPDs and other land-based systems that have the ability to offer video, Internet, telephone, and other two-way services. DIRECTV 2010 Form 10-K at 17. DIRECTV and DISH Network have cooperative arrangements with telephone and broadband companies to provide Internet access and telephone service. These arrangements, however, are typically with telephone and broadband companies that do not offer video services in the same geographic area. For example, DIRECTV typically has cooperative arrangements with Verizon to provide Internet access and telephone service where Verizon offers DSL and not in areas where Verizon offers FiOS TV. Verizon, <http://www22.verizon.com/home/directv/#packages> (visited Feb. 26, 2012).

²⁶¹ Although the expanded basic tier is being converted from analog to digital, the basic tier remains analog. Comcast 6/8/11 Comments at 9, 17.

²⁶² NCTA 5/20/09 Comments at 37.

²⁶³ Cox 8/28/09 Reply at 12.

²⁶⁴ *Id.*

homes, so SDV technology can free up capacity for other uses, including additional channels, more VOD offerings, and faster Internet connections.²⁶⁵ The cable industry and TiVo collaborated in the development of a tuning adaptor to enable the two-way tuning of switched digital video signals for a “one-way” TiVo device.²⁶⁶

93. Industry sources predict that SDV may pass 90 million homes by the end of 2012.²⁶⁷ Time Warner Cable has deployed switched digital video in all of its service areas²⁶⁸ and BrightHouse has deployed SDV across some of their systems.²⁶⁹ SDV was available in 68 percent of Charter’s footprint as of June 2011.²⁷⁰ The Commission has required cable operators to support SDV reception on retail devices.²⁷¹ In Northern Virginia, Cox has implemented SDV technology adding 24 new high-definition channels and 27 additional standard-definition channels.²⁷² Comcast, however, has conducted some tests but recently decided to put further SDV deployments on hold.²⁷³

²⁶⁵ *Id.*

²⁶⁶ NCTA 8/28/09 Reply at 12-14.

²⁶⁷ Jeff Baumgartner, *Cable SDV Makes Bid for a Tech Renaissance*, LR Cable News Analysis, Oct. 12, 2010, http://www.lightreading.com/document.asp?doc_id=198361&site=lr_cable (visited Oct. 25, 2011).

²⁶⁸ BigBand Networks, *BigBand’s SDV Reaches More than 39 Million Households* (press release), May 18, 2011.

²⁶⁹ Time Warner Cable 2010 Form 10-K at 2.

²⁷⁰ *Charter Loses More Video Subs, Widens Loss in Q2*, CED NEWS, Aug. 2, 2011, <http://www.cedmagazine.com/news/2011/08/charter-loses-more-video-subs,-widens-loss-in-q2> (visited Nov. 10, 2011).

²⁷¹ *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment; Oceanic Time Warner Cable, A subsidiary of Time Warner Cable, Inc.; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. Oceanic Kauai Cable System; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. Oceanic Oahu Central Cable System; Cox Communications, Inc. Fairfax County, Virginia Cable System; Cable One, Inc.’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, CS Docket No. 97-80; PP Docket No. 00-67; File Nos. EB-07-SE-351, EB-07-SE-352; NAL/Acct. Nos. 200832100074, 200932100001, 200932100002, 200932100003, 200932100008, 200932100022, and 200932100023; FRN Nos. 0018049841, 0016034050; CSR-8080-Z, Third Report and Order and Order on Reconsideration, 25 FCC Rcd 14657, 14665-66, ¶¶ 14-15 (2010) (“*Navigation Devices Third Report and Order*”). Early issues centered on compatibility with third-party, unidirectional CableCARD devices needed to perform the signaling required to enable SDV. NCTA 8/28/09 Reply at 12-14. In June 2009, the Commission vacated Notices of Liability relating to Time Warner’s and Cox’s SDV implementation of programming previously delivered using CableCARD equipped unidirectional digital cable products (UDCPs). *See Oceanic Time Warner Cable, A subsidiary of Time Warner Cable, Inc.; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. Oceanic Kauai Cable System; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. Oceanic Oahu Central Cable System; Cox Communications, Inc. Fairfax County, Virginia Cable System*, File Nos. EB-07-SE-351, EB-07-SE-352; NAL/Acct. Nos. 200832100074, 200932100001, 200932100002, 200932100003, 200932100008, 200932100022, and 200932100023; FRN Nos. 0018049841, 0016034050; Order on Review, 24 FCC Rcd 8716 (2009) (vacating forfeiture orders).

²⁷² Cox 8/28/09 Reply at 12-13.

²⁷³ Jeff Baumgartner, *Comcast Back-Burners SDV (Again)*, LIGHT READING CABLE, Feb. 1, 2011, http://www.lightreading.com/document.asp?doc_id=203902&site=lr_cable (visited Jan. 15, 2012). Comcast did not elaborate on its reasons or what other bandwidth management technologies it may be considering. *Id.*

94. Corporate annual reports suggest that product differentiation has been, and remains, a key factor for competing in the market for delivered video programming.²⁷⁴ For instance, an MVPD might offer a unique video product that a rival MVPD cannot or does not provide. DIRECTV offers the NFL Sunday Ticket where subscribers can watch every out-of-market professional football game in HD. In its advertising, DIRECTV states that, “You won’t find anything like it with DISH Network or cable ... It’s available only on DIRECTV.”²⁷⁵ Some MVPDs highlight better-value or low-price video packages. DISH Network maintains that it offers better value, and claims that, “DIRECTV can’t compare with DISH Network’s everyday low price.”²⁷⁶ Argent Communications, a cable operator in New Hampshire with 2,500 subscribers, highlights cable at “affordable rates” with lifeline and basic video service listed before higher-priced digital video service.²⁷⁷ Commonly, an MVPD claims to offer more channels or more channels of a specific type than its rivals. For example, DIRECTV claims to offer the most full-time HD channels.²⁷⁸ Verizon, on the other hand, claims that FiOS TV offers more children’s, sports, and premium movie channels than cable.²⁷⁹ MVPDs further attempt to differentiate their products by claiming their products have superior quality. For example, Verizon FiOS claims that it offers brilliant HD picture quality in almost any kind of weather: “Simply put, it’s the best HDTV experience you can get.”²⁸⁰ Some MVPDs highlight bundles of video, Internet access, and telephone services while other MVPDs focus their marketing on video packages. The two DBS MVPDs focus their marketing on video services, in part, because the satellite technology they use for delivering video programming limits their ability to provide non-video (*i.e.*, Internet and telephone) services. The major cable and telephone MVPDs focus their marketing on bundled video, Internet access, and telephone. Their emphasis usually is that bundles offer better prices for consumers, relative to individual service offerings.

95. Another component of a MVPD’s business model is the choice of where the company will offer delivered video programming. The two DBS MVPDs offer delivered video programming nationwide.²⁸¹ In contrast, cable and telephone MVPDs vary widely in the geographic areas and populations covered by their systems. Some offer delivered video programming in multiple states and multiple large cities. For example, at the end of 2010, Verizon offered FiOS video services to approximately 60 percent of its wireline footprint.²⁸² Other MVPDs specialize in a region of the country

²⁷⁴ MVPDs typically refer to the importance of product differentiation in their business strategies. *See, e.g.*, DIRECTV 2010 Form 10-K at 4; DISH Network 2010 Form 10-K at 1.

²⁷⁵ DIRECTV, <http://www.directv.com/DTVAPP/content/sports/nfl?footernavtype=-1&lpos=header> (visited Oct. 24, 2011).

²⁷⁶ DISH Network, <http://www.dishnetwork.com/compare/> (visited Oct. 24, 2011).

²⁷⁷ Argent Communications, <http://www.argentcommunications.com/> (visited Oct. 24, 2011).

²⁷⁸ DIRECTV, <http://www.directv.com/DTVAPP/content/directv/programming> (visited Oct. 24, 2011).

²⁷⁹ Verizon, <http://www22.verizon.com/home/fiostv/> (visited Jan. 15, 2012).

²⁸⁰ Verizon, <http://www22.verizon.com/Residential/FiOSTV/Overview.htm#features> (visited Oct. 26, 2011).

²⁸¹ DIRECTV explains that it provides the same programming packages, at the same rates, in Alaska and Hawaii as it provides in the contiguous 48 states. However, subscribers in Alaska and Hawaii must use slightly larger dishes than customers in the contiguous 48 states. DIRECTV 6/8/2011 Comments at 13-14. DISH Network offers local broadcast stations in all 210 markets, including Alaska and Hawaii. DISH Network 7/29/2009 Comments at 6; DISH Network 6/8/2011 Comments at 2. *See also* DishNow, <http://www.dishnow.com/alaska.html>; <http://www.dishnow.com/hawaii.html> (visited Mar. 14, 2012).

²⁸² Verizon 6/8/11 Comments at 6. According to the company’s FCC Form 477 for December 31, 2010, Verizon’s wireline footprint includes households in 13 states and the District of Columbia.

or an even smaller geographic area. For example, BendBroadband, a cable MVPD, provides delivered video programming to 12 communities in Central Oregon.²⁸³

96. One of the newest forms of product differentiation is known as the “TV Everywhere” initiative, which allows consumers to access both linear video programming and VOD programs on a variety of in-home and mobile Internet-connected devices. At its inception, TV Everywhere embodied the MVPD industry’s attempt to compete with online video offered by others.²⁸⁴ TV Everywhere is evolving, however, into a competitive strategy that MVPDs use to differentiate themselves from their rivals.²⁸⁵ Some MVPDs, such as Comcast, Cox, and AT&T, permit non-subscribers to access a subset of video content online. Other MVPDs, such as Time Warner Cable and Verizon, permit only their MVPD subscribers to access their TV Everywhere content.²⁸⁶ Both DBS MVPDs also have TV Everywhere strategies. In 2010, DIRECTV began offering the “NFL Sunday Ticket To-Go” for the first time on the iPad.²⁸⁷ TV Everywhere is new, and the amount of MVPD content available and the number of devices that can receive TV Everywhere content are rapidly increasing.²⁸⁸ For example, some MVPDs recently began offering streaming of live programs to iPads while devices are in subscribers’ homes.²⁸⁹

97. VOD and DVR services represent another noticeable difference in the marketing of MVPDs. With respect to VOD, some highlight thousands of VOD movies and television shows in their libraries while others simply mention that they offer VOD. With respect to DVR service, some MVPDs call attention to their whole-home DVR, which allows subscribers to view recorded video programs on multiple televisions throughout a house. For example, AT&T U-verse offers a DVR that can record up to 65 hours of HD content, record and play back programs from any room, pause a recorded show in one room and pick it up in another, and can be programmed remotely from a computer or wireless phone.²⁹⁰ Time Warner Cable offers a DVR that enables subscribers to restart a program already in progress.²⁹¹ Cablevision offers a DVR service that enables subscribers to record programs that are stored on Cablevision’s servers instead of storing the programs on the hard drive within the DVR cable box.²⁹²

98. The language an MVPD uses to market its delivered video programming suggests the identity of the other MVPDs it perceives to be its closest rivals. For example, in its marketing, DIRECTV

²⁸³ BendBroadband, http://www.bendbroadband.com/residential/abb_company_info.asp?pageID=abbb&subID=aci (visited Nov. 2, 2011).

²⁸⁴ SNL Kagan, *Cable TV Investor: Deals & Finance*, Oct. 31, 2011, at 3 & 5.

²⁸⁵ *Id.* at 5.

²⁸⁶ MVPDs that wish to restrict access to their online TV Everywhere video programming use an authentication process that requires MVPD subscribers to provide a user ID and password.

²⁸⁷ DIRECTV, *2010 Annual Report*, Message to Shareholders.

²⁸⁸ SNL Kagan, *Cable TV Investor: Deals & Finance*, Oct. 31, 2011, at 3-6.

²⁸⁹ See, e.g., DIRECTV, http://www.directv.com/DTVAPP/content/technology/mobile_apps/ipad (visited Mar. 2, 2012); Cablevision, http://optimum.custhelp.com/app/answers/detail/a_id/2694/kw/ipad%20streaming (visited Mar. 2, 2012).

²⁹⁰ AT&T, <http://www.att.com/shop/tv/#fbid=h2tVPdbUKLw> (visited Jan. 20, 2012).

²⁹¹ Time Warner Cable, <http://www.timewarnercable.com/nynj/learn/cable/startover.html> (visited Mar. 2, 2012).

²⁹² Cablevision, http://optimum.custhelp.com/app/answers/detail/a_id/2580/kw/DVR%20Plus/session/L3RpbWUvMTMzMdCwODYzMC9zaWQvZ0xQZzE1U2s%3D (visited Mar. 2, 2012).

often names DISH Network and contrasts its video services to those offered by DISH Network.²⁹³ Similarly, DISH Network often compares its services with those offered by DIRECTV.²⁹⁴ Verizon FiOS and AT&T U-verse, on the other hand, tend to compare themselves to cable MVPDs, perhaps because they consider their bundle offerings as more similar to those offered by cable MVPDs and less similar to the bundles offered by DBS MVPDs.²⁹⁵

99. Consumers need information to make informed choices regarding MVPD services and MVPD providers. To provide this information, MVPDs use print, radio, television, and Internet media to motivate new and existing customers to call the MVPD, visit the MVPD's website, or contact independent third party retailers.²⁹⁶ Some MVPDs also use telemarketing and door-to-door sales.²⁹⁷ Customers looking to switch MVPD providers or purchase MVPD service for the first time receive and obtain information on services and promotional prices during introductory periods.²⁹⁸ Existing customers looking to change their services, but not necessarily their MVPD provider, receive and obtain information on upgrading HD and DVR receivers, free programming, and promotional prices for existing customers, possibly in exchange for a contractual commitment.²⁹⁹ Some MVPDs seek to retain subscribers that move to a new location by offering free installation of equipment at the new address.³⁰⁰

100. Because subscribers of MVPD services watch video programming daily and for many years, they value customer service. MVPDs recognize the importance of customer service as a critical component in customer acquisition and retention and explain their investment and efforts to improve customer service in communications with shareholders. For example, DIRECTV has 36 customer service centers that employ 17,000 customer service representatives.³⁰¹ Time Warner Cable explains that it continues to upgrade its customer care processes and infrastructure.³⁰² Time Warner Cable is upgrading its call center platforms and utilizing online approaches to give customers another alternative for engaging with the company.³⁰³ As another example, Charter explains that its strategy for customer retention is to enhance the customer experience by providing customer care, making it easier for customers to use Charter's service, and exceeding customer expectations.³⁰⁴ Periodic surveys of MVPD subscribers by

²⁹³ DIRECTV, <http://www.directv.com/DTVAPP/content/directv/directv-vs-dish-network> (visited Jan. 20, 2012).

²⁹⁴ DISH Network, http://www.dishnetwork.com/compare/index.aspx?WT.ac=ACQ_MKTG_DISH_STATIC_0112_getMoreForLess (visited Jan 25, 2012).

²⁹⁵ Verizon FiOS has mailed marketing materials containing messages such as: "Say good-bye to the cable company"; "FiOS vs. Cable or should we say the future vs. the past"; and "You're paying all that for cable and not getting all this?"

²⁹⁶ See, e.g., DISH Network 2010 Form 10-K at 4; Time Warner Cable 2010 Form 10-K at 6.

²⁹⁷ See, e.g., Time Warner Cable 2010 Form 10-K at 6.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ See, e.g., DIRECTV 2010 Form 10-K at 39.

³⁰¹ DIRECTV 2010 Form 10-K at 7.

³⁰² Time Warner Cable 2010 Form 10-K at 6.

³⁰³ *Id.*

³⁰⁴ Charter Communications, *2010 Annual Report*, Letter to Shareholders at 4.

Consumer Reports and others provide information on which MVPDs are doing well meeting consumer expectations.³⁰⁵

101. Customer satisfaction can be influenced by more than products, prices, and customer service. For example, Comcast maintains that upgrading to an all-digital platform has enhanced its reputation for technical innovation.³⁰⁶ Comcast explains that this reputation, as well as the recent rebranding of products as Xfinity, has driven improved perceptions and customer satisfaction.³⁰⁷ Similarly, in 2010, Time Warner Cable refreshed its logo “to better convey the image of an innovative, dynamic company.”³⁰⁸ Time Warner Cable maintains that its name and logo “carry tremendous brand equity and high consumer recognition.”³⁰⁹

c. Business Models and Competitive Strategies of Select MVPDs

102. The MVPD group is comprised of 1,157 cable MVPDs, two DBS MVPDs, two large telephone MVPDs and many smaller telephone MVPDs.³¹⁰ Although each MVPD has its own business model and competitive strategy, there may be some similarities within types of MVPDs. Below, we provide an overview of the business models and competitive strategies focusing on the two largest cable MVPDs (Comcast and Time Warner Cable) and a few selected mid-sized and smaller cable MVPDs (Buckeye Cable System, BendBroadband, Adams Cable Service, Sweetwater Cable). We also provide an overview of the business models and competitive strategies of the two DBS MVPDs (DIRECTV and DISH Network). Finally, we provide an overview of the business models and competitive strategies of the two largest telephone MVPDs (AT&T and Verizon) and a new telephone MVPD (CenturyLink).

(i) Cable MVPD Business Models and Competitive Strategies

103. Pursuant to statutory requirements, cable operators offer a basic service tier that includes broadcast television signals, PEG channels, and a few other national, regional, or local video programming services.³¹¹ Cable MVPDs also offer one or more cable programming service tiers which include additional national, regional, and local cable entertainment, news and other networks, such as CNN, USA, and ESPN. In addition to providing an analog tier, cable operators also offer a digital tier or digital tiers, which enable digital video subscribers to receive additional cable networks. Some cable MVPDs are all digital and no longer offer an analog tier. Cable MVPDs also offer genre-based programming tiers, such as a movie tier or a sports tier, and premium services, such as HBO and Showtime.

104. *Large Incumbent Cable MVPDs.* In this category, we focus primarily on the business models and competitive strategies of the two largest cable MVPDs: Comcast and Time Warner Cable. Comcast is the largest cable MVPD and the largest MVPD, with 22.8 million video subscribers clustered in the mid-Atlantic, Chicago, Denver, and Northern California. Comcast has ownership interests in

³⁰⁵ See, e.g., DSL Reports, <http://www.dslreports.com/shownews/Consumer-Reports-FiOS-UVerse-Tops-113561> (visited Mar. 2, 2012).

³⁰⁶ Comcast, *2010 Annual Review*, Letter to Shareholders at 2.

³⁰⁷ *Id.*

³⁰⁸ Time Warner Cable, *2010 Annual Report*, Letter to Shareholders at 2.

³⁰⁹ *Id.*

³¹⁰ See *supra*, ¶¶ 18, 28 & n. 33.

³¹¹ 47 U.S.C. § 543(b)(7).

approximately one out of every seven channels carried on its cable systems.³¹² Comcast has interests in numerous national networks including E!, Golf Channel, Versus, Style, G4, A&E, Bravo, Chiller, CNBC, MSNBC, Oxygen, Sleuth, SyFy, and The Weather Channel.³¹³ Comcast also has ownership interests in numerous regional sports networks (“RSNs”).³¹⁴ In addition Comcast has ownership interests in the NBC network and its owned and operated (“O&O”) NBC affiliated local television stations, the Telemundo network and its O&O Telemundo affiliated local television stations, and Universal Pictures.³¹⁵

105. Time Warner Cable is the second largest cable MVPD and the fourth largest MVPD, with over 12 million video subscribers clustered in five geographic areas – New York State (including New York City), the Carolinas, Ohio, Southern California (including Los Angeles), and Texas.³¹⁶ Time Warner Cable has ownership interests in national networks including MLB, MLS Direct Kick, NBA League Pass, NHL Center Ice, and Team HD, and numerous regional news networks and RSNs.³¹⁷

106. *Programming Tiers.* Comcast video services range from a limited basic package with 20 to 40 channels of linear programming to digital packages that may include over 300 linear channels and more than 100 HD channels.³¹⁸ Similarly, Time Warner Cable offers hundreds of video channels and HD channels throughout its footprint.³¹⁹

107. *Technology and Advanced Video Services.* Comcast and Time Warner Cable use a hybrid fiber optic and coaxial network that provides at least 750 MHz capacity and two-way transmission, which is essential to providing interactive services like VOD, Internet access, and telephone.³²⁰ Comcast offers more than 25,000 VOD titles with approximately 6,000 VOD HD titles each month and a 3D channel that aggregates 3D movies, sports, and other video programming.³²¹ In some markets, Comcast also offers “AnyRoom DVR,” which allows subscribers to share recorded programs with any television in

³¹² Comcast 6/8/11 Comments at 7. In approving the Comcast’s joint venture with General Electric, the Commission concluded that the transaction would give the joint venture the incentive and ability to block – temporarily or permanently – Comcast’s video distribution rivals from accessing programming owned by the joint venture and to raise the programming costs of its video distribution rivals. *Comcast-NBCU Order*, 26 FCC Rcd at 4250, ¶ 29. Given the findings, the Commission adopted an arbitration remedy applicable to all Comcast-NBCU affiliated programming, including regional sports networks, to prevent these potential harms. *Id.* at 4364-70, App. A, § VII. With respect to program carriage, the Commission found that the vertical integration of Comcast’s distribution network with NBCU’s programming assets increased Comcast’s ability and incentive to discriminate against or foreclose unaffiliated programming. *Id.* at 4282, ¶ 110. To remedy these harms, the Commission adopted a program carriage condition prohibiting Comcast from discriminating against programming vendors, including regional sports networks, on the basis of affiliation or nonaffiliation in the selection, price, terms or conditions of carriage. *Id.* at 4287, ¶ 121; *see also id.* at 4358, App. A, § III.1.

³¹³ For a list of Comcast’s national programming interests, *see* Appendix B, Table B-1.

³¹⁴ For a list of Comcast’s regional programming interests, *see* Appendix C, Table C-1.

³¹⁵ Comcast 2010 Form 10-K at 2.

³¹⁶ Time Warner Cable 2010 Form 10-K at 1.

³¹⁷ For a list of Time Warner Cable’s programming interests, *see* Appendix B, Table B-1 and Appendix C, Table C-1.

³¹⁸ Comcast 2010 Form 10-K at 3; Comcast 6/8/11 Comments at 9.

³¹⁹ Time Warner Cable, <https://www.timewarnercableoffers.com/> (visited Mar. 3, 2012).

³²⁰ Time Warner Cable 2010 Form 10-K at 6.

³²¹ Comcast 6/8/11 Comments at 8-9, 11.

the house.³²² Similarly, in some markets, Time Warner Cable offers multi-room DVR service with 80 hours of storage for video programs and thousands of VOD titles to digital video subscribers.³²³ Time Warner Cable also offers Start Over, a feature that enables customers that have missed the beginning of a live program to watch it from the beginning.³²⁴

108. Large cable MVPDs have been transitioning to all-digital systems.³²⁵ Most large cable MVPDs currently provide some digital channels in all or nearly all systems and they are continuing to migrate analog channels to digital.³²⁶ Comcast and Cablevision appear to have made the most progress turning off analog channels. For example, 20 percent of Comcast's footprint is currently all-digital. And Cablevision is all-digital in its New York City and Connecticut markets.³²⁷ According to reports, Time Warner Cable, Cox, Charter, and Suddenlink are transitioning to digital more gradually.³²⁸

109. Comcast's TV Everywhere initiative offers digital subscribers 150,000 online video choices, including on-demand television shows, movies, and video clips, but little or no linear video programming.³²⁹ For subscribers with mobile devices, Comcast's TV Everywhere offers almost 6,000 hours of on-demand video content to subscribers with smart devices.³³⁰ As part of its TV Everywhere service, Time Warner Cable offers subscribers online sports programming from ESPN, ESPN2, ESPN3, to customers who subscribe to a video tier that includes those networks.³³¹

110. *Bundling.* Like most cable MVPDs, Comcast and Time Warner Cable sell video services separately and in bundled packages of video, Internet access, and telephone services. Each of these services is provided over their own two-way cable systems. Comcast and Time Warner Cable explain that their primary competition for bundles comes from AT&T and Verizon, which overlap some of their service areas and offer video, Internet access, and telephone services with features and functions comparable to those offered by Comcast and Time Warner Cable.³³²

111. *Marketing.* Comcast now markets its services under the Xfinity brand, which includes Xfinity TV, Xfinity Internet, and Xfinity Voice. In marketing its services, Comcast compares its offerings with those of DBS and telephone MVPDs.³³³ Time Warner Cable has begun targeting higher-end demographics with its SignatureHome service that offers an enhanced bundle of video, Internet

³²² *Id.* at 10.

³²³ Time Warner Cable, <http://www.timewarnercable.com/nynj/learn/cable/> (visited Mar. 2, 2012).

³²⁴ *Id.* See also Time Warner Cable 2010 Form 10-K at 3.

³²⁵ Katie Ardmore, *Cable Operators Progressing Slowly Toward All-Digital Systems*, COMM. DAILY, Feb. 22, 2012, at 8-10.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ Comcast 6/8/11 Comments at 12-13.

³³⁰ *Id.* at 13.

³³¹ Time Warner Cable 2010 Form 10-K at 3.

³³² Comcast 2010 Form 10-K at 6; Time Warner Cable 2010 Form 10-K at 8, 9, 20, 38.

³³³ See Comcast, <http://www.comcast.com/Corporate/Learn/Compare/comcast-vs-att-U-verse.html?Processed=true> (visited Feb. 28, 2012).

access, and telephone services, and budget-conscious customers with its TV Essentials service that offers video only.³³⁴

112. *Small and Midsized Incumbent Cable MVPDs.* In this category, we consider four cable MVPDs: (i) Buckeye CableSystem (“Buckeye”), the 22nd largest cable MVPD, with approximately 135,000 subscribers in Northwest Ohio; Southeast Michigan; and Erie County, Ohio;³³⁵ (ii) BendBroadband, the 38th largest cable MVPD, with approximately 35,000 subscribers in 12 communities in Central Oregon;³³⁶ (iii) Adams Cable Service (“Adams”), the 42nd largest cable MVPD with approximately 22,000 subscribers in Carbondale, Pennsylvania;³³⁷ and (iv) Sweetwater Cable, the 52nd largest cable MVPD, with approximately 7,000 subscribers in Rock Springs and Green River, Wyoming.³³⁸

113. *Programming Tiers.* Buckeye offers 250 digital channels and HD channels.³³⁹ BendBroadband offers a range of digital video packages.³⁴⁰ At the low end is a limited video package with 27 channels and 12 HD channels. At the high end is a preferred video package with 92 channels and 59 HD channels, with the option of adding four genre-based programming tiers (*i.e.*, Variety, with 26 channels and eight HD channels; Sports with 17 channels and six HD channels; Movies, with 19 channels and two HD channels; and Discovery/MTV, with 13 channels). In addition, BendBroadband offers premium channels: HBO, Cinemax, Showtime, and Starz. Adams offers analog and digital video service ranging from a basic package with 17 channels to a digital package with an additional 120 channels and 48 HD channels.³⁴¹ Sweetwater Cable offers a basic video service and an expanded basic video service.³⁴² Prior to 2011, Sweetwater offered only analog video services.³⁴³ Currently, Sweetwater offers 22 channels on its basic service, 48 channels on its expanded basic service and 41 channels on its digital service.³⁴⁴

114. *Technology and Advanced Video Services.* Of the four systems studied, two offer comparable HD channels, DVR service, and VOD programming to the largest operators, one offers similar HD offerings but less robust DVR service and VOD programming, and the fourth offers DVR,

³³⁴ Time Warner Cable 2010 Form 10-K at 6.

³³⁵ Buckeye CableSystem, <http://www.buckeyecablesystem.com/index.html> (visited Oct. 31, 2011).

³³⁶ Communities in Central Oregon served by BendBroadband include: Bend, Black Butte, Culver, LaPine, Madras, Metolius, Prineville, Powell Butte, Redmond, Sisters, Sunriver, and Terrebonne. The company changed its name from Bend Cable to BendBroadband in 2003 in recognition that its services had expanded beyond cable television. See BendBroadband, http://www.bendbroadband.com/residential/abb_company_info.asp?pageID=abbb&subID=aci (visited Nov. 2, 2011).

³³⁷ Adams Cable Service, <http://www.adamsable.com/cable.html> (visited Nov. 2, 2011).

³³⁸ Sweetwater Cable, <http://www2.sweetwaterhsa.com/> (visited Feb. 13, 2012).

³³⁹ Buckeye CableSystem, <http://www.buckeyecablesystem.com/digital/index.html> (visited Oct. 31, 2011).

³⁴⁰ BendBroadband, http://www.bendbroadband.com/residential/dc_index.asp?pageID=dc&adct=3 (visited Feb. 26, 2012).

³⁴¹ Adams Cable Service, <http://www.adamsable.com/cable.html> (visited Nov. 2, 2011).

³⁴² Sweetwater Cable, <http://www2.sweetwaterhsa.com/> (visited Feb. 13, 2012).

³⁴³ *Id.*

³⁴⁴ Sweetwater Cable, <http://www2.sweetwaterhsa.com/digitalcable.html> (visited Feb. 13, 2012).

VOD and limited HD service.³⁴⁵ Some of these systems are offering innovative services. For example, Buckeye recently introduced Whole Home VOD, which allows subscribers to access VOD programs on any television in the home.³⁴⁶ BendBroadband offers a service called Alpha, which combines a set-top receiver, cable modem, and wireless router into a single box that can record six video programs simultaneously.³⁴⁷ Adams offers pay-per-view movies and special events, but appears to offer a more limited selection of free VOD content than that found on the larger cable MVPDs.³⁴⁸ In addition, the company's DVR service is limited to a single room.

115. Overall, small and mid-sized cable MVPDs are also transitioning to all-digital systems. In a recent survey by the American Cable Association, 50 percent of the 107 cable MVPDs respondents indicate that they plan to either operate an all-digital system, or will be upgrading to all-digital within three years.³⁴⁹

116. *Bundling.* Each of the small cable systems we studied now offers Internet access and telephone services.³⁵⁰ Buckeye offers Internet access and telephone services and "money-saving" bundles similar to large cable MVPDs. BendBroadband offers Internet access (both wireline and wireless) and telephone service, separately and in bundles. Adams offers Internet access and telephone service, separately and in bundles, that appear to be comparable to those offered by larger cable MVPDs. In 2011, Sweetwater upgraded its cable systems to offer digital video service, as well as Internet access and telephone services.³⁵¹

117. *Marketing.* Buckeye's marketing is focused on winning subscribers from DBS MVPDs.³⁵² The company offers current DBS subscribers \$200 to convert to Buckeye's video service. As added incentives to subscribe to its bundle of services, Buckeye will remove the DBS satellite dish and provide a free month of Internet access and telephone service.

³⁴⁵ Buckeye offers 250 digital channels, HD channels, DVR service, and thousands of hours of VOD programming. Buckeye CableSystem, <http://www.buckeyecablesystem.com/digital/index.html> (visited Oct. 31, 2011); BendBroadband offers a total of 108 HD channels, DVR service, and VOD. BendBroadband, http://www.bendbroadband.com/residential/alpha_index.asp?pageID=al&adct=1 (visited Nov. 2, 2011); Adams video services are comparable to those offered by the largest cable MVPDs, but it offers fewer VOD programs and its DVR service does not deliver programs to other televisions throughout the house. Adams Cable Service, <http://www.adamscale.com/index.html> (visited Nov. 2, 2011). According to Sweetwater Cable's website, it offers the Salt Lake City broadcast stations and a number of national cable networks in HD, with plans to add additional HD channels upon availability and system capacity. Sweetwater Cable, <http://www2.sweetwaterhsa.com/digitalcable.html> (visited July 10, 2012).

³⁴⁶ Buckeye CableSystem, <http://www.buckeyecablesystem.com/vod/index.html> (visited Oct. 31, 2011).

³⁴⁷ BendBroadband, http://www.bendbroadband.com/residential/alpha_index.asp?pageID=al&adct=1 (visited Nov. 2, 2011).

³⁴⁸ Adams Cable Service, <http://www.adamscale.com/cable.html> (visited Nov. 2, 2011).

³⁴⁹ See Letter from Barbara S. Esbin, Counsel to the American Cable Association, to Marlene Dortch, Secretary, FCC, MB Docket No. 11-169, PP Docket No. 00-67 (Feb. 27, 2012).

³⁵⁰ We note that not all of the smallest cable systems offer Internet access or telephone services. FCC staff analysis shows that 160 cable systems, each with less than 5,000 subscribers, filed a Form 325 for 2010. Of these, five cable systems offered neither Internet access nor telephone service.

³⁵¹ Sweetwater Cable, <http://www2.sweetwaterhsa.com/> (visited Feb. 13, 2012).

³⁵² Buckeye CableSystem, <http://www.buckeyecablesystem.com/nodish/index.html> (visited Oct. 31, 2011).

(ii) DBS MVPD Business Models and Competitive Strategies

118. DIRECTV is the second largest MVPD, with approximately 19 million subscribers in the United States.³⁵³ The company is organized into two operating segments: DIRECTV U.S. and DIRECTV Latin America.³⁵⁴ DIRECTV has ownership interests in Root Sports, a group of RSNs, and a 65 percent interest in Game Show Network, a cable television network dedicated to game-related programming and Internet interactive game playing.³⁵⁵ DISH Network is the third largest MVPD, with approximately 14 million subscribers.³⁵⁶ The company does not have significant ownership interests in programming networks. DISH Network recently acquired Blockbuster, Inc. and now offers DVDs and online streaming of video programming.³⁵⁷

119. *Programming Tiers.* At the end of 2010, DIRECTV offered over 285 all-digital channels, 160 national HD channels, and four 3D channels.³⁵⁸ At the end of 2010, DIRECTV offered local broadcast television stations (also called local-into-local service) in 172 television markets and local broadcast television HD channels in 155 television markets.³⁵⁹ DIRECTV also has exclusive rights to offer the NFL SUNDAY TICKET, which allows subscribers to view the largest selection of NFL games during the regular season.³⁶⁰ At the end of 2010, DISH Network offered 280 video channels and 215 national HD channels.³⁶¹ At the end of 2010, DISH Network offered local broadcast television stations in all 210 television markets and local broadcast television HD channels in more than 160 markets.³⁶² In 2010, DISH Network also offered 250 Latino and international channels, 30 premium movie channels, 35 regional and specialty sports channels, and 55 channels of pay-per-view content.³⁶³

120. *Technology and Advanced Video Services.* DIRECTV and DISH Network use an all-digital, one-way technology to deliver video programming to set-top receivers. Subscribers receive programming through a small satellite dish. DIRECTV uses 12 geosynchronous satellites (eleven owned and one leased).³⁶⁴ DISH Network uses 13 satellites (six owned, five leased from EchoStar, and two

³⁵³ DIRECTV 2010 Form 10-K at 2.

³⁵⁴ In this Report, we focus only on the DIRECTV U.S. segment.

³⁵⁵ DIRECTV 2010 Form 10-K at 2.

³⁵⁶ DISH Network 6/8/11 Comments at 2.

³⁵⁷ DISH Network, *Dish Network Agrees to Acquire Blockbuster Assets* (press release), Apr. 6, 2011; DISH Network, <http://www.dishnetwork.com/blockbuster/> (visited Jan. 25, 2012).

³⁵⁸ DIRECTV 6/8/2011 Comments at 10.

³⁵⁹ *Id.* DIRECTV has been expanding its local-into-local service and currently offers local broadcast television stations in 194 television markets and local broadcast television HD channels in 181 markets. DIRECTV, http://www.directv.com/DTVAPP/content/hd/hd_locals (visited Apr. 6, 2012).

³⁶⁰ DIRECTV, http://www.directv.com/DTVAPP/content/about_us/our_company (visited Feb. 26, 2012).

³⁶¹ DISH Network 2010 Form 10-K at 1-2.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ DIRECTV 2010 Form 10-K at 6.

leased from third parties).³⁶⁵ The satellites used by DIRECTV and DISH Network provide a nationwide footprint, such that almost every home has access to DBS MVPD service.³⁶⁶

121. DIRECTV offers a “whole home” DVR, which distributes video content to multiple televisions throughout the house from a single DVR.³⁶⁷ DISH Network says that its whole home DVR is coming soon.³⁶⁸ Because DBS technology is a one-way transmission service, DIRECTV and DISH Network provide their VOD service over the Internet. Thus, DBS subscribers must also subscribe to Internet access service to receive DBS VOD service. Both DIRECTV’s and DISH Network’s VOD service offer thousands of movies and television programs.³⁶⁹

122. In 2010, DIRECTV stated that its TV Everywhere strategy was to deliver the best anytime, anywhere video experience, in and out of the home.³⁷⁰ DIRECTV now offers shows, movies, sports, and NFL SUNDAY TICKET To-Go, which is available on the iPad.³⁷¹ DIRECTV also offers movies and television shows from HBO and Cinemax on cell phones, iPads, or online.³⁷² In 2010, DISH Network promoted a suite of products designed to make it convenient and easy to watch television anytime and anywhere.³⁷³ DISH Network’s TV Everywhere uses online access and Slingbox placeshifting technology.³⁷⁴ The service enables customers to watch live television on computers, iPads, iPhones, or Android devices; or access thousands of on-demand movies and shows from a computer at Dish Online or on an iPad using a DISH remote access application.³⁷⁵

123. DIRECTV notes that its advertising revenue per subscriber trails many of its competitors because it does not have the ability to target advertising at the local level due to its national satellite infrastructure.³⁷⁶ Using new technology, DIRECTV anticipates being able to insert advertisements into individual DVR set-top receivers. This will enable advertisers to target subscribers in local regions and

³⁶⁵ DISH Network 6/8/11 Comments at 5.

³⁶⁶ In addition to the contiguous 48 states, DIRECTV states that it provides the same programming packages for the same prices to customers in Alaska and Hawaii. DIRECTV 6/8/2011 Comments at 13-14. DISH Network also appears to offer the same programming packages to the contiguous 48 states and Alaska and Hawaii. *See* SatelliteSales.com, <http://www.satellitesales.com/ak-fairbanks-dish-network.html>; D&M Satellite Solutions, <http://www.dishtvhawaii.com/> (visited Mar. 14, 2012).

³⁶⁷ DIRECTV 6/8/2011 Comments at 4.

³⁶⁸ DISH Network, <http://www.dish.com/technology/receivers-dvrs/> (visited Feb. 29, 2012).

³⁶⁹ DIRECTV 6/8/2011 Comments at 2; DISH Network, <http://www.dish.com/entertainment/vod/> (visited Feb. 29, 2012).

³⁷⁰ DIRECTV, *2010 Annual Report*, Message to Shareholders.

³⁷¹ *Id.* *See also* DIRECTV, http://www.directv.com/DTVAPP/content/technology/mobile_apps?footernavtype=-1&lpos=header (visited Mar. 2, 2012).

³⁷² DIRECTV, http://www.directv.com/entertainment/watch_online/ (visited Mar. 5, 2010).

³⁷³ DISH Network, *2010 Annual Report*, Letter to Shareholders.

³⁷⁴ *Id.*

³⁷⁵ DISH Network, <http://www.dish.com/testdrive/> and <http://www.dish.com/technology/tv-everywhere/> (visited Mar. 2, 2010).

³⁷⁶ DIRECTV 2010 Form 10-K at 5-6.

eventually in the individual home. With this new technology, DIRECTV expects to increase its advertising revenues significantly.³⁷⁷

124. *Bundling.* DBS MVPDs rely on cooperative arrangements with telephone companies to offer a “synthetic bundle” of video, Internet access, and telephone service.³⁷⁸ DIRECTV explains that cable and telephone MVPDs have advantages over it because they have been able to upgrade their facilities to bundle their video service with two-way high-speed Internet access and telephone service over the same wire, which DIRECTV cannot do.³⁷⁹ DIRECTV also expresses concern that telephone companies that upgrade their networks with fiber optic technology to provide their own MVPD service have less incentive to bundle with DIRECTV.³⁸⁰ DISH also partners with telephone companies to bundle DISH Network video programming with Internet access and telephone service on a single bill.³⁸¹

125. *Marketing.* The marketing of DIRECTV and DISH Network is focused on delivered video programming, with less emphasis on bundles.³⁸² DISH Network markets its video programming packages as providing better “price-to-value” than those available from other MVPDs.³⁸³ DIRECTV compares its video services with those offered by DISH Network and also with those offered by cable and telephone MVPDs.³⁸⁴ DISH Network takes a similar approach, stating that it competes directly with DIRECTV in the market for the delivery of video programming, but also faces competition from cable and telephone MVPDs.³⁸⁵ Both DIRECTV and DISH Network assert that cable and telephone MVPDs have a competitive advantage in the provision of video, Internet access, and telephone service bundles.

(iii) Telephone MVPD Business Models and Competitive Strategies

126. In the last report, we explained that some telephone companies offered video service through cooperative arrangements with DBS MVPDs, although Verizon and AT&T were upgrading their networks to provide their own, facilities-based, wireline video service.³⁸⁶ At the time, some analysts were skeptical of Verizon and AT&T’s plans to build their own facilities-based video service and pointed to the

³⁷⁷ *Id.*

³⁷⁸ DIRECTV 6/8/11 Comments at 16; DISH Network 2010 Form 10-K at 3.

³⁷⁹ DIRECTV 2010 Form 10-K at 17.

³⁸⁰ *Id.* DIRECTV has cooperative arrangements with telephone companies that use DSL technology to offer Internet access and telephone services. When telephone companies (e.g., AT&T and Verizon) upgrade their systems and begin offering their own MVPD service, they may end their cooperative arrangements with DIRECTV. One analyst explains that DBS MVPDs remain “enormously dependent” on the telephone companies’ legacy DSL as their partner for broadband. Craig Moffett, *The Long View: Cord Cutting, Household Formation, and the Long Road to a New Pay TV Video Equilibrium*, BERNSTEIN RESEARCH, Nov. 10, 2011, at 15.

³⁸¹ DISH Network 2010 Form 10-K at 3.

³⁸² DIRECTV’s and DISH Network’s main websites market video programming, with no mention of Internet access or telephone services. DIRECTV, <http://www.directv.com/DTVAPP/index.jsp> (visited Feb. 29, 2012); DISH Network, <http://www.dishnetwork.com/> (visited Jan. 25, 2012). See also DIRECTV 6/8/11 Comments at 3.

³⁸³ DISH Network 2010 Form 10-K at 1.

³⁸⁴ DIRECTV, <http://www.directv.com/DTVAPP/content/directv/competition?footernavtype=-1&lpos=header> (visited Feb. 29, 2012).

³⁸⁵ DISH Network 2010 Form 10-K at 3.

³⁸⁶ *13th Report*, 24 FCC Rcd at 604-5, ¶ 131.

slower-than-projected rollout, the high capital costs, and the lack of differentiation from cable MVPD video and bundle offerings.³⁸⁷ Much has changed in the intervening years, and by the end of 2010, Verizon and AT&T were the seventh and ninth largest MVPDs. More recently, CenturyLink began upgrading its systems and offering its own MVPD service.

127. Verizon began offering video on its FiOS network in 2005. By the end of 2006, Verizon passed 2.4 million homes with 207,000 subscribers.³⁸⁸ By the end of 2010, Verizon passed 15.6 million homes with approximately 3.5 million video subscribers.³⁸⁹ Verizon recently stated that it plans to reach 18 million homes, but has no current plans to build out further.³⁹⁰ AT&T U-verse entered the market in late 2006 and by 2010 passed approximately 27 million homes and had approximately three million video subscribers.³⁹¹ In 2010, CenturyLink began offering Prism TV video service in Fort Myers, Florida, and Las Vegas, Nevada.³⁹² Subsequently, CenturyLink extended its Prism TV video service to Jefferson City, Missouri; Columbia, Missouri; La Crosse, Wisconsin; Tallahassee, Florida; Central Florida; and Raleigh, North Carolina.³⁹³ Prism TV service is now available to one million homes.³⁹⁴ Verizon, AT&T, and CenturyLink have no significant ownership interests in video programming networks.

128. *Programming Tiers.* Verizon's FiOS TV offers 530 all-digital video channels, 130 HD channels, and claims to offer more children's sports, and premium movie channels than cable MVPDs.³⁹⁵ AT&T's U-Verse TV offers a basic package with local channels only, a range of additional channel packages with anywhere from 130 to 470 video channels, and 170 HD channels.³⁹⁶ Prism TV offers over 230 channels and HD channels.³⁹⁷

129. *Technology and Advanced Video Services.* Verizon has deployed an all-digital fiber-to-the-premises network, which offers FiOS TV and FiOS Internet.³⁹⁸ FiOS offers 35,000 VOD titles each

³⁸⁷ Kagan Research, LLC., *Cable TV Investor: Deals & Finance*, Sept. 30, 2006, at 1, 6.

³⁸⁸ Verizon, *2006 Annual Report* at 19. The 207,000 subscribers in 2006 included both video and Internet subscribers. Verizon is organized into a Domestic Wireless and Wireline segment. FiOS is included in the Wireline segment. Verizon, *2010 Annual Report* at 14, 22.

³⁸⁹ Verizon 6/8/11 Comments at 5-6; Verizon, *2010 Annual Report* at 14-15.

³⁹⁰ In an interview with UBS analyst John Hodulik, Lowell McAdam, Verizon President & CEO, stated, "With FiOS we are about 16 million POPs at this point and we want to get to about 18 million. If we built out the whole footprint, we would be more in the 21 million, maybe a little bit more, range . . . But for now the bottom line is we are going to build out what we said and not any more." See *VZ-Verizon Communications Inc at UBS Media and Communications Conference*, Final Transcript, THOMSON STREETEVENTS, Dec. 7, 2011, http://www22.verizon.com/idc/groups/public/documents/adacct/event_1012_trans.pdf (visited Feb. 10, 2012).

³⁹¹ AT&T 6/8/11 Comments at 2-3. AT&T has four operating segments: Wireless, Wireline, Advertising Solutions, and Other. U-verse is included in the Wireline segment. AT&T, *2010 Annual Report*, at 33.

³⁹² CenturyLink, <http://www.centurylink.com/home/> (visited Jan. 26, 2012).

³⁹³ CenturyLink, <http://www.centurylink.com/prismtv/#prismChannelLineup.html> (visited Nov. 15, 2011).

³⁹⁴ CenturyLink, Inc., *CenturyLink Reports Strong Third Quarter 2011 Earnings* (press release), Nov. 2, 2011.

³⁹⁵ Verizon, <http://www22.verizon.com/home/fiosTV/> (visited Jan. 26, 2012).

³⁹⁶ AT&T, <http://www.att.com/u-verse/explore/tv-landing.jsp?wtSlotClick=1-0069UB-0-1&WT.svl=calltoaction> (visited Oct. 26, 2011).

³⁹⁷ CenturyLink, <http://www.centurylink.com/prismtv/#index.html> (visited Nov. 15, 2011).

³⁹⁸ Verizon, *2010 Annual Report*, at 46.

month and a multi-room DVR receiver.³⁹⁹ AT&T's U-verse uses an all-digital fiber-to-the-premises technology, which includes fiber-optic cable all the way to the home, or fiber-to-the-node technology, which includes fiber-optic cable to the node and copper wire from the node to the home.⁴⁰⁰ AT&T's IP technology sends only the video program selected by the subscriber to the set-top receiver.⁴⁰¹ AT&T U-verse offers a large library of VOD titles and a "Total Home" DVR receiver.⁴⁰² CenturyLink is in the process of deploying additional fiber and transitioning to an all-digital IP-based network.⁴⁰³ CenturyLink's Prism TV offers VOD and a whole home DVR that records four programs at once and holds 230 hours of video programming.⁴⁰⁴

130. For TV Everywhere, Verizon's states that its FlexView service is a "go-everywhere, watch-anywhere, mobile entertainment technology" that enables customers to view over 10,000 video titles.⁴⁰⁵ FiOS FlexView gives customers streaming video to televisions, computers, tablets, and smartphones.⁴⁰⁶ Verizon says customers can start watching a movie on one device and finish watching it on another device.⁴⁰⁷ With respect to TV Everywhere, AT&T stated in 2010 that it was increasingly focused on delivering video across networks and platforms so that customers could simply and seamlessly access video programming without giving a thought to whether they happened to be on a wired or a wireless network.⁴⁰⁸

131. *Bundling.* Although FiOS TV and U-verse TV can be purchased on a stand-alone basis, both Verizon and AT&T typically market video services in a bundle that includes video, Internet access, and telephone service.⁴⁰⁹ Verizon marketing focuses on bundles and states that its bundled pricing strategy allows it to provide competitive offerings to subscribers and potential subscribers.⁴¹⁰ AT&T states it uses a bundling strategy that "rewards customers who consolidate their services (e.g., local and long-distance telephone, high-speed Internet, wireless and video)."⁴¹¹ Verizon and AT&T contend that their most significant competitors are the incumbent cable operators that offer bundles of video, Internet

³⁹⁹ Verizon, <http://www22.verizon.com/home/fiosTV/> (visited Jan. 26, 2012).

⁴⁰⁰ AT&T, http://www.att.com/Common/about_us/files/pdf/HowUverseIsDelivered_2-22.pdf (visited Oct. 26, 2011). A node is a communications control unit in a video system that interconnects traditional coaxial cable and fiber-optics. It is the place where an optical signal is converted to a radio frequency (RF) signal, or vice versa.

⁴⁰¹ AT&T, http://www.att.com/Common/about_us/files/pdf/IPTV_background.pdf (visited Jan. 26, 2012).

⁴⁰² AT&T, <http://www.att.com/shop/tv/index.jsp?wtSlotClick=1-0056C5-0-4#fbid=dEBRF88Fm3S> (visited Jan. 26, 2012).

⁴⁰³ CenturyLink, *2010 Review and CEO's Message*, at 4, <http://ir.centurylink.com/phoenix.zhtml?c=112635&p=irol-reportsannual> (visited Nov. 15, 2011).

⁴⁰⁴ CenturyLink, <http://www.centurylink.com/prismtv/#index.html> (visited Nov. 15, 2011).

⁴⁰⁵ Verizon, <http://www22.verizon.com/home/fiosTV/#connect> (visited Mar. 2, 2012).

⁴⁰⁶ Verizon, *2010 Annual Report*, at 6.

⁴⁰⁷ *Id.*

⁴⁰⁸ AT&T, *2010 Annual Report*, at 4.

⁴⁰⁹ Verizon, *2010 Annual Report*, at 25; AT&T, <http://www.att.com/shop/u-verse/#fbid=dEBRF88Fm3S> (visited Jan. 26, 2012).

⁴¹⁰ Verizon, *2010 Annual Report*, at 25.

⁴¹¹ AT&T, *2010 Annual Report*, at 44.

access, and voice services in virtually every area that they provide service.⁴¹² Verizon and AT&T also state that their MVPD services experience significant video competition from DBS MVPDs.⁴¹³ CenturyLink states that 70 percent of Prism TV customers subscribe to a video, Internet access, and telephone services bundle.⁴¹⁴

132. Although bundling by cable MVPDs has generally involved triple-play offerings of video, Internet access, and telephone service, MVPDs have also added wireless telephone service through partnerships.⁴¹⁵ For example, Verizon Wireless and SpectrumCo, which is a joint venture among subsidiaries of Comcast, Time Warner Cable, and Bright House, have requested consent to assign 122 Advanced Wireless Services licenses to Verizon Wireless from SpectrumCo.⁴¹⁶ In a second application, Verizon Wireless and Cox have requested consent to assign 30 Advanced Wireless Services Licenses to Verizon Wireless from Cox.⁴¹⁷ The Commission consolidated consideration of the applications and issued a Public Notice.⁴¹⁸ In addition to acquiring spectrum from the cable companies, Verizon Wireless and the Applicants report that they have entered into agreements under which the cable companies and Verizon Wireless will sell one another's products and services.⁴¹⁹

133. *Marketing.* Verizon describes its all-fiber FiOS network as the fastest, highest-quality broadband network in the country.⁴²⁰ Verizon asserts that its networks differentiate it from its competitors.⁴²¹ Verizon markets FiOS TV as a premium service, although it also offers a less-promoted low-price, basic video service.⁴²² AT&T maintains that "U-verse uses fiber optic technology and computer networking to bring you better digital television, faster Internet, and a smarter phone."⁴²³

⁴¹² Verizon 6/8/11 Comments at 7; AT&T 6/8/11 Comments at 4; AT&T, *2010 Annual Report*, at 43-44.

⁴¹³ Verizon 6/8/11 Comments at 5; AT&T 6/8/11 Comments at 5.

⁴¹⁴ CenturyLink, <http://www.centurylink.com/prismtv/#index.html> (visited Nov. 15, 2011).

⁴¹⁵ See *13th Report*, 24 FCC Rcd at 578, ¶ 69.

⁴¹⁶ See Application and Public Interest Statement of SpectrumCo., LLC, transferor, to Cellco Partnership d/b/a Verizon Wireless, transferer (Dec. 16, 2011) ("Verizon Wireless-SpectrumCo- Application"). See also Verizon, Comcast, Time Warner Cable, and Bright House Networks Sell Advanced Wireless Spectrum to Verizon Wireless for \$3.6 Billion (press release), Dec. 2, 2011.

⁴¹⁷ See Application and Public Interest Statement of Cox TMI Wireless, LLC, transferor, to Cellco Partnership d/b/a Verizon Wireless, transferer (Dec. 21, 2011) ("Verizon Wireless-Cox Application"). See also Verizon, Cox Communications Announces Agreement to Sell Advanced Wireless Spectrum to Verizon Wireless (press release), Dec. 16, 2011.

⁴¹⁸ See *Cellco Partnership D/B/A Verizon Wireless, SpectrumCo, LLC and Cox TMI Wireless, LLC Seek FCC Consent to the Assignment of AWS-1 Licenses*, WT Docket No. 12-4, Public Notice, 27 FCC Rcd 360 (WT 2012).

⁴¹⁹ Verizon Wireless-SpectrumCo Application, Public Interest Statement, at 1; Verizon Wireless-Cox Application, Public Interest Statement, at 1.

⁴²⁰ Verizon, *2010 Annual Report*, at 2-3.

⁴²¹ *Id.* at 8, 15. Verizon states that "Current and potential competitors for network services include other telephone companies, cable companies, wireless service providers, foreign telecommunications providers, satellite providers, electric utilities, Internet service providers, providers of VoIP services, and other companies that offer network services using a variety of technologies." *Id.* at 37.

⁴²² See Verizon, http://www22.verizon.com/home/aboutfios/?CMP=DMC-CVS_ZZ_ZZ_E_TV_N_X001 (visited Jan. 26, 2012).

⁴²³ AT&T, http://www.att.com/shop/u-verse/#fbid=QmA4InkA_TN (visited Mar. 5, 2012).

CenturyLink markets Prism TV as “TV worth switching for,” and “one of the most advanced TV services in the world,” which “will change the way you experience TV forever.”⁴²⁴

4. MVPD Performance

134. The structural and behavioral characteristics of a competitive market are desirable not as ends in themselves, but rather as a means of bringing tangible benefits to consumers such as lower prices, higher quality, and greater choice of services. To determine if the market for the delivery of video programming is producing these kinds of positive outcomes, we look at video prices and provide current prices for a sample of video packages offered by some MVPDs. We also examine competition in the market for the delivery of video programming from an investor perspective, including how the various types of MVPDs are doing relative to one another. As such, we report on video subscribers and penetration, revenue, investment, and profitability.

a. Video Programming Pricing

135. Section 623(k) of the Act of 1934, as amended by the Cable Act,⁴²⁵ requires the Commission to publish annually a statistical report on the average rates that cable operators charge for basic service, other cable programming, and cable equipment.⁴²⁶ Table 3 uses data from the Commission’s most recent report on cable industry prices to show prices for basic service, expanded basic service, and the next most popular service (plus equipment) for the years 2006 to 2010.⁴²⁷ Table 3 shows that prices for basic service, expanded basic service, and the next most popular service (plus equipment) increased over the period 2006 to 2010.⁴²⁸

⁴²⁴ CenturyLink, <http://www.centurylink.com/prismtv/#index.html> (visited Mar. 2, 2012).

⁴²⁵ See 47 U.S.C. § 543(k).

⁴²⁶ The 1992 Cable Act requires operators to offer an entry-level basic service, which must include, at a minimum, all commercial and noncommercial local broadcast stations entitled to carriage under the must-carry provisions of the Communications Act of 1934, 47 U.S.C. §§ 534-35. Basic service must also offer any other local broadcast station provided to any subscriber, as well as public, educational, and governmental access channels that the local franchise authority (LFA) may require the operator to carry. See 47 U.S.C. § 543(b)(7). Cable programming refers to a tier of video channels for which the operator charges a separate rate, other than the basic service channels and channels for which per-channel or per-program charges apply. See 47 U.S.C. § 543(k)(1)(2). Cable equipment refers to a converter box and other customer premises equipment for accessing cable services. See 47 U.S.C. § 543(b)(3).

⁴²⁷ See *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, 27 FCC Rcd 2427, 2435, Table 3 (MB 2012) (“2010 Cable Price Survey Report”).

⁴²⁸ The next most popular service package generally includes all the programming channels included in the expanded basic service package and at least seven additional cable network channels. *Id.* 2432, at ¶ 10.

Table 3: Historical Average Monthly Prices

Year	Basic Service Price	Expanded Basic Service Price	Next Most Popular Service & Equipment Price
2006	\$14.59	\$45.26	\$59.09
2007	\$15.33	\$47.27	\$60.27
2008	\$16.11	\$49.65	\$63.66
2009	\$17.65	\$52.37	\$67.92
2010	\$17.93	\$54.44	\$71.39

136. Table 4 provides examples of prominently displayed video packages from MVPD websites. Table 4 does not show all of the video packages offered by the MVPDs. For example, the cable MVPDs included in Table 4 offer basic and expanded basic video packages. These video packages, however, were not prominently displayed on their websites. Table 4 shows the name of the video package, the advertised price, and the number of channels.⁴²⁹ The advertised video packages are often promotional prices for new customers. At the end of the promotional time period, the price for services rises to the “normal” price. It is important to note that some of the video packages shown in Table 4 include advanced video services (*e.g.*, DVR service), some include equipment (*e.g.*, an HD/DVR set-top receiver), and some include premium channels (*e.g.*, HBO). Even where the number of channels is the same, each package contains a different mix of channels.⁴³⁰ Many services and features that affect the value of a video package are not shown in Table 4. Therefore, at best, this information provides only a starting point for comparing video packages since there is no standard video package for making direct price comparisons. For these reasons, Table 4 contains only a sample of advertised prices for prominently displayed video package offerings.

⁴²⁹ When MVPDs advertise the number of channels, they usually include both video channels and music channels. The video channels in Table 4 include those found on the basic and expanded basic service and a range of digital channels.

⁴³⁰ For example, some MVPDs include all of the premium movie channels in their most expensive advertised video package while other MVPDs include fewer premium movie channels in their most expensive advertised video package.

Table 4: Examples of MVPD Video Package Prices

Cable				
Comcast ⁴³¹	Digital Starter \$29.99 (80 channels)	Digital Preferred \$39.99 (160 channels)	Digital Premier \$84.99 (200 channels)	
Cox ⁴³²	TV Essential \$57.99 (95 channels)	Advanced TV Preferred \$67.99 (236 channels)	Advanced TV Premier \$76.99 (270 channels)	
BendBroadband ⁴³³	Essentials \$46.99 (159 channels)	Preferred \$54.99 (196 channels)	Gold Package \$98.47 (295 channels)	
DBS				
DIRECTV ⁴³⁴	Choice \$29.99 (150 channels)	Choice Extra \$34.99 (210 channels)	Choice Ultimate \$39.99 (225 channels)	Premier \$83.99 (285 channels)
DISH Network ⁴³⁵	America’s Top 120 \$29.99 (120 channels)	America’s Top 200 \$39.99 (200 channels)	America’s Top 250 \$44.99 (250 channels)	America’s “Everything” Pak \$79.99 (315 channels)
Telephone				
AT&T U-verse ⁴³⁶	U100 TV \$34 (210 channels)	U200 TV \$44 (270 channels)	U300 TV \$59 (360 channels)	U450 TV \$92 (430 channels)
Verizon FiOS ⁴³⁷	Prime HD \$64.99 (195 channels)	Extreme HD \$74.99 (285 channels)	Ultimate HD \$89.99 (350 channels)	

⁴³¹ Comcast, <http://www.comcast.com/Corporate/Learn/DigitalCable/digitalcable.html> (visited Nov. 9, 2011).

⁴³² Cox Communications, https://secure.cox.com/Service/Store/OrderNow.aspx?SO=W&camcode=satv_1_special-offers (visited Nov. 9, 2011).

⁴³³ BendBroadband, http://www.bendbroadband.com/residential/dc_index.asp?pageID=dc#Essentials (visited Nov. 9, 2011).

⁴³⁴ DIRECTV, http://www.directv.com/DTVAPP/new_customer/base_packages.jsp?footernavtype=-1 (visited Nov. 9, 2011).

⁴³⁵ DISH Network, <http://www.dishnetwork.com/packages/programming/default.aspx> (visited Nov. 9, 2011).

⁴³⁶ AT&T, <http://www.att.com/u-verse/shop/index.jsp?shopFilterId=100004&wtSlotClick=2-005THH-903422-2-2&rel=nofollow#fbid=wqVQ02ViVNz> (visited Nov. 9, 2011).

⁴³⁷ Verizon, <http://www22.verizon.com/Residential/FiOSTV/Overview#plans> (visited Nov. 9, 2011).

b. Video Subscribers and Penetration

137. *Video Subscribers.* Table 5 shows the number of video subscribers for cable, DBS, and telephone MVPDs. Between 2006 and 2010, the number of subscribers to MVPD video service has grown from 95.8 million in 2006 to 100.8 in 2010, a net increase of five million subscribers.⁴³⁸ Over that period, however, cable MVPDs lost video subscribers and market share. At the end of 2006, cable MVPDs had 65.4 million video subscribers (68.3 percent of the 95.8 million MVPD video subscribers).⁴³⁹ By year-end 2010, the number of cable MVPD subscribers had declined to 59.8 million (59.3 percent of the MVPD subscribers), a loss of 5.6 million subscribers.⁴⁴⁰ Table 5 shows that from 2006 to 2010, large cable MVPDs accounted for the majority of the cable MVPD video subscriber losses. For example, Comcast lost 1.4 million video subscribers, Time Warner Cable lost one million video subscribers, Cox lost 500,000 video subscribers, and Charter lost 900,000 video subscribers.

138. SNL Kagan explains that competition continues to reduce cable's share of the U.S. video market and that cable MVPDs are expected to continue losing basic video subscribers to competing MVPDs.⁴⁴¹ According to SNL Kagan, cable video subscriptions have been eroded by competition from new telephone MVPDs and established DBS MVPDs.⁴⁴² Another analyst says that a weak economy is a contributing factor but increased competition from DBS and telephone MVPDs is the main reason that cable MVPDs are losing video subscribers.⁴⁴³

139. Table 5 shows that DBS MVPDs and telephone MVPDs gained video subscribers and market share during the period 2006 to 2010. In 2006, DBS MVPDs had 29.1 million video subscribers (30.4 percent).⁴⁴⁴ By 2010, the number of DBS MVPD video subscribers had increased to 33.4 million (33.1 percent), a gain of 4.3 million subscribers.⁴⁴⁵ DIRECTV credits its increase in subscribers and market share to taking customers primarily from cable.⁴⁴⁶ Similarly, in 2006, telephone MVPDs had approximately 300,000 video subscribers (0.3 percent).⁴⁴⁷ Five years later, the number of telephone MVPD video subscribers had increased to 6.9 million (6.8 percent of MVPD video subscribers), a gain of 6.6 million subscribers. According to SNL Kagan, the subscriber gains of telephone MVPDs come at the

⁴³⁸ SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 21, 2011).

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ SNL Kagan, *Broadband Cable Financial Databook*, 2010 Edition, at 6.

⁴⁴² SNL Kagan, *Cable TV Investor: Deals & Finance*, Jan. 29, 2010, at 10.

⁴⁴³ Marguerite Reardon, *Competition and a Weak Economy Plague Cable TV*, CNET NEWS, Nov. 3, 2011, http://news.cnet.com/8301-30686_3-57316511-266/competition-and-a-weak-economy-plague-cable-tv/ (visited Apr. 6, 2012). The article cites statements from Craig Moffett, an analyst with Sanford Bernstein.

⁴⁴⁴ SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 21, 2011).

⁴⁴⁵ *Id.*

⁴⁴⁶ DIRECTV, *2010 Annual Report*, Message to Shareholders.

⁴⁴⁷ SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 21, 2011).

expense of cable and DBS MVPDs, rather than from a larger percentage of homes subscribing to MVPD video services.⁴⁴⁸

Table 5: MVPD Video Subscribers (in millions)

Year	2006	2007	2008	2009	2010
MVPD Total ⁴⁴⁹	95.8	97.7	98.9	100.7	100.8
Cable ⁴⁵⁰	65.4	64.9	63.7	62.1	59.8
Comcast	24.2	24.1	24.2	23.6	22.8
Time Warner	13.4	13.3	13.1	12.9	12.4
Cox	5.4	5.4	5.3	5.2	4.9
Charter	5.4	5.2	5.0	4.8	4.5
Cablevision	3.1	3.1	3.1	3.1	3.3
Bright House	2.3	2.3	2.3	2.3	2.2
Suddenlink	1.4	1.3	1.3	1.2	1.2
Mediacom	1.4	1.3	1.3	1.2	1.2
All Other Cable ⁴⁵¹	8.8	8.9	8.1	7.8	7.3
DBS ⁴⁵²	29.1	30.6	31.3	32.6	33.3
DIRECTV ⁴⁵³	16.0	16.8	17.6	18.5	19.2
DISH Network ⁴⁵⁴	13.1	13.8	13.7	14.1	14.1

⁴⁴⁸ SNL Kagan, *Broadband Technology*, June 19, 2009, at 1.

⁴⁴⁹ SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 21, 2011). Table 5 does not include subscribers to PCO, HSD, OVS, and wireless cable MVPDs, which had fewer than one million subscribers between 2006 and 2010. In addition, the number of video subscribers for individual companies in Table 5 is rounded to the nearest 100,000. Because some types of MVPDs are not included and because of rounding, the sum of the individual entries does not equal the MVPD totals.

⁴⁵⁰ *Id.* Individual cable company data come from SNL Kagan, *Top Cable MSOs*, <http://www.snl.com/interactivex/TopCableMSOs.aspx> (visited Dec. 21, 2011).

⁴⁵¹ All other cable subscribers are estimated by subtracting the subscribers of the eight largest cable MVPDs from total cable subscribers.

⁴⁵² SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 21, 2011).

⁴⁵³ DIRECTV subscriber numbers come from DIRECTV, *SEC Form 10-K for the Year Ended December 31, 2006*, at 3 (“DIRECTV 2006 Form 10-K”); DIRECTV, *SEC Form 10-K for the Year Ended December 31, 2007*, at 3 (“DIRECTV 2007 Form 10-K”); DIRECTV, *SEC Form 10-K for the Year Ended December 31, 2008*, at 3 (“DIRECTV 2008 Form 10-K”); DIRECTV, *SEC Form 10-K for the Year Ended December 31, 2009*, at 3 (“DIRECTV 2009 Form 10-K”); DIRECTV 2010 Form 10-K at 2.

⁴⁵⁴ DISH Network subscriber numbers come from EchoStar, *SEC Form 10-K/A for the Year Ended December 31 2006*, at 1; DISH Network, *SEC Form 10-K for the Year Ended December 31, 2007*, at 1; DISH Network, *SEC Form 10-K for the Year Ended December 31, 2008*, at 1 (“DISH Network 2008 Form 10-K”); DISH Network, *SEC Form 10-K for the Year Ended December 31, 2009*, at 1; DISH Network 2010 Form 10-K at 1.

Table 5: MVPD Video Subscribers (in millions) (continued)

Year	2006	2007	2008	2009	2010
Telephone ⁴⁵⁵	0.3	1.3	3.1	5.1	6.9
AT&T U-verse	0	0.2	1.0	2.1	3.0
Verizon FiOS	0.2	0.9	1.9	2.9	3.5
All Other Telephone ⁴⁵⁶	0.1	0.1	0.2	0.1	0.4

140. Consumers watch delivered video programming that appeals to them even when the programming is not provided by MVPDs.⁴⁵⁷ From 2006 to 2010, an increasing number of consumers streamed an increasing amount of video content directly from the Internet to computers, television sets, tablets, and smartphones.⁴⁵⁸ Although some consumers may consider online video to be a substitute for MVPD video, other consumers may consider online video to be a complement to MVPD video. According to Nielsen, during the second quarter of 2011, Americans watched each week on average 32 hours and 47 minutes of traditional television, two hours and 21 minutes of time-shifted television, 27 minutes of Internet video, and seven minutes of smart phone video.⁴⁵⁹ Reports suggest that some consumers are dropping their MVPD video services (“cutting-the-cord”) or eliminating subscriptions for some video services such as premium channels (“cord-shaving”) in favor of video services delivered over the Internet.⁴⁶⁰ According to one estimate, 13 percent of consumers with a broadband connection “cord-shaved” in the past year.⁴⁶¹ However, there are also indications that increased viewing of video

⁴⁵⁵ SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snk.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 21, 2011). Individual telephone company data come from SNL Kagan, *Broadband Cable Financial Databook*, 2008 Edition, at 48; 2009 Edition, at 50; 2010 Edition, at 44; 2011 Edition, at 42.

⁴⁵⁶ All other telephone MVPD subscribers are estimated by subtracting the subscribers of the two largest telephone MVPDs from total telephone MVPD subscribers.

⁴⁵⁷ NCTA 6/8/11 Comments at 19-21.

⁴⁵⁸ We discuss online video distributors in Section III. C. of this Report.

⁴⁵⁹ Nielsen, *The Cross-Platform Report*, Quarter 2, 2011, at 5.

⁴⁶⁰ See Ian Olgeirson & Deana Myers, *Over-the-top Substitution Forecast to Erode Multichannel Penetrations*, SNL Kagan, July 15, 2011, <http://www.snk.com/interactivex/article.aspx?id=13029656&KPLT=6> (estimating that nearly 4 percent of occupied U.S. households will employ Internet video in lieu of subscribing to a multichannel video package at year-end 2011); Terrence O’Brien, *Netflix Users More Likely to Cut the Cord*, SWITCHED, Jan. 5, 2011, <http://www.switched.com/2011/01/05/netflix-users-more-likely-to-cut-the-cable-cord/> (citing a JP Morgan survey that 28 percent of cable subscribers would consider cutting the cord, but that 47 percent of Netflix customers would do so); Andy Plesser, *Roku Owners are “Cutting the Cord” in Substantial Numbers*, Beet.TV, May 10, 2011, <http://www.beet.tv/2011/05/roku-owners-are-cutting-dcord-in-substantial-numbers-.html> (citing interview with Jim Funk of Roku that “[s]ome 15-20 percent of Roku owners are cancelling their cable or satellite services agreement and are relying solely on a broadband connection to get their television programming”).

⁴⁶¹ *High-speed Broadband May Accelerate Cord Cutting*, Parks Associates, Aug. 24, 2011, <http://www.parksassociates.com/blog/article/high-speed-broadband-may-accelerate-cord-cutting>. One commenter explains that viewing Internet content on a television set can be relatively simple, as “simple as connecting a cable between the HDMI output of a computer and the HDMI input of a television set” though not many consumers may be inclined to view television programming in this manner. Nonetheless, such direct PC-to-TV connections are deemed infrequent and restricted to tech-savvy consumers, with approximately one-third of broadband users connecting a PC to their TV specifically to enjoy PC or online video on “the big screen” at least once a year. See NCTA 6/8/2011 Comments at 24 (citing The Diffusion Group, *PC-to-TV Connectivity More Widespread Than* (continued....))

programming delivered over the Internet does not necessarily translate into decreased MVPD subscriptions.⁴⁶²

141. *Video Penetration.* Because a large part of all MVPD video delivery systems represents fixed costs (costs that do not vary with the number of subscribers), higher levels of video penetration (the number of video subscribers divided by the number of homes passed by the MVPD) typically translate into lower costs per subscriber and increased profit.⁴⁶³ Comparing the video penetration of one type of MVPD with the video penetration of another type of MVPD can be problematic, however, because the different types of MVPDs have different fixed costs.⁴⁶⁴ For instance, the fixed costs of offering cable MVPD service to every home in the United States is much higher than the fixed costs of offering DBS MVPD service to every home in the United States.⁴⁶⁵ As such, a DBS MVPD may be on solid financial footing with lower video penetration, relative to a cable MVPD with higher video penetration. Regardless of technology, however, every MVPD seeks higher levels of video penetration.

142. Table 6 shows MVPD video penetration for the years 2006 through 2010. Over the five-year period, cable MVPD video penetration decreased from 53.8 percent of all homes passed by cable MVPDs to 46.5 percent. This is consistent with our finding that cable MVPDs lost subscribers over the same period. In contrast, DBS MVPD video penetration increased from 22.9 percent of all homes in 2006 to 25.5 percent in 2010. Over the same period, telephone MVPDs built new video delivery systems and signed subscribers, increasing their video penetration from 3.3 percent to 15.2 percent of all homes. To the extent that telephone MVPDs incur fixed and operating costs similar to those incurred by cable MVPDs, telephone MVPDs will have to increase video penetration to realize financial returns similar to those earned by cable MVPDs.⁴⁶⁶

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Perceived, Mar. 1, 2011, <http://tdgresearch.com/blogs/press-releases/archive/2011/03/01/pc-to-tv-connectivity-more-widespread-than-perceived.aspx>).

⁴⁶² Frank N. Magid Associates, Inc., *Magid Study: Consumers More Connected to TV Sets Than Ever – TV Purchase Intentions Climb to Pre-Recession Levels, Demand for Smart TVs Impressive* (press release), Nov. 22, 2011.

⁴⁶³ Harold L. Vogel, *ENTERTAINMENT INDUSTRY ECONOMICS* 339-43 (Cambridge University Press) (8th ed. 2011) (“Vogel”).

⁴⁶⁴ *Id.* at 344-46.

⁴⁶⁵ DIRECTV explains that its satellite-based service provides many advantages over ground-based cable television services including the ability to distribute video programming to millions of recipients nationwide with minimal incremental infrastructure cost per additional subscriber. Satellites also provide comprehensive coverage to areas with low population density. DIRECTV 2010 Form 10-K at 4.

⁴⁶⁶ *Hazlett on Verizon FiOS Project*, George Mason University School of Law, http://www.law.gmu.edu/news/2010/hazlett_fios (visited Jan. 16, 2012).

Table 6: MVPD Video Penetration

Year	2006	2007	2008	2009	2010
Cable⁴⁶⁷	53.8%	52.4%	50.7%	48.9%	46.5%
Comcast	51.0%	49.8%	47.8%	45.5%	43.9%
Time Warner	51.4%	50.0%	48.8%	47.0%	45.2%
Cox	58.3%	57.1%	54.8%	52.5%	49.5%
Charter	46.3%	44.8%	43.1%	40.4%	38.4%
Cablevision	68.5%	66.7%	65.7%	63.4%	59.9%
Bright House	57.8%	57.4%	56.1%	54.1%	51.6%
Suddenlink	49.7%	49.5%	48.8%	46.4%	45.4%
Mediacom	48.8%	46.7%	46.3%	44.1%	42.4%
DBS⁴⁶⁸	22.9%	23.8%	24.2%	25.0%	25.5%
DIRECTV	12.6%	13.1%	13.6%	14.2%	14.7%
DISH Network	10.3%	10.7%	10.6%	10.8%	10.8%
Telephone⁴⁶⁹	3.3%	6.4%	9.8%	13.2%	15.2%
AT&T U-verse	N/A	2.5%	5.9%	9.3%	11.0%
Verizon FiOS	3.3%	9.7%	15.0%	18.8%	22.4%

143. *Digital Video, Internet, and Telephone Subscription and Penetration.* SNL Kagan reports that cable MVPDs have been losing video subscribers at an increasing rate over the last five years. At the same time, however, the remaining cable customers added subscriptions to digital video service or

⁴⁶⁷ Estimates are derived by dividing all cable basic subscribers by all cable homes passed. Because cable MVPDs rarely offer video service in the same geographic areas, video penetration for all cable MVPDs is a weighted average of the video penetration of all cable MVPDs. SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 23, 2011). Individual cable company data come from SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 5.

⁴⁶⁸ Estimates are derived by dividing all DBS MVPD subscribers by the number of homes in the United States. Because DIRECTV and DISH Network offer MVPD service to all homes in the United States, DBS video penetration can also be derived by summing the video penetration of DIRECTV and DISH Network. SNL Kagan, *U.S. Multichannel Industry Benchmarks*, <http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx> (visited Dec. 23, 2011). Individual DBS company estimates are derived by dividing the company's subscribers (as reported in their annual reports) by the number of homes in the United States.

⁴⁶⁹ Estimates are derived by summing Verizon and AT&T MVPD subscribers and dividing by the number of Verizon FiOS and AT&T U-verse homes passed. Because Verizon and AT&T do not offer MVPD service in the same geographic area, video penetration is a weighted average of the video penetration of these two telephone MVPDs. Verizon and AT&T estimates are derived by dividing a company's MVPD subscribers (as reported in their annual reports) by the number of homes passed by the company's MVPD system (as reported in their annual reports).

subscribed to cable bundles that include video, Internet access, and telephone services.⁴⁷⁰ While cable MVPD video subscribers decreased from 65.4 million in 2006 to 59.8 million in 2010, the number of cable customers that subscribed to digital video service grew from 32.6 million to 44.7 million, and digital video penetration rose from 49.8 percent to 74.8 (*i.e.*, the number of digital video subscribers divided by the number of basic cable subscribers).⁴⁷¹ In addition, the number of cable Internet access subscribers grew from 31.1 million in 2006 to 44.4 million in 2010, increasing Internet penetration (*i.e.*, the number of Internet subscribers divided by the number of cable homes passed) from 25.0 percent to 34.8 percent.⁴⁷² In addition, the number of telephone subscribers grew from 9.4 million in 2006 to 23.9 million in 2010, with telephone penetration (*i.e.*, the number of telephone subscribers divided by the number of homes passed) increasing from 11.1 percent to 19.2 percent.⁴⁷³

c. Revenue

144. The varied business models of the different types of MVPDs complicate any discussion of revenue. Specifically, cable and telephone MVPDs, which have two-way systems, offer video, Internet, and telephone services and earn revenue from each of these services. Thus, data regarding total revenue for cable and telephone MVPDs reflect an aggregation of revenue from multiple services. In contrast, DBS MVPDs, have one-way systems and earn almost all of their revenue from delivered video services. Although we report MVPD total revenue, because the focus of this Report is the delivery of video programming when data are available we also report the revenue earned from video services. Providing both total revenue and video revenue facilitates a comparison regarding how much of a specific MVPD's business is related to the delivery of video services.

145. Table 7 shows MVPD total revenue. Total revenue for cable MVPDs derives from video, Internet access, and telephone services sold to both residential units and businesses. Total revenue for cable MVPDs increased from \$71.9 billion in 2006 to \$93.8 billion in 2010. Revenue from video accounted for 63 percent of cable MVPD total operating revenue in 2010, Internet access accounted for 21 percent, telephone accounted for approximately 10 percent, and commercial services accounted for approximately 6 percent.⁴⁷⁴ Table 7 also provides total revenue for a sample of cable MVPDs.⁴⁷⁵ Each of the large cable MVPDs in our sample increased total revenue over the period 2006 to 2010. Total revenue for DBS MVPDs increased from \$24.6 billion in 2006 to \$36.7 billion in 2010, and almost all of the revenue comes from the video services.⁴⁷⁶ Table 7 shows total revenue for AT&T and Verizon. Total

⁴⁷⁰ SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 2.

⁴⁷¹ *Id.* at 7.

⁴⁷² *Id.* at 8.

⁴⁷³ *Id.* at 10.

⁴⁷⁴ SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 8. We include local advertising revenue and "miscellaneous" revenue in our estimates of video revenue. Miscellaneous revenue includes installation fees, home shopping, equipment charges, home networking, pay-per-view and VOD, DVRs, and HD.

⁴⁷⁵ Total revenue estimates for individual cable MVPDs comes from SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 13.

⁴⁷⁶ For DISH Network, subscriber-related revenue accounted for over 99 percent of total operating revenue in 2010. DISH explains that subscriber-related revenue consists of revenue from basic, premium movie, local, HD and pay-per-view programming, as well as Latino and international subscription television services, equipment rental fees and other hardware related fees, including fees for DVRs, equipment upgrade fees and additional outlet fees from subscribers with multiple receivers, advertising services, fees earned from in-home service operations, and other subscriber revenue. DISH Network 2010 Form 10-K at 45, 48. DIRECTV explains that it earns revenues mostly from the monthly fees it charges subscribers for subscriptions to basic and premium channel programming, HD (continued....)

revenue for AT&T combines revenue from its wireless segment, which accounted for 47 percent of its total operating revenue in 2010; its wireline segment (that includes U-verse), which accounted for 49 percent of its total operating revenue in 2010; and two other segments, which together accounted for four percent of its total operating revenue.⁴⁷⁷ Total revenue for Verizon combines revenue from its domestic wireless segment and its wireline segment (that includes FiOS). The wireless segment contributed approximately 60 percent of Verizon's total operating revenue in 2010 and the wireline segment contributed approximately 40 percent.⁴⁷⁸

Table 7: MVPD Total Revenue (in billions)

Year	2006	2007	2008	2009	2010
Cable ⁴⁷⁹	\$71.9	\$78.9	\$85.2	\$89.5	\$93.8
Comcast	\$26.5	\$30.3	\$32.6	\$33.9	\$35.4
Time Warner	\$14.8	\$16.0	\$17.2	\$17.9	\$18.9
Charter	\$5.5	\$6.0	\$6.4	\$6.7	\$7.0
Cablevision	\$4.1	\$4.5	\$5.0	\$5.2	\$5.5
Suddenlink	\$0.9	\$1.3	\$1.5	\$1.6	\$1.7
Mediacom	\$1.2	\$1.3	\$1.4	\$1.5	\$1.5
DBS ⁴⁸⁰	\$24.6	\$28.3	\$31.3	\$33.3	\$36.7
DIRECTV ⁴⁸¹	\$14.8	\$17.2	\$19.7	\$21.6	\$24.1
DISH Network ⁴⁸²	\$9.8	\$11.1	\$11.6	\$11.7	\$12.6
Telephone ⁴⁸³	\$150.7	\$211.8	\$220.8	\$230.3	\$230.9
AT&T ⁴⁸⁴	\$62.5	\$118.3	\$123.4	\$122.5	\$124.3
Verizon ⁴⁸⁵	\$88.2	\$93.5	\$97.4	\$107.8	\$106.6

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programming and access fees, pay-per-view programming, and seasonal and live sporting events. DIRECTV also earns revenues from monthly fees that it charges subscribers for leased set-top receivers and DVR service. DIRECTV 2010 Form 10-K at 38.

⁴⁷⁷ AT&T, *2010 Annual Report*, at 33.

⁴⁷⁸ Verizon, *2010 Annual Report*, at 13.

⁴⁷⁹ SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 8. The estimates shown are based on all cable MVPDs, not just the cable MVPDs listed in Table 7.

⁴⁸⁰ Total revenue for DBS is the sum of total revenue for DIRECTV and DISH Network.

⁴⁸¹ DIRECTV 2010 Form 10-K at 30.

⁴⁸² DISH Network 2010 Form 10-K at 41.

⁴⁸³ The estimates shown are the sum of total revenue for AT&T and Verizon and do not include other telephone companies that offer MVPD service. As such, the estimates understate total revenue for telephone MVPDs.

⁴⁸⁴ AT&T, *2010 Annual Report*, at 30.

⁴⁸⁵ Verizon, *2010 Annual Report*, at 13.

146. Table 8 shows available data on MVPD revenue from video services alone. Cable MVPD video revenue increased from \$51.8 billion in 2006 to \$59.0 billion in 2010.⁴⁸⁶ Although the number of basic cable MVPD subscribers decreased from 2006 to 2010, the remaining subscribers purchased an increasing number of subscriptions to advanced video services (*e.g.*, digital programming tiers and HD and DVR services). The increased number of subscriptions to advanced video services and increases in the prices charged for cable MVPD services resulted in an increase in cable MVPD revenue during the period 2006 to 2010.⁴⁸⁷ DBS MVPD video revenue increased from \$23.5 billion to \$32.9 billion. Table 8 also shows video revenue for a select number of publicly-traded cable MVPDs. AT&T and Verizon do not report video revenue separately.⁴⁸⁸

⁴⁸⁶ SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 8. Estimates for cable MVPD video revenue were derived by summing basic cable revenue, total pay revenue, total digital tier revenue, net local advertising revenue, and miscellaneous revenue (which include revenues from installation and equipment rentals, VOD, DVR, and HD).

⁴⁸⁷ *Id.* at 2, 12.

⁴⁸⁸ Within AT&T's wireline segment, the company aggregates video revenue into "Data" revenue, which includes video service, Internet access service from both U-verse and DSL, and VoIP telephone service from U-verse. AT&T asserts that it expects revenue from U-verse to expand as revenue from traditional, circuit-based services continues to decline. AT&T, *2010 Annual Report*, at 37-38.

Within Verizon's wireline segment, video revenue is aggregated into "Mass Markets" revenue, which includes video service, Internet access service from both FiOS and DSL, and traditional landline and VoIP telephone service. Verizon explains that increases in Mass Markets revenue from 2009 to 2010 are driven by the expansion of consumer and business FiOS services, which is partially offset by a decline of local exchange revenue stemming from a decline in legacy landline telephone service. Verizon, *2010 Annual Report*, at 25.

Table 8: Video Revenue (in billions)

Year	2006	2007	2008	2009	2010
Cable	\$51.8	\$54.3	\$56.6	\$57.4	\$59.0
Comcast ⁴⁸⁹	\$15.1	\$17.7	\$19.2	\$19.4	\$19.5
Time Warner ⁴⁹⁰	\$7.6	\$10.2	\$10.5	\$10.8	\$11.0
Charter ⁴⁹¹	\$3.3	\$3.4	\$3.7	\$3.7	\$3.7
Cablevision ⁴⁹²	\$2.6	\$2.8	\$3.0	\$3.1	\$3.2
DBS⁴⁹³	\$23.5	\$26.6	\$28.9	\$30.4	\$32.9
DIRECTV ⁴⁹⁴	\$13.7	\$15.5	\$17.3	\$18.7	\$20.3
DISH Network ⁴⁹⁵	\$9.8	\$11.1	\$11.6	\$11.7	\$12.6

147. *Average Revenue Per Unit.* Average revenue per unit (“ARPU”) is a performance metric that estimates the value of a single unit by dividing a company’s total revenue by the total number of units. In this case a unit is a single subscriber. The metric includes revenue from all services. Therefore, for those MVPDs that provide video, Internet access, and telephone service, this metric includes revenue from all of these services and associated equipment such as set-top boxes and modems. Since this Report, however, is focused on video, when data are available, we also report ARPU for video services alone, which is estimated by dividing video revenue by the total number of video subscribers.

148. Table 9 shows monthly ARPU for all services for the five-year period from 2006 to 2010. Cable MVPDs’ per-subscriber monthly revenue has risen steadily over this period due to a combination of growth in the number of subscribers to cable bundles, growth in the number of subscribers to advanced services, and price rate increases.⁴⁹⁶ Monthly ARPU for cable MVPDs was \$87.70 in 2006, and increased to \$122.20 in 2010. DBS MVPDs generally receive smaller ARPU compared to cable MVPDs.⁴⁹⁷

⁴⁸⁹ Comcast 2010 Form 10-K at 39; Comcast, *SEC Form 10-K for the Year Ended December 31, 2007*, at 24.

⁴⁹⁰ Time Warner Cable, *2010 Annual Report*, at 69; Time Warner Cable, *SEC Form 10-K for the Year Ended December 31, 2007*, at 89.

⁴⁹¹ Charter, *SEC Form 10-K for the Year Ended December 31, 2010*, at 43; Charter, *SEC Form 10-K for the Year Ended December 31, 2007*, at 24.

⁴⁹² Cablevision, *SEC Form 10-K for the Year Ended December 31, 2010*, at 68; Cablevision, *SEC Form 10-K for the Year Ended December 31, 2008*, at 67; Cablevision, *SEC Form 10-K for the Year Ended December 31, 2007*, at 63.

⁴⁹³ DBS MVPD video revenue is the sum of DIRECTV U.S. and DISH Network video revenue.

⁴⁹⁴ DIRECTV video revenue is less than total revenue because we report video revenue from DIRECTV U.S. and exclude video revenue from DIRECTV Latin America. DIRECTV 2010 Form 10-K at 35; DIRECTV 2007 Form 10-K at 40.

⁴⁹⁵ DISH Network 2010 Form 10-K at 41.

⁴⁹⁶ SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 14.

⁴⁹⁷ Whereas cable MVPDs receive revenue from video, Internet access, and telephone services, DBS relies almost exclusively on revenue from video services.

Although AT&T and Verizon estimate ARPU for their Wireless segments, they do not make similar estimates for their Wireline segments, which include their video services, so data are not available to calculate this performance metric.⁴⁹⁸

Table 9: Monthly ARPU for All MVPD Services

Year	2006	2007	2008	2009	2010
Cable⁴⁹⁹	\$87.70	\$95.30	\$105.40	\$113.70	\$122.20
Comcast	\$91.30	\$101.60	\$111.10	\$118.20	\$127.10
Time Warner Cable	\$91.70	\$94.10	\$102.50	\$110.30	\$118.60
Charter	\$84.60	\$94.10	\$105.10	\$114.70	\$125.70
Cablevision	\$110.40	\$121.20	\$132.70	\$140.40	\$143.00
Suddenlink	\$78.00	\$81.80	\$93.20	\$103.20	\$114.40
Mediacom	\$72.00	\$79.70	\$88.40	\$95.20	\$102.80
DBS					
DIRECTV ⁵⁰⁰	\$73.70	\$79.10	\$83.90	\$85.50	\$89.70
DISH Network ⁵⁰¹	\$62.80	\$65.80	\$69.30	\$70.00	\$73.30

149. Table 10 shows monthly ARPU for video services alone. Despite losses in cable subscribers, cable MVPDs achieved increased ARPU for video services from 2006 to 2010 by raising prices and increasing subscriptions from the remaining customers for advanced video services (*e.g.*, digital video, DVR, VOD, and HD).⁵⁰² Video ARPU for cable MVPDs increased from \$52.20 in 2006 to \$66.40 in 2010. Table 10 also includes video ARPU estimates for a sample of cable companies. The results show consistent growth in video ARPU for each of these cable companies. Because DBS MVPDs earn almost all of their operating revenue from subscription video services, we estimate monthly ARPU for video services to be the same as monthly ARPU for all services. As noted above, AT&T and Verizon do not provide estimates of ARPU for their Wireline segments, which include their video services, so data are not available to calculate this performance metric.

⁴⁹⁸ One reason for telephone MVPDs not providing ARPU estimates for their wireline segments may be that the wireline segment contains an amalgamation of two systems (an older system using traditional copper wire and circuit switches and the newer using fiber and IP technology) with a migration of customers and services from one system to the other.

⁴⁹⁹ Monthly ARPU data for cable MVPDs and individual cable companies come from SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 14.

⁵⁰⁰ ARPU data are for DIRECTV's U.S. Segment (*i.e.*, excluding the Latin America Segment). DIRECTV 2006 Form 10-K at 48; DIRECTV 2007 Form 10-K at 47; DIRECTV 2008 Form 10-K at 49; DIRECTV 2009 Form 10-K at 55; DIRECTV 2010 Form 10-K at 42.

⁵⁰¹ DISH Network 2010 Form 10-K at 41.

⁵⁰² SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition at 14.

Table 10: Monthly ARPU for Video Services

Year	2006	2007	2008	2009	2010
Cable ⁵⁰³	\$52.20	\$57.20	\$61.40	\$64.10	\$66.40
Comcast	\$60.10	\$65.60	\$68.40	\$71.00	\$73.20
Time Warner Cable	\$47.40	\$63.60	\$66.20	\$68.90	\$72.30
Charter	\$50.20	\$55.40	\$63.20	\$65.90	\$69.20
Cablevision	\$69.80	\$74.00	\$79.20	\$83.20	\$84.60
Suddenlink	\$33.10	\$45.20	\$51.70	\$54.50	\$57.20
Mediacom	\$52.40	\$55.00	\$58.70	\$61.40	\$62.90
DBS					
DIRECTV ⁵⁰⁴	\$73.70	\$79.10	\$83.90	\$85.50	\$89.70
DISH Network ⁵⁰⁵	\$62.80	\$65.80	\$69.30	\$70.00	\$73.30

d. Investment

150. For the five-year period from 2006 to 2010, cable MVPDs invested \$67.3 billion in infrastructure.⁵⁰⁶ For cable MVPDs, capital expenditures peaked from 2000 to 2002 when many cable MVPD system upgrades occurred.⁵⁰⁷ Cable MVPD capital spending has fallen since then and has fluctuated within the \$10 billion to \$12 billion range over the past five years as capital investments have shifted from upgrades to capital tied to increased revenue streams (*e.g.*, providing upgraded set-top receivers to new subscribers of advanced services) and capital tied to expansion of MVPD services to businesses.⁵⁰⁸ According to NCTA, cable MVPD infrastructure expenditures were \$12.4 billion in 2006, \$14.6 billion in 2007, \$14.6 billion in 2008, \$13.3 billion in 2009, and \$12.4 billion in 2010.⁵⁰⁹ DBS MVPDs needed to construct and launch new satellites to expand their offerings of new programming and services.⁵¹⁰ DISH Network expanded its channel capacity by launching two more satellites in 2010.⁵¹¹

⁵⁰³ Monthly video ARPU data for cable MVPDs and individual cable companies come from SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 14.

⁵⁰⁴ ARPU data are for DIRECTV's U.S. Segment (*i.e.*, excluding the Latin America Segment). DIRECTV 2006 Form 10-K at 48; DIRECTV 2007 Form 10-K at 47; DIRECTV 2008 Form 10-K at 49; DIRECTV 2009 Form 10-K at 55; DIRECTV 2010 Form 10-K at 42.

⁵⁰⁵ DISH Network 2010 Form 10-K at 41.

⁵⁰⁶ NCTA 6/8/11 Comments at 10.

⁵⁰⁷ SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 16.

⁵⁰⁸ *Id.* at 12, 16; SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 83.

⁵⁰⁹ NCTA 6/8/11 Comments at 10.

⁵¹⁰ DIRECTV 2010 Form 10-K at 21.

⁵¹¹ DISH Network, *2010 Annual Report*, Letter to Shareholders.

Between 2006 and 2010, Verizon and AT&T invested billion of dollars upgrading their systems enabling them to provide MVPD video service. Verizon expected to invest \$23 billion from 2004 to 2010 deploying its FiOS network.⁵¹²

e. Profitability

151. In reporting profitability, MVPDs often combine revenues and costs from multiple services.⁵¹³ For example, cable MVPDs that offer video, Internet access, and telephone services often combine the revenues and costs of these services to estimate profitability. As such, for cable MVPDs we are not able to separate out profitability metrics for video services only. In contrast, DBS MVPDs focus on video services and derive the vast majority of their revenue and profits from video services. Thus, estimates of DBS profitability can be interpreted as profits from video services. Telephone MVPDs, especially the two largest telephone MVPDs that account for the overwhelming majority of telephone MVPD video subscribers, combine revenues and costs from video, Internet access, and telephone services from both their upgraded wireline systems and their legacy wireline systems.⁵¹⁴ Because they combine a range of services from two systems, we cannot estimate any meaningful metric for telephone MVPD profits that relate to video services only.

152. SNL Kagan reports that, despite cable MVPDs continued losses in video subscribers, all the advanced service segments (*e.g.*, digital cable, Internet, and telephone) continue to grow.⁵¹⁵ The result, according to SNL Kagan, has been higher per-subscriber revenues and strong overall financial results for cable MVPDs over the past five years from 2006 to 2010.⁵¹⁶ Comcast reports that it has had “terrific momentum in our operating and financial performance. In 2010, we had solid growth in consolidated revenue, operating cash flow, and operating income.”⁵¹⁷ Comcast explains that its free cash flow climbed 22 percent – its third straight year of 20 percent-plus free cash flow growth.⁵¹⁸ DIRECTV states, “We had a terrific year in 2010, as we excelled in every important category, beating our plans for subscriber growth, revenue and cash flow.”⁵¹⁹ DIRECTV explains that it is now a \$24 billion business with free cash flow for the full year at \$2.8 billion, growing at 18 percent, and its operating profit before depreciation and amortization grew 20 percent, finishing 2010 at \$6.4 billion.⁵²⁰

153. The conventional measure of financial performance for cable MVPDs has been operating cash flow, defined as earnings before interest, taxes, and depreciation and amortization expense (EBITDA).⁵²¹ Estimates of operating cash flow for a sample of MVPDs are shown in Table 11. SNL

⁵¹² Verizon 5/20/09 Comments at 6.

⁵¹³ Profit is defined as revenue minus costs, although its measurement may vary in different contexts. See Donald S. Watson & Mary A. Holman, PRICE THEORY AND ITS USES 144 (Houghton Mifflin Company) (4th ed. 1977). See also Brian Butler, A DICTIONARY OF FINANCE AND BANKING 280-81 (Oxford University Press) (2nd ed. 1997) (stating that it is not always possible to derive one single figure for profit for an organization from an accepted set of data). See also Vogel at 336, Table 8.3 (showing select cable MVPD operating revenues and expenses).

⁵¹⁴ Verizon, 2010 Annual Report, at 25.

⁵¹⁵ SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 2.

⁵¹⁶ *Id.*

⁵¹⁷ Comcast, 2010 Annual Review, Letter to Shareholders.

⁵¹⁸ *Id.*

⁵¹⁹ DIRECTV, 2010 Annual Report, Message to Shareholders.

⁵²⁰ *Id.*

⁵²¹ Vogel at 339-43. See also SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 12.

Kagan explains that from 2006 to 2010, despite basic video subscriber losses and weaker subscriber trends during the housing downturn, a combination of price increases and growth in subscriptions to digital video services and Internet access and telephone services have enabled cable MVPDs to maintain operating margins (defined as operating cash flow divided by revenue) in the upper 30 percent range.⁵²² According to SNL Kagan, Cablevision and Comcast have led their peers with operating margins averaging about 40 percent from 2006 to 2010.⁵²³ Over the same period, Verizon reported for its Wireline segment an operating margin (EBITDA margin) averaging about 22 percent.⁵²⁴ Although DIRECTV exhibited steady growth in operating cash flow from 2006 to 2010, DISH Network's numbers grew from 2006 to 2008, declined in 2009, then rebounded in 2010. AT&T did not report EBITDA and Verizon only reported EBITDA for its Wireline segment for 2008, 2009, and 2010.

Table 11: MVPD Operating Cash Flow (in billions)

Year	2006	2007	2008	2009	2010
Cable ⁵²⁵					
Comcast	\$10.6	\$12.2	\$13.2	\$13.7	\$14.6
Time Warner	\$5.2	\$5.8	\$6.2	\$6.5	\$6.9
Charter	\$1.9	\$2.1	\$2.3	\$2.5	\$2.6
Cablevision	\$1.6	\$1.8	\$2.0	\$2.1	\$2.2
Suddenlink	\$0.3	\$0.4	\$0.5	\$0.6	\$0.6
Mediacom	\$0.4	\$0.5	\$0.5	\$0.5	\$0.5
DBS					
DIRECTV ⁵²⁶	\$3.2	\$3.6	\$3.9	\$4.4	\$5.2
DISH Network ⁵²⁷	\$2.4	\$2.8	\$2.9	\$2.3	\$3.0
Telephone					
Verizon ⁵²⁸	NA	NA	\$11.3	\$9.8	\$9.2

⁵²² SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 12.

⁵²³ *Id.*

⁵²⁴ Verizon reported a wireline segment EBITDA margin of 25.4 percent in 2008, 23.1 percent in 2009, and 22.4 percent in 2010. Verizon, *2010 Annual Report*, at 27.

⁵²⁵ EBITDA estimates for individual cable companies come from SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 13.

⁵²⁶ DIRECTV does not provide EBITDA estimates, so we report net cash provided by operating activities. DIRECTV 2010 Form 10-K at 33; DIRECTV 2008 Form 10-K at 41. Estimates for DIRECTV include both DIRECTV U.S. and DIRECTV Latin America.

⁵²⁷ EBITDA estimates for DISH Network come from DISH Network 2010 Form 10-K at 48, 53; DISH Network 2008 Form 10-K at 44, 50.

⁵²⁸ Verizon reported EBITDA for its wireline segment in 2008, 2009, and 2010, but did not report EBITDA in 2006 and 2007. Verizon, *2010 Annual Report*, at 27.

154. In recent years, however, analysts have favored estimating free cash flow, *i.e.*, the cash that is available to the company for purposes other than new system construction.⁵²⁹ Free cash flow has emerged as an increasingly relevant metric for financial health as the capital investments of cable MVPDs have shifted from system upgrades to capital expenditures (*e.g.*, set-top boxes with HD and DVR features) tied to increased revenue streams.⁵³⁰ Table 12 shows free cash flow for a sample of MVPDs. AT&T did not report free cash flow. Verizon reported free cash flow for 2008, 2009, and 2010 but its estimates include both its wireless and wireline segments, so the numbers shed little light on the financial performance of its FiOS video services.

Table 12: MVPD Free Cash Flow (in billions)

Year	2006	2007	2008	2009	2010
Cable ⁵³¹					
Comcast	\$2.6	\$2.3	\$3.7	\$4.4	\$4.9
Time Warner	\$0.7	\$1.0	\$1.7	\$1.9	\$2.3
Charter	(\$0.8)	(\$0.9)	(\$0.9)	(\$0.6)	\$0.7
Cablevision	\$0.0	\$0.2	\$0.5	\$0.8	\$0.9
Suddenlink	(\$0.1)	\$0.0	\$0.1	\$0.1	\$0.0
Mediacom	\$0.0	\$0.0	\$0.0	\$0.1	\$0.1
DBS					
DIRECTV ⁵³²	\$1.2	\$1.0	\$1.7	\$2.4	\$2.8
DISH Network ⁵³³	\$0.9	\$1.2	\$1.2	\$1.2	\$0.9
Telephone					
Verizon ⁵³⁴	NA	NA	\$10.3	\$14.5	\$16.9

⁵²⁹ Vogel at 340. SNL Kagan defines free cash flow as EBITDA less capital expenditures, cash paid for interest and taxes, and changes in working capital. SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 12.

⁵³⁰ *Id.*

⁵³¹ Free cash flow estimates for individual cable companies come from SNL Kagan, *Benchmarking Cable MSO Financial Statistics*, 2011 Edition, at 13.

⁵³² Free cash flow estimates for DIRECTV come from DIRECTV 2010 Form 10-K at 33; DIRECTV 2008 Form 10-K at 41. Estimates for DIRECTV include both DIRECTV U.S. and DIRECTV Latin America.

⁵³³ Free cash flow estimates for DISH Network come from DISH Network 2010 Form 10-K at 58; DISH Network 2008 Form 10-K at 54.

⁵³⁴ Verizon reported free cash flow for 2008, 2009, and 2010, but did not report free cash flow for 2006 and 2007. Verizon's free cash flow estimates include all segments (*i.e.*, both wireless and wireline). Verizon, *2010 Annual Report*, at 31.

B. Broadcast Television Stations

1. Introduction

155. This Report considers broadcast television stations as a separate group. Broadcast stations package video programming and deliver it directly over the air to those consumers who do not subscribe to an MVPD as well as MVPD subscribers who own television sets that are not connected to an MVPD service. Broadcast television station programming is also an input for MVPD services.

156. Broadcast stations cater to two distinct sets of customers: audiences and advertisers.⁵³⁵ They seek to provide desirable content to attract and maximize their audiences. In turn, they primarily derive revenues by selling time during their broadcasts to advertisers based on the size and demographic characteristics of the audiences they reach.⁵³⁶ Individual commercial stations compete primarily with other commercial broadcast stations within their local markets (DMAs)⁵³⁷ for audiences and advertising revenue. Noncommercial stations, while not relying on advertising revenues, compete with commercial stations for viewers. Other media, including daily newspapers, local and national cable networks, and the Internet earn advertising revenues by attracting audiences within the geographic areas they serve.⁵³⁸ Broadcast stations' advertising revenues depend on viewership of their television programs, whether received by consumers over the air or via an MVPD. Today, broadcast stations are turning to additional revenue sources, including retransmission consent fees, ancillary digital television revenues, and advertising sold on their web sites.⁵³⁹ Noncommercial broadcast stations rely on underwriters, viewer donations, and government funding for their operations, and also seek to attract audiences as a way to increase their revenues from these sources.

157. On June 12, 2009, full-power television stations completed a transition from analog to digital service pursuant to a statutory mandate.⁵⁴⁰ Digital broadcasting gives broadcast stations greater flexibility. Instead of sending one analog program signal, broadcast stations can use digital technology to offer high definition ("HD") programming, provide multiple streams of programming, and/or distribute

⁵³⁵ Advertisers and audiences are mutually dependent. Television stations need to attract audiences in order to earn money from advertising. They need advertising revenues in order to make investments in programming that will attract audiences. See David S. Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, COMPETITION POL'Y INT'L 151, 155-56 (2007) (discussing the economics of two-sided platforms and its application to competition policy issues especially as it relates to advertising-supported media).

⁵³⁶ "[B]roadcasting in any and all of its forms is an audience aggregation business." See Vogel, *supra*, n. 463, at 288.

⁵³⁷ Under Commission rules, broadcast television stations serve a community of license. See *supra*, n. 148.

⁵³⁸ See, e.g., Nexstar Broadcasting Group, Inc., *SEC Form 10-K for the Year Ended December 31, 2010*, at 1, 5 ("Nexstar 2010 Form 10-K"); Sinclair Broadcast Group, Inc., *SEC Form 10-K for the Year Ended December 31, 2010*, at 4, 21 ("Sinclair 2010 Form 10-K").

⁵³⁹ Gray Television, Inc., *SEC Form 10-K for the Year Ended December 31, 2010*, at 3-4 ("Gray 2010 Form 10-K"); Sinclair 2010 Form 10-K at 4-5; LIN Television Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 8-10 ("LIN 2010 Form 10-K").

⁵⁴⁰ 47 U.S.C. §309(j)(14)(A). Full-power analog television service therefore has terminated. See, e.g., *Pending Applications and Pleadings Related to Proceedings for New Analog Full-Power Television Stations for Communities in Several States*, Order, 26 FCC Rcd 14301, ¶ 1 (Video Div., MB 2011). Low-power stations are not required to complete their digital conversion until September 1, 2015. See *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, MB Docket No. 03-185, Second Report and Order, 26 FCC Rcd 10732, 10733, ¶ 2 (2011).

programming to mobile devices. With multicasting,⁵⁴¹ stations can provide a diverse array of programming to the audience within a DMA.⁵⁴² In addition, stations may affiliate their multicast streams with established networks to give viewers in smaller markets more over-the-air viewing options.

2. Broadcast Television Industry Structure

158. Consistent with our discussion of the MVPD industry, a key element of our analysis of video competition in the broadcast television industry includes industry structure. In this section of the Report, we describe critical elements of the broadcast television industry. We then explain horizontal concentration and vertical integration in the market. Next, we describe conditions effecting market entry during the relevant period, including an overview of existing regulations and market conditions that might influence entry decisions. Finally, we describe recent entry in the market.

159. The broadcast television station group consists of commercial and noncommercial, full-power, Class A, and low-power stations.⁵⁴³ The Commission licenses broadcast television stations to both individual and group owners to serve local communities within DMAs.

160. Nationally, the number of broadcast stations has changed little since the last report, although the relative mix of VHF and UHF stations has changed due in large part to the transition to digital television. As of December 31, 2010, there were 1,022 commercial UHF stations and 368 commercial VHF stations in the United States. In addition, there were 284 noncommercial educational UHF stations and 107 noncommercial educational VHF stations. There were also 7,240 television translators, Class A stations, and low power television stations.⁵⁴⁴

⁵⁴¹ Multicasting allows broadcast stations to offer digital streams or channels (*i.e.*, digital multicast signals) of programming simultaneously, using the same amount of spectrum previously required for analog programming. See FCC, *DTV.gov: What is DTV?*, <http://www.dtv.gov/whatisdtv.html>.

⁵⁴² For example, Bounce TV is a network targeting African Americans and Retro Television features classic television programs. See Bounce Media, LLC, *FAQs: What is Bounce TV?*, <http://www.bouncetv.com/faq/bounce-tv/what-is-bounce-tv.html> (visited Feb. 27, 2012); Retro Television, Inc., *RTV Shows*, <http://myretroTV.com/shows.html> (visited Feb. 27, 2012). Under Commission rules, digital stations asserting must-carry rights are entitled to carriage only of a single programming stream and other programming-related content on that stream. See *Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2622, ¶ 57 (2001).

⁵⁴³ In this Report, we focus on commercial, full-power broadcast stations because of their impact on competition in the market for the delivery of video programming and the limitations on available data for other types of stations.

⁵⁴⁴ A television translator station rebroadcasts the programs of a full-power television broadcast station. Television translator stations typically serve communities that cannot receive the signals of free over-the-air television stations because they are too far away from a full-power television station or because of geographic limitations. See, *e.g.*, FCC Consumer Advisory: The DTV Transition and LPTV/Class A and Translator Stations, <http://www.fcc.gov/cgb/consumerfacts/DTVandLPTV.html>. In 2000, the Commission established the Class A television service to implement the Community Broadcasters Protection Act of 1999. See Community Broadcasters Protection Act of 1999, Pub. L. No. 106-113, § 5008, 113 Stat. 1501, 1501A-594-98 (1999) (codified as amended at 47 U.S.C. § 336(f)). Thus, certain qualifying low-power television (LPTV) stations are accorded Class A status, which indicates that these stations have “primary” status as television broadcasters and have a measure of interference protection from full service television stations. Pursuant to Commission rules, stations eligible for this status must provide locally originated programming, often to rural and certain urban communities that have little or no access to such programming. See *Establishment of a Class A Television Service*, MM Docket No. 00-10, Report and Order, 15 FCC Rcd 6355, 6357, ¶ 1 (2000). Created by the Commission in 1982, low-power television service has been a secondary spectrum priority. See *Inquiry Into the Future Role of Low-power Television Broadcasting and Television Translators in the National Telecommunications System*, Report and Order, BC Docket No. 78-253, (continued....)

Table 13: Total Full Power Broadcast Television Stations by Year⁵⁴⁵

Station Type	Date				
	12/31/06	12/31/07	12/31/08	12/31/09	12/31/10
UHF Commercial	789	796	796	1,019	1,022
VHF Commercial	587	583	582	373	368
Total	1,375	1,379	1,378	1,392	1,390
UHF Noncommercial	252	252	252	283	284
VHF Noncommercial	128	128	129	107	107
Total	380	380	381	390	391
Grand Total	3,512	3,518	3,518	3,564	3,562

161. Since the last report, the broadcast television industry completed its transition to digital service in 2009. Broadcast television stations have begun offering more programming than ever before, including both HD signals and standard-definition (SD) multicast signals.⁵⁴⁶ NAB states that at the end of 2008, about one-third of broadcast television stations delivered programming on a secondary channel.⁵⁴⁷ After the switch to digital television in 2009, the majority of full-power stations were multicasting – more than 60 percent.⁵⁴⁸ As of December 2010, about 71 percent of the 1,196 total commercial stations SNL Kagan surveyed were multicasting, representing an increase of 1,240 multicast signals since 2009, for a total of 2,518 multicast signals as of 2010.⁵⁴⁹ In addition, SNL Kagan analyzed 349 noncommercial stations and found that approximately 83 percent were multicasting as of December 2010.⁵⁵⁰ To continue to receive over-the-air broadcasting, viewers had to obtain a digital converter box for their analog television set or purchase a digital television set. Nielsen estimates that as of August 2009, about 0.6 percent of U.S. households with television sets were unable to receive digital television signals, either over-the-air or via MVPD service.⁵⁵¹

162. The geographic area applicable for competition among broadcast television stations is the DMA because consumers view alternative stations that are available to them in the areas where they live. The level of broadcast television station competition within a DMA varies. While the size of television markets and number of stations that Nielsen assigns to each DMA are not directly correlated, larger
(Continued from previous page)

51 Rad. Reg. 2d (P & F) 476, 486 (1982), *aff'd sub nom. Neighborhood TV Co. v. FCC*, 742 F.2d 629 (D.C. Cir. 1984).

⁵⁴⁵ See FCC, *Licensed Broadcast Station Totals*, <http://transition.fcc.gov/mb/audio/BroadcastStationTotals.html>.

⁵⁴⁶ See, e.g., Comcast 6/8/11 Comments at 3; NAB 6/8/11 Comments at 5.

⁵⁴⁷ NAB 6/8/11 Comments at 21 (citing SNL Kagan). See also SNL Kagan, *TV Stations Deals Databook*, 2011 Edition, at 7 (2011) (“2011 SNL Kagan TV Stations Databook”).

⁵⁴⁸ 2011 SNL Kagan TV Stations Databook at 7.

⁵⁴⁹ *Id.* at 6-7. See also Justin Nielson, *TV Stations Multiplatform Analysis '11 Update: Multicasting Expands Programming Options, Mobile TV Goes Live*, SNL Kagan, Jan. 28, 2011, at 3-4. Moreover, as of year-end 2010, 60 commercial mobile digital television (“mobile DTV”) stations were broadcasting more than 80 live video channels in several major cities. For a more detailed discussion of mobile DTV, see *infra*, Sec. III.B.3.b.

⁵⁵⁰ See also 2011 SNL Kagan TV Stations Databook at 7. Of those total digital noncommercial stations covered, 262 are affiliated with PBS. *Id.*

⁵⁵¹ *The Digital Transition: Update on the Digital Readiness of U.S. Households*, Nielsen, Sept. 8, 2009, at 1. Nielsen stopped tracking the readiness of U.S. television households after the digital transition was completed.

markets tend to have more full-power stations than smaller markets. For example, Los Angeles, the number-two ranked DMA by number of television households, has 23 full-power television stations, more than any other market.⁵⁵² Nine television markets, including Harrisonburg, Virginia, ranked 177, have only one full-power television station.⁵⁵³

163. Programming is a critical input for broadcast television stations to effectively compete in the industry. Stations combine local programming, either produced in-house or acquired from independent sources, syndicated programming and/or network programming. The mix of programming varies by station, and depends on whether the station is affiliated with a network or operates as an independent station.⁵⁵⁴ Whether or not a station is affiliated with one of the four major networks (ABC, CBS, FOX, or NBC) has a significant impact on the composition of the stations' revenues, expenses, and operations.⁵⁵⁵

164. In 2011, most full-power commercial stations (about 1,145 out of 1,196 total full-power commercial stations) got at least some of their programming from broadcast networks on their primary signals.⁵⁵⁶ Commercial broadcast networks generally fall into five main categories: English-language (e.g., ABC, CBS, FOX, NBC, The CW, and MyNetworkTV); Spanish-language (e.g., Univision, Telemundo, and TeleFutura); shopping (e.g., HSN), religious (e.g., TBN and CTN), and regional specialty networks (e.g., Memorable Entertainment Television). Three of the major networks (ABC, CBS, and NBC) generally provide their affiliates with about 22 hours per week of prime time programming.⁵⁵⁷ FOX, MyNetworkTV, and The CW supply affiliates with up to 15 hours per week of prime time programming.⁵⁵⁸ In addition, these networks may supply affiliates with daytime programming, e.g., morning news programs, game shows, talk shows (including Sunday public affairs),

⁵⁵² BIA Financial Network, Inc. ("BIA"), *Broadcast Television Station* database. The Los Angeles DMA had 5.7 million television households as of the 2010-2011 television season. See *Local Television Market Universe Estimates*, Nielsen, Sept. 25, 2010 ("Nielsen 2010-11 Local Market Estimates"). Estimates were effective as of January 1, 2011, and used throughout the 2010-2011 television season. Nielsen estimates several measurements, including the number of television households within each DMA, by broadcast television seasons, which run from September through August.

⁵⁵³ BIA, *Broadcast Television Station* database. The Harrisonburg DMA had 94,700 television households as of the 2010-2011 television season. See Nielsen 2010-11 Local Market Estimates. The other eight markets with one full-power television station are: Alpena, Michigan; Glendive, Montana; Lafayette, Indiana; Mankato, Minnesota; North Platte, Nebraska; Parkersburg, West Virginia; Presque Isle, Maine; and Zanesville, Ohio.

⁵⁵⁴ The Commission defines broadcast television networks as "any person, entity, or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states; and/or any person, entity, or corporation controlling, controlled by, or under common control with such person, entity, or corporation." 47 C.F.R. § 73.3613(a)(1). Stations affiliated with a network may be owned and operated by the network (O&Os) or owned by other entities that have agreements with a network for distribution of the network's programming.

⁵⁵⁵ Nexstar 2010 Form 10-K at 5; Gray 2010 Form 10-K at 7. Station groups differ in the importance they ascribe to network affiliation contracts with respect to their broadcast licenses. See *infra*, n. 601.

⁵⁵⁶ FCC staff analysis based on 2011 data from BIA, *Broadcast Television Station* database.

⁵⁵⁷ Nexstar 2010 Form 10-K at 14.

⁵⁵⁸ *Id.*

and late night programs. Spanish language and religious networks provide nearly round-the-clock programming for affiliates.⁵⁵⁹

165. Broadcast stations also acquire programming from television syndicators that distribute original (“first-run syndication”), such as *Jeopardy!* and *Judge Judy*, or reruns of network television series (“off-net” syndication), such as reruns of *Seinfeld* and *The Simpsons*, to television stations.⁵⁶⁰ In addition, local broadcast stations produce programming in-house, such as local newscasts, public affairs shows, and coverage of regional and local sporting events.⁵⁶¹

a. Horizontal Concentration

166. *National Group Ownership.* The Act imposes a cap that limits the percentage of television households that one television station group owner can serve at 39 percent of U.S. television households.⁵⁶² Standard & Poor’s estimates that nearly a third of the commercial television stations are owned by and/or affiliated with the top 10 television station groups.⁵⁶³ As of 2010, the largest group owners, by coverage total of U.S. television households, include ION Media Networks (Avenue Capital, Black Diamond Capital, and Trilogy Capital), Univision Communications (Broadcast Media Partners Inc.), Trinity Broadcasting (Paul F. Crouch Sr. and Jan Crouch), CBS Television Stations (CBS Corp.), FOX Television Stations (News Corp.), NBC Universal Stations (Comcast Corp. and General Electric), Tribune Broadcasting (owned by an Employee Stock Ownership Plan), ABC Owned Television Stations (The Walt Disney Company), and Gannett Broadcasting (Gannett Company).⁵⁶⁴ In 2011, Sinclair increased its coverage of U.S. households when it purchased eight broadcast television stations from Freedom Communications, and five full power stations from Four Point Media.⁵⁶⁵ Disney decreased its coverage when in April 2011 it closed the sale of its two smallest stations owned and operated by the

⁵⁵⁹ See, e.g., Entravision Communications Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 6-7 (“Entravision 2010 Form 10-K”); Trinity Broadcasting Network, *Watch Us: Broadcast Schedule*, <http://www.tbn.org/watch-us/broadcast-schedule> (visited Mar. 20, 2012).

⁵⁶⁰ Some firms specialize in one of these functions and form partnerships. For example, Harpo Studios and Sony Pictures Television (“SPT”) co-produce *The Dr. Oz Show* and *The Nate Berkus Show* first-run syndicated series, and SPT licenses them for distribution to television stations. See Harpo Productions, Inc., *Sony Pictures Television to Distribute the Dr. Oz Show* (press release), Oct. 15, 2009; Harpo Productions, Inc., *Harpo, Sony Pictures Television, NBC Local Media to Launch The Nate Berkus Show* (press release), Feb. 1, 2010. Financial arrangements between syndicators and stations vary. Some syndication rights are acquired for a per episode or series fee, but others involve sharing advertising time or barter. Vogel at 212-15. Under a barter agreement, a national program distributor retains a fixed amount of advertising time within the program in exchange for the programming its supplies. The television station may pay a fixed fee for such programming. Gray 2010 Form 10-K at 7; LIN 2010 Form 10-K at 12.

⁵⁶¹ Nexstar 2010 Form 10-K at 7; Gray 2010 Form 10-K at 8.

⁵⁶² 1996 Act, § 202(c); 47 C.F.R. §73.3555(e). See also *infra*, ¶ 178.

⁵⁶³ Tuna N. Amobi & Erik B. Kolb, *Industry Surveys: Broadcasting, Cable & Satellite*, STANDARD & POOR’S, Feb. 18, 2010, at 9.

⁵⁶⁴ Kim McAvoy, *TV Group Ranking Could See Shake-Up in ’11*, TVNEWSCHECK, Mar. 30, 2011, <http://www.tvnewscheck.com/article/2011/03/30/50206/tv-group-ranking-could-see-shakeup-in-11#group-19> (visited Jan. 10, 2012).

⁵⁶⁵ Tony Lenoir, *Top 50 Station Groups by U.S. TVHH Coverage: Sinclair up 6 Percentage Points Through Acquisitions*, SNL Kagan, Jan. 31, 2012, at 12.

ABC network (“O&Os”) to SJL Broadcast Management Corporation.⁵⁶⁶ The top ten station groups remained the same.

167. *Local Duopolies.* Commission rules limit the number of broadcast television stations that a single entity can own within a DMA based on the number of independently owned stations in the market.⁵⁶⁷ The local television ownership limit permits a single entity to own two television stations in the same local market if (1) the so-called “Grade B” contours of the stations do not overlap; or (2) at least one of the stations in the combination is not ranked among the top four stations in terms of audience share and at least eight independently owned and operating commercial or noncommercial full-power broadcast television stations would remain in the market after the combination.

168. Using BIA data and counting stations in the same market with a common parent, we find that as of 2012, there are about 124 duopolies among commonly owned stations in the United States and an additional 59 duopolies among stations operating pursuant to local marketing agreements.⁵⁶⁸ Broadcast stations owned-and-operated by parents of multiple broadcast networks are generally more likely than other stations to participate in duopolies. Through the dual network rule, the Commission limits the extent to which broadcast television licensees can affiliate with broadcast networks under common ownership.⁵⁶⁹ The dual network rule effectively permits common ownership of multiple broadcast networks, but prohibits a merger of two out of the “top four” networks (*i.e.*, ABC, CBS, FOX, and NBC). Univision Corporation, Inc., which owns the Univision and TeleFutura broadcast networks, operates 13 duopolies; CBS Corp., which has ownership interests in the CBS and The CW networks, has 10 duopolies; News Corp., which owns the FOX and MyNetwork TV networks, has nine duopolies; Comcast/NBCUniversal (“Comcast/NBCU”), which owns the NBC and Telemundo broadcast networks, operate six duopolies. In contrast, Disney Corp., whose sole broadcast network is ABC, does not operate any duopolies.

169. Large television group owners with major broadcast network affiliates are also more likely to operate duopolies. Sinclair which owns 59 full-power stations as of 2012 is involved in more duopolies than any other station group, with 12 co-owned duopolies and ten LMAs. LIN operates nine duopolies of co-owned stations and is involved in two LMAs. Belo Corp. and Newport Television LLC operate five duopolies each. Cox Media Group, Hearst Television Inc., and the Tribune Company each operate four duopolies.

⁵⁶⁶ *Ch. 13's New Owners Cut 20-Plus Jobs*, TOLEDOBLADE.COM, Apr. 12, 2011, <http://www.toledoblade.com/TV-Radio/2011/04/12/Ch-13-s-new-owners-cut-20-plus-jobs.html> (visited Apr. 26, 2012).

⁵⁶⁷ See 47 C.F.R. § 73.3555(b). See also *infra*, ¶ 178. In the context of the Media Ownership proceeding, the Commission is considering revising this rule. See *2010 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership In the Broadcasting Services*, MB Docket Nos. 09-182, 07-294, Notice of Proposed Rulemaking, 26 FCC Rcd 17489, 17493, 17498-511, ¶¶ 8, 25-59 (2011) (“*Media Ownership NPRM*”).

⁵⁶⁸ Commission staff estimates based on BIA, *Broadcast Television Station* database. For purposes of this FCC staff estimate, we count full-power stations within a DMA that have a common parent company (*i.e.*, co-owned) as a duopoly. We also count local marketing agreements (LMAs), if the programmer under its ownership limits provides more than 15 percent of a station's weekly broadcast programming. See 47 C.F.R. § 73.3555 note 2(j). For the purposes of this Report, the Commission has not verified the BIA data.

⁵⁶⁹ 47 C.F.R. § 73.658(g).

170. There is at least one duopoly in 71 markets as of 2012.⁵⁷⁰ While larger DMAs tend to have a greater number of duopolies, smaller DMAs have duopolies as well. Three top ranked markets have four duopoly combinations: Los Angeles, Dallas-Ft. Worth, and San Francisco-Oakland-San Jose.⁵⁷¹ Smaller markets are more likely to have LMAs than co-owned stations. Six markets ranked below 100 have co-owned duopolies, while 25 markets ranked below 100 have LMAs. The smallest market with a duopoly is Victoria, Texas, ranked 204.

b. Vertical Integration

171. Some stations are vertically integrated upstream, with suppliers of programming, as well as downstream, with distributors of programming. For instance, the stations' parent company may have ownership interests in television production studios, movie studios, sports teams, broadcast television networks, cable networks, or syndicators.

172. The parent companies of six of the top seven station groups—ION Media Networks, Univision Communications, Inc., CBS Television Stations, FOX Television Stations, NBC Universal Stations, and ABC Owned Television Stations, representing 185 owned and operated local broadcast stations ("O&Os"), own all or part of at least one broadcast television network. Broadcast networks typically own and operate their own stations in the largest television markets. Spanish-language broadcast networks, *e.g.*, Univision and Telemundo, own and operate television stations in the largest Spanish-speaking markets.

173. In addition to ownership of broadcast networks, a number of owners of local broadcast stations have affiliations with cable networks.⁵⁷² Through its NBC Universal joint venture with the General Electric Company, Comcast has ownership interests in 31 cable networks. Other broadcast station owners with affiliated cable networks are: The Walt Disney Company with interests in 21 cable networks; News Corp. with interests in 12 cable networks; Univision with interests in six affiliated cable networks; and CBS Corporation with interests in three cable networks.⁵⁷³ Several broadcast television groups owners, while not vertically integrated with broadcast networks, also have ownership interests in cable networks. These owners include Hearst Television Inc. (17 cable networks) and InterMedia Partners (three cable networks). In addition, Tribune Company, Cox Communications Inc., and Hubbard Broadcasting Corp. have ownership interests in two cable networks each. Combined, Hearst, InterMedia, Tribune, Cox, and Hubbard, own 83 stations. Other broadcast station groups operate local and regional cable news channels. For example, Belo Corp. owns 20 television stations, two local and two regional cable news channels, and holds ownership interests in two other cable news channels while Allbritton own eight television stations and one regional cable news network.⁵⁷⁴

⁵⁷⁰ BIA, *Broadcast Television Station* database. In addition, San Juan, Puerto Rico, which is not part of any DMA, has six television station combinations.

⁵⁷¹ These markets are ranked one, two, five, six, and twelve respectively as of the 2010-2011 television season.

⁵⁷² This is not the case with syndicators. Columbia/Tristar (Sony), the only major syndicator unaffiliated with a broadcast network, does not own television stations.

⁵⁷³ Comcast, Viacom, News Corp., and The Walt Disney Company also control production studios, which are the primary source of programming for their networks, and hold ultimate distribution rights for their programming, subject to contractual negotiations. *See infra*, Sec. V.A.

⁵⁷⁴ Belo Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 3 ("Belo 2010 Form 10-K"); Allbritton Communications Co., *TBD: About Us*, <http://www.tbd.com/about/> (visited Mar. 20, 2012). *See also infra*, Appendix C, Table C-2.

174. Both Viacom and E.W. Scripps have split their broadcast television station groups and cable network holdings into separate corporate entities.⁵⁷⁵ Because their station groups and cable networks have common corporate directors, however, we consider them to be affiliated.⁵⁷⁶ Counting Viacom's 24 cable networks and CBS's three cable networks, these affiliated companies have interests in 27 cable networks. Including Scripps Networks Interactive, E.W. Scripps has interests in six cable networks.

175. Since the last report, Comcast became the only distributor of video programming with ownership interests in each mode of video distribution covered by this Report; it is an MVPD that owns and operates 25 full-power television stations and maintains an ownership interest in Hulu, an OVD.⁵⁷⁷ News Corp., which also has an ownership interest in Hulu and 27 broadcast television stations, no longer is an MVPD; it divested its interest in DIRECTV in 2008.⁵⁷⁸ Besides Comcast, Cox Media Holdings is the only MVPD that owns broadcast stations, an ABC affiliate serving a DMA where it also owns a cable system.⁵⁷⁹

c. Entry and Exit Conditions

176. Entry and exit in the broadcast television industry occurs within the broadcast television allocation and licensing regime: ownership of television station properties can change hands, licensees may go out of business and return broadcast licenses for reissue by the Commission, or the Commission may auction channels for new broadcast stations. The amount of spectrum authorized exclusively for broadcast television use by the Commission and the allocation of that spectrum across the United States limits the number of entities that can enter and exit the industry. Besides spectrum, programming is another critical input for broadcast television stations. Both regulatory and non-regulatory conditions affecting the availability of programming may impact stations' entry and exit decisions. Stations also require access to capital in order to remain competitive and operational. Below, we first discuss the regulatory conditions potentially affecting entry. Thereafter, we describe the market ("non-regulatory") conditions that may influence entry decisions. We then describe recent entry and exit from the market.

(i) Regulatory Conditions

177. *Licensing of Broadcast Spectrum.* A broadcast station may not operate in the United States without first receiving Commission authorization.⁵⁸⁰ The Commission is thus responsible for

⁵⁷⁵ See Viacom Inc., *CBS Separation*, <http://www.viacom.com/investorrelations/Pages/separationfromcbs.aspx> (visited Feb. 14, 2012); E.W. Scripps Co., *Scripps Controlling Class of Shareholders Approves Company's Planned Separation* (press release), June 13, 2008.

⁵⁷⁶ Scripps Networks Interactive (owner of cable networks) has 10 members of the board of directors and E.W. Scripps (owner of broadcast stations) has nine members. Of those, three directors on the boards of both companies: Nackey E. Scagliotti (Chairman of E.W. Scripps), John H. Burlingame, and Mary McCabe Peirce. Likewise, Viacom Inc. has 11 board members and CBS Corporation has 14 members. Their boards share three members: Sumner Redstone (Chairman of both boards), Shari E. Redstone (Vice Chairman of both boards), and Frederic V. Salerno.

⁵⁷⁷ Comcast's cable systems overlap with NBC Universal's stations in six markets: San Francisco, Philadelphia, Chicago, Miami, Hartford, and Washington, DC. *Comcast-NBCU Order*, 26 FCC Rcd at 4289, ¶ 126 n. 302.

⁵⁷⁸ See *News Corp-DirectV Order*, *supra*, n. 101.

⁵⁷⁹ In the Orlando-Daytona Beach-Melbourne DMA, Cox owns television stations WFTV and WRDQ, as well as a cable system serving Ocala, Florida. See Cox Media Group, *Orlando*, <http://www.coxmediagroup.com/orlando/> (visited Jan. 11, 2012); Cox Communications, Inc., *Welcome*, <http://ww2.cox.com/> (visited Jan. 11, 2012).

⁵⁸⁰ 47 U.S.C. § 301.

licensing broadcast spectrum to respective applicants and ensuring that the spectrum is used to serve the public interest.⁵⁸¹ Courts have consistently held that the Commission retains significant discretion under its public interest standard to approve applications for broadcast spectrum licenses.⁵⁸² The Act prohibits broadcast stations from transferring control of their licenses without obtaining Commission approval.⁵⁸³ Certain obligations are imposed on licensees during each license term, which is generally eight years.⁵⁸⁴

178. *Ownership Limits.* The Commission has adopted several rules limiting the ownership interests of broadcasters.⁵⁸⁵ These rules were adopted to further the Act's goals of competition, localism, and diversity.⁵⁸⁶ The Commission's broadcast ownership rules limit local television ownership, local radio ownership, newspaper/broadcast cross-ownership, radio/television cross-ownership, and dual network ownership.⁵⁸⁷ The local television ownership rule permits a single entity to own two television stations in the same market only if certain conditions are met.⁵⁸⁸ The newspaper/broadcast cross-ownership rule prevents the common ownership of a radio or television broadcast station and a daily newspaper where the station's broadcast signal encompasses the entire community where the newspaper is published.⁵⁸⁹ The radio/television cross-ownership rule restricts the common ownership of radio and television broadcast stations in a single market after factoring in the size of the relevant market.⁵⁹⁰ Congress mandates that the Commission review its media ownership rules every four years to determine

⁵⁸¹ 47 U.S.C. §§ 303(c), 308(a), 309(a).

⁵⁸² See, e.g., *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953) ("In choosing among applicants, the Commission was to be guided by the 'public interest, convenience, or necessity[.]' . . . The statutory standard no doubt leaves wide discretion and calls for imaginative interpretation."); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940) ("In granting or withholding permits for the construction of stations, and in granting, denying modifying or revoking licenses for the operation of stations, 'public convenience, interest, or necessity' was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy.").

⁵⁸³ 47 U.S.C. § 310(d).

⁵⁸⁴ 47 U.S.C. § 307(c); 47 C.F.R. § 73.1020. Among other things, each licensee is required to maintain a main studio in its communities of license (47 C.F.R. § 73.1125(a)), maintain and carry out an equal opportunity program (47 C.F.R. § 73.2080), and maintain an accessible public inspection file (47 C.F.R. §§ 73.3526-27).

⁵⁸⁵ 47 C.F.R. §§ 73.3555(a)-(e), 73.658(g). The Commission also has developed rules to attribute both direct and indirect ownership in broadcast licenses, cable television systems, and daily newspapers in order to enforce its media ownership rules. Among other parties, these rules apply to investment companies; limited partnerships; officers and directors of a broadcast licensee, cable television system or daily newspaper; and entities participating in local marketing agreements. 47 C.F.R. § 73.3555 notes 1-2. Moreover, the Communications Act limits the extent on non-U.S. ownership of companies that own U.S. broadcast stations. Under this restriction, a U.S. broadcast company may have no more than 25 percent non-U.S. ownership (by vote and equity). 47 U.S.C. § 310(b)(4).

⁵⁸⁶ *Media Ownership NPRM*, 26 FCC Rcd at 17494-96, ¶¶ 10-17.

⁵⁸⁷ See *supra*, n. 585.

⁵⁸⁸ 47 C.F.R. § 73.3555(b). Similarly, the local radio ownership rule limits the number of commercial radio stations one entity may own in a local market. 47 C.F.R. § 73.3555(a).

⁵⁸⁹ 47 C.F.R. § 73.3555(d). In the *Media Ownership NPRM*, the Commission proposed relaxing this rule for the top 20 DMAs, provided that the television station is not ranked among the top four, and eight independently owned major media voices remain with the DMA. See *Media Ownership NPRM*, 26 FCC Rcd at 17525-32, ¶¶ 99-116.

⁵⁹⁰ 47 C.F.R. § 73.3555(c).

whether they “are necessary in the public interest as a result of competition.”⁵⁹¹ The Commission is currently conducting such a review.⁵⁹²

179. *Territorial Exclusivity.* The territorial exclusivity rules restrict the geographic area in which a television broadcast station may obtain exclusive rights to video programming. Under the network territorial exclusivity rule, a broadcast station may not have an agreement with a network preventing another station located in a different community from broadcasting any of the network’s programming or preventing another station located in the same community from broadcasting the network’s programs not purchased by the broadcast station.⁵⁹³ Under the non-network territorial exclusivity rule, a broadcast station may not enter into an agreement with a non-network programming distributor that prevents another station located in a community more than 35 miles away from broadcasting the same programming.⁵⁹⁴

180. *Incentive Spectrum Auctions.* On February 22, 2012, President Obama signed legislation providing the Commission with the authority to conduct incentive auctions by which television broadcast licensees could voluntarily relinquished their licensed spectrum or modify their spectrum usage in exchange for a portion of the spectrum auction proceeds.⁵⁹⁵ This legislation provides new financial opportunities for broadcast television station licensees, including relinquishing all usage rights with respect to a particular channel, moving from a UHF to a VHF channel, or sharing a channel with another licensee.⁵⁹⁶ In addition, voluntary channel sharing may provide existing small and minority-owned stations, as well as other niche stations, an opportunity to use the capital infusion they receive from the incentive auction as well as provide operating-cost savings from sharing a transmission facility to enhance or preserve their local program offerings.⁵⁹⁷

(ii) Non-regulatory Conditions

181. The primary means of entering the television broadcast industry is to purchase broadcast properties from licensees who are already operating stations rather than constructing new broadcast station infrastructure and obtaining a new license. Once a licensee takes over operations of an existing station, the new owner may decide to change programming by affiliating with a different network, purchasing new syndicated programming, or changing on-air talent for local programming, such as newscasts, subject to the terms of their contracts.

182. *Access to Capital.* Entities seeking to enter the broadcasting industry either by purchasing properties or launching a new station, require access to capital, which may come in the form of debt or equity financing. In determining whether to lend money or invest in a licensee, banks or other firms look at expected revenues and expenses, especially whether new owners could increase profits by

⁵⁹¹ 1996 Act, § 202(h).

⁵⁹² *Media Ownership NPRM*, *supra*, n. 567.

⁵⁹³ 47 C.F.R. § 73.658(b).

⁵⁹⁴ 47 C.F.R. §§ 73.658(m), 76.53. An exception is made, however, for communities located in hyphenated markets, *i.e.*, television markets that include more than one city (*e.g.*, Dallas-Fort Worth, TX). 47 C.F.R. §§ 73.658(m), 76.51.

⁵⁹⁵ See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, §§ 6401-05, 126 Stat. 156, 222-30 (2012).

⁵⁹⁶ *Id.* at 225.

⁵⁹⁷ *Innovation in the Broadcast Television Bands: Allocations, Channel Sharing and Improvements to VHF*, ET Docket No. 10-235, Report and Order, 27 FCC Rcd 4616, 4622 ¶ 12 (2012).

changing programming or reducing expenses. Structural changes in the media industry, combined with the strong correlation of their revenues and profits to economic cycles, indicate that financing media transactions with debt entails some risk.⁵⁹⁸ In particular, high interest rates may lead station owners to file for bankruptcy and transfer control to lenders or sell their stations,⁵⁹⁹ while reducing the number of potential station buyers who can obtain loans and service debt without strain.⁶⁰⁰

183. *Programming.* Access to programming also affects the ability of licensees to enter and remain in the industry.⁶⁰¹ Network affiliation agreements and syndication contracts often last several years. For example, if a station loses its network affiliation, it may not be able to affiliate with an alternative network, because that alternative network is likely to already have a distribution agreement in place with another station in the market. The loss of this programming could require the station to obtain replacement programming at a higher cost, and that may be less attractive to its target audience, thereby causing it to lose advertising revenues while potentially increasing expenses. Similarly, popular syndicated programming may not be available for a new station due to exclusive distribution arrangements with competing stations or cable networks.⁶⁰² As an alternative to contracting for expensive third-party programming, stations may produce their own programming in-house or lease time to other parties (*e.g.*, producers of infomercials) willing to pay stations.

(iii) Recent Entry and Exit

184. Overall, between December 31, 2006, and December 31, 2010, the number of full-power commercial television stations on the air increase by 14, bringing the total to 1,390.⁶⁰³ During this period, the total number of full-power noncommercial television stations increased by eleven, going from 380 to

⁵⁹⁸ “The broadcast sector historically has been highly levered. It’s the recession’s impact on revenues and cash flow that has magnified financial strain.” Price Colman, *TV Groups Cope with Leverage Troubles*, TVNEWSCHECK, Mar. 4, 2009, <http://www.tvnewscheck.com/article/2009/03/04/30075/tv-groups-cope-with-leverage-troubles> (visited Jan. 12, 2012). Lenders impose restrictions (covenants) on the ratio of debt to equity and earnings before interest and taxes (EBIT) to interest. LIN 2010 Form 10-K at 23-24; Sinclair 2010 Form 10-K at 23-24; Nexstar 2010 Form 10-K at 12-13; Gray 2010 Form 10-K at 16-17.

⁵⁹⁹ LIN 2010 Form 10-K at 23-24; Sinclair 2010 Form 10-K at 23-24; Nexstar 2010 Form 10-K at 12-13; Gray 2010 Form 10-K at 16-17.

⁶⁰⁰ “[W]hen credit markets froze in 2007, a big no-exit sign was hung over TV broadcasting. The gap between bid and ask is more like a gulf.” Price Colman, *Hot Trend: Outsourcing Management*, TVNEWSCHECK, Aug. 25, 2010, <http://www.tvnewscheck.com/article/2010/08/25/44718/hot-trend-outsourcing-station-management> (visited Jan. 12, 2012).

⁶⁰¹ Broadcasters differ in the value they place on programming with respect to a station’s purchase price. For example, Gray and LIN believe that the value of a television station is derived primarily from the attributes of its broadcast license, rather than its type of programming, *i.e.*, whether or not it is an affiliate of one of the major four broadcast networks. Gray 2010 Form 10-K at 53-54; LIN 2010 Form 10-K at 38. LIN notes that other companies ascribe a belief that network affiliations are the most important component of a station’s value. LIN 2010 Form 10-K at 38.

⁶⁰² Stations compete against in-market broadcast stations for exclusive access to syndicated programming within their markets. In addition, cable networks occasionally acquire programs that might otherwise be offered to stations, and some programs are available via OVDs. Nexstar 2010 Form 10-K at 7; LIN 2010 Form 10-K at 12. Stations usually purchase syndicated programming two to three years in advance, and sometimes must make multi-year commitments. Gray 2010 Form 10-K at 20; Sinclair 2010 Form 10-K at 25.

⁶⁰³ See FCC, *Licensed Broadcast Stations Totals*, <http://transition.fcc.gov/mb/audio/BroadcastStationTotals.html>.

391. In 2009, six stations did not complete the transition to digital television and as a result the Commission canceled their licenses.⁶⁰⁴

185. Furthermore, between 2007 and 2010, the number of television station transactions declined in number and dollar value.⁶⁰⁵ During 2007, 218 full-power television stations traded hands, for a total of \$10.158 billion, or about \$46.6 million per station, with an average 12.5 times the station's cash flow. In 2010, 23 full-power stations traded hands, totaling \$171 million, or \$7.43 million per station, with an average cash flow multiple of 9.3, marking the first time since 1995 that cash flow multiples were in the single digits.⁶⁰⁶ In terms of the dollar value of station transactions, 2010 marked the smallest amount of station transaction activity since 1982.

186. Since the last report, several major group owners have exited the television broadcasting business by selling stations, while private equity and other investment firms have entered. Clear Channel Communications sold all of its television assets, 60 full-power stations, in 2008 to new entrant Newport Television (a holding company formed by private equity firm Providence Equity Partners).⁶⁰⁷ In addition, the New York Times Company exited the broadcast television business in May 2007 when it sold its nine full-power stations to private equity firm Oak Hill Capital Partners. Comcast entered the broadcast television business in 2010 when, as part of its joint venture with General Electric, it purchased majority ownership interests in the NBC and Telemundo O&Os.

187. Since 2006, several broadcaster station groups filed for bankruptcy, primarily impacting stations in smaller and medium-sized markets.⁶⁰⁸ These include Young Broadcasting, the Tribune Company, Pappas Broadcasting, Equity Media, Multicultural Broadcasting, and Johnson Broadcasting. In some cases, banks and financing organizations took control over their stations. For example, in 2009, Young Broadcasting Lenders took over the 14 stations of Young Broadcasting, and New Vision Lenders took over 15 stations from New Vision Television. Station groups that file for bankruptcy do not necessarily exit the industry or cease broadcasting. Some station groups have reorganized and emerged from Chapter 11 proceedings. For example, Freedom Communications, an operator of broadcast television stations, print publications, and interactive businesses, filed for protection in September 2009, and completed its restructuring eight months later.⁶⁰⁹

⁶⁰⁴ WDCP, University Center, MI, did not obtain a construction permit for digital operation; the Commission canceled its analog license. In November 2009, KOFT, Farmington, NM, returned its analog license to the Commission. In February 2008, KBGH, Filer, ID, notified the Commission that it would not transition to digital. In July 2009, after Equity Broadcast Holdings, LLC filed for bankruptcy and failed to find a buyer for the stations KLMN, Great Falls, MT, KMMF, Missoula, MT, and KBTZ, Butte, MT, it returned the licenses for the stations to the Commission.

⁶⁰⁵ See Volker Moerbitz, *Freedom Buy Catapults Sinclair to No. 2 in Stations Owned*, SNL Kagan, Nov. 25, 2011, at 6-7.

⁶⁰⁶ 2011 SNL Kagan TV Stations Databook at 13.

⁶⁰⁷ Newport Television, *About Us*, <http://www.newporttv.com/content/aboutus.aspx> (visited Mar. 5, 2012). See also Reuters, *Clear Channel Sale Complete*, MEDIAPOST NEWS, Mar. 17, 2008, <http://www.mediapost.com/publications/article/78604/clear-channel-tv-station-sale-complete.html> (visited Mar. 5, 2012).

⁶⁰⁸ NAB 6/8/11 Comments at 29-30.

⁶⁰⁹ Freedom Communications, *Freedom Communications Emerges from Chapter 11* (press release), Apr. 30, 2010.

3. Broadcast Television Industry Conduct

188. In addition to industry structure, a second key element of our analysis of broadcast television station competition is an examination of the conduct of industry participants – in particular, the business models and competitive strategies of these entities. Broadcast stations derive most of their revenue from local and national advertising by selling on-air time to reach viewers.⁶¹⁰ They differentiate themselves primarily by investing in the purchase and production of programming, as well as making it available to viewers at their convenience. In this section of the Report, we discuss broadcast television station competition in terms of both price and non-price rivalry.

a. Price Rivalry

189. *Price to Consumers.* Because broadcast television stations do not charge consumers directly for the delivery of their signals, they do not compete on price in the traditional sense. Broadcast television is free to consumers who receive it over-the-air. Nevertheless, since about 90 percent of all television households receive broadcast stations from an MVPD, most consumers pay for broadcast stations as part of their MVPD service.⁶¹¹ In the case of cable, broadcast television stations are part of the basic service package, which is generally a low price offering.⁶¹² As of January 1, 2010, the average cable system charged \$17.93 per month, for its basic service tier, which includes 41 channels on average.⁶¹³ As of January 2012, AT&T U-Verse charges \$19 per month for a basic television service including only local channels.⁶¹⁴ As of January 2012, Verizon offers 72 channels as part of its FiOS TV Local Digital plan for \$12.99 per month.⁶¹⁵ DBS providers may charge subscribers an additional fee to receive broadcast television stations. As of January 2012, DIRECTV generally offers local channels at no additional charge as part of its local packages, but eligibility for this offer is based on a customer's service area.⁶¹⁶ As of January 2012, DISH includes local television station services as part of some packages, but charges an additional \$5.99 per month to subscribers opting for local television stations in other packages.⁶¹⁷

⁶¹⁰ We discuss additional sources of revenue further, *infra*, Sec. III.B.4.

⁶¹¹ *National Universe Estimates -- Market Breaks*, Nielsen, Jan. 1, 2012. *See also infra*, Table 15.

⁶¹² 47 U.S.C. § 543(b)(7), 47 C.F.R. § 76.901(a).

⁶¹³ *2010 Cable Price Survey Report*, 27 FCC Rcd at 2433, 2436, ¶¶ 13, 17.

⁶¹⁴ This plan only includes local channels; AT&T does not specify the number. *See* AT&T Inc., *Shop: Compare TV Packages*, <http://www.att.com/u-verse/explore/tv-landing.jsp> (visited Jan. 12, 2012).

⁶¹⁵ This plan includes 72 channels, excluding HD. In addition to the broadcast stations' primary signals, this package includes broadcast multicast signals and PEG, as well as WGN America and the Weather Channel. Additional national networks are available to households that bundle video services with broadband or voice service from Verizon. *See* Verizon Communications Inc., *FiOS TV, Local Channel Plan* (using 22201 zip code in Arlington, VA), <http://www22.verizon.com/home/FiOSTV/Plans> (visited Jan. 12, 2012).

⁶¹⁶ DIRECTV, *English Packages* (using 22314 zip code in Alexandria, VA), http://www.directv.com/DTVAPP/new_customer/base_packages.jsp?footernavtype=-1&lpos=header (visited Jan. 12, 2012).

⁶¹⁷ DISH Network, *Entertainment: Channels, Washington, DC/Hagerstown* (using 22314 zip code in Alexandria, VA), <http://www.dishnetwork.com/packages/local/default.aspx> (visited Jan. 12, 2012).

190. *Price to Advertisers.* Television broadcast stations get about 90 percent of their revenue through the sale of advertising time during their programs.⁶¹⁸ In the broadcasting industry, competition for advertising revenue occurs primarily within individual markets.⁶¹⁹ Generally, advertising rates are determined by a station's overall ability to attract viewers in its market area and a station's ability to attract viewers generally and among particular demographic groups that an advertiser may be targeting.⁶²⁰ Specifically, advertising rates depend upon: (1) the size of a station's market; (2) a station's overall ratings; (3) a program's popularity among targeted viewers; (4) the number of advertisers competing for available time; (5) the demographic makeup of the station's market; (6) the availability of alternative advertising media in the market; (7) the presence of effective sales forces; (8) the development of projects, features and programs that tie advertiser messages to programming; and (9) the level of spending commitment made by the advertiser.⁶²¹ Within network shows, stations are generally permitted to sell a fixed amount of advertising time, about 2.5 to three minutes per hour. Any remaining advertising time is sold by the network, which retains those revenues and includes the advertising in the network programming time. In the alternative, stations can use their allotted 2.5 to three minutes of time during network shows to promote their own programming. In newscasts or during other non-network shows, stations may sell approximately nine minutes of advertising time per hour.⁶²²

191. Local advertisers purchase time directly from a station's local sales staff. Such advertisers typically include car dealerships, retail stores, and restaurants.⁶²³ National advertisers that wish to reach a particular region or local audience buy advertising time through national advertising sales representative firms.⁶²⁴ Such advertisers typically include automobile manufacturers and dealer groups, telecommunications companies, fast food franchisers, and national retailers.⁶²⁵ Stations compete for advertising revenue with other stations in their respective markets; advertisers may also place advertisements with other media including newspapers, radio stations, magazines, outdoor advertising, transit advertising, yellow page directories, direct mail, local cable systems, DBS systems, and web sites online, as well as telephone and/or wireless companies.⁶²⁶

192. While individual stations do not make their advertising rates publicly available, prices for a composite group of television stations is available.⁶²⁷ Local advertisers typically use the cost per rating

⁶¹⁸ SNL Kagan, *Media Sector Forecast: Total TV Station Industry Revenue Projections Through 2015*, Jan. 25, 2012 (tables, Document ID 14075490); Robin Flynn, *The Complete Picture of TV Station Industry Revenues, 2006 to 2015*, SNL Kagan, Jan. 31, 2012, at 1-2. See also *infra*, Sec. III.B.4.b.

⁶¹⁹ Nexstar 2010 Form at 7; Gray 2010 Form 10-K at 9; Sinclair 2010 Form 10-K at 21.

⁶²⁰ Nexstar 2010 Form 10-K at 5; Gray 2010 Form 10-K at 4; Sinclair 2010 Form 10-K at 21.

⁶²¹ Nexstar 2010 Form 10-K at 5-6; Gray 2010 Form 10-K at 9; LIN 2010 Form 10-K at 9; Sinclair 2010 Form 10-K at 21.

⁶²² Vogel at 317, n. 29. In September 2010, ABC announced that it would launch its Inventory Exchange System, or IES, during the election season, making extra inventory available during periods of high demand, such as election and holiday season, for its affiliates, who have the option to buy additional advertising units to sell within their local markets. 2011 SNL Kagan TV Stations Databook at 6.

⁶²³ Nexstar 2010 Form 10-K at 6.

⁶²⁴ Nexstar 2010 Form 10-K at 5; Entravision 2010 Form 10-K at 11.

⁶²⁵ Nexstar 2010 Form 10-K at 6.

⁶²⁶ Nexstar 2010 Form 10-K at 7; Gray 2010 Form 10-K at 9; Belo 2010 Form 10-K at 5.

⁶²⁷ See TVB, *Trends: TV Cost & CPM Trends*, <http://www.tvb.org/trends/4718> (visited Jan. 16, 2012).

point (“CPP”) measure to value advertising time, which represents the percentage of households in a local market with television sets watching a station or show at a given time.⁶²⁸ CPPs vary by the time of day, with prime time (8 p.m.-11 p.m., Eastern and Pacific Time; 7 p.m.-10 p.m., Central and Mountain Time), being the most expensive. For the top 100 television markets, on average, a station’s CPP for a 30-second advertisement during prime time in 2006 was \$26,430. That is, on average, a station within the top 100 markets charged advertisers \$26,430 to reach one percent of the television households within its DMA with a 30-second commercial. The average prime time CPP for a station rose in 2007 to \$32,663, but had dropped to \$26,343 by 2010. During the late newscasts (11 p.m. Eastern and Pacific Time; 10 p.m., Central and Mountain Time), on average, stations charged lower prices. In 2006, on average, the CPP for a 30-second advertisement during this time slot was \$15,630. This average price dropped to \$14,934 by 2010.⁶²⁹ Advertisers assess the relative expense and efficiency of delivering a message via different media, *e.g.*, a broadcast network compared with a group of broadcast television stations, on the basis of cost per thousand households (“CPM”).⁶³⁰ We include CPM figures here in charts 14 and 14 b to provide another basis for comparing prices charged to advertisers since 2006.

Table 14: Top 100 Television Markets: Average Price of a 30-Second Commercial⁶³¹

Year	Prime Time		Late News	
	CPP	CPM	CPP	CPM
2006	\$26,430	\$28.08	\$15,630	\$16.61
2007	\$32,663	\$34.48	\$16,606	\$17.53
2008	\$26,484	\$27.67	\$15,122	\$15.80
2009	\$29,434	\$30.33	\$17,440	\$17.97
2010	\$26,343	\$26.76	\$14,934	\$15.17

193. *Price to MVPDs.* As discussed above, broadcast television stations are entitled to carriage on MVPDs’ systems.⁶³² Commercial stations are entitled to decide whether to seek mandatory carriage or negotiate for compensation of their signals. As noted above, the Commission has opened a proceeding on issues related to retransmission consent.⁶³³ Broadcasters claim that the prices they charge MVPDs today are significantly lower than the fees paid to cable networks with comparable or lower ratings.⁶³⁴ In the

⁶²⁸ See The Museum of Broadcast Communications, *Cost-Per-Thousand (CPM) and Cost-Per-Point (CPP)*, <http://www.museum.tv/eotvsection.php?entrycode=cost-per-thou> (visited Mar. 21, 2012); Vogel at 290-91, 574-75. For example, if 100,000 households in a DMA own television sets, and 20,000 of those households are tuned to a particular broadcast television station, then a station’s rating is 20. If it charges \$25,000 per point during a particular program, then it can earn \$500,000.

⁶²⁹ Other non-advertising sources of revenue for broadcast television stations include retransmission consent fees, network compensation, DTV revenue, online revenue, and mobile revenue. These sources of revenue are discussed further, *infra*, Sec. III.B.4.b.

⁶³⁰ Vogel at 292.

⁶³¹ TVB, *Trends: TV Cost & CPM Trends*, <http://www.tvb.org/trends/4718> (visited Jan. 16, 2012) (citing SQUAD Media Market Guide 1st Quarter Projections (Fall books)).

⁶³² See *supra*, ¶¶ 56-60, for further discussion of retransmission consent.

⁶³³ See *Retransmission Consent NPRM*, *supra*, n. 154.

⁶³⁴ See, *e.g.*, NAB 7/8/11 Reply, Attachment A at 43-44; Sinclair 10-71 Comments at 11-12 (citing Michael G. Baumann, *Proposals for Reform of the Retransmission Consent Good Faith Bargaining Rules: An Economic* (continued....))

Retransmission Consent NPRM, the Commission sought comment on whether it should be a per se violation of the good faith standard for a station to grant another station (or station group) the right to negotiate its retransmission consent agreement(s) when the stations are not commonly owned (“Joint Negotiations”).⁶³⁵ In previous proceedings, MVPDs have claimed that economic theory and evidence suggests that such joint negotiations lead to broadcast stations charging higher prices to MVPDs.⁶³⁶ NAB claims that Joint Negotiations help lower the transactions costs of negotiating retransmission consent agreements, and help level the playing field between broadcasters and MVPDs.⁶³⁷

b. Non-Price Rivalry

194. Broadcast stations compete with each other for viewers and advertisers on two major non-price criteria: (1) programming;⁶³⁸ and (2) the type of viewing experience.⁶³⁹ Each of these items is described below in turn.

195. *Programming.* The largest point of differentiation among broadcast stations is the type of programming they offer and when such programming is offered. Consumers watch multiple broadcast stations and switch stations based on the type of programming carried. When choosing the type of programming to air, stations weigh the cost of acquiring programming, the number of viewers they can expect to attract, the amount of advertising they can sell, and the prices they can charge to advertisers.

196. As noted above, the digital transition completed in 2009 introduced a dramatic increase in the use of multicasting among broadcast television station. Commercial stations use these multicast streams to offer consumers additional programming choices, such as new networks This TV (with 129 digital multicast affiliates), Bounce TV (with 52 digital multicast affiliates), and Retro TV (with 46 digital multicasting affiliates).⁶⁴⁰ In addition, multicasting enables stations in smaller markets to affiliate with multiple established networks. For example, The CW (with 108 digital multicast outlets) and My Network TV (87 outlets) are additional examples of established networks that enhance their coverage with multicasting.⁶⁴¹

197. Network affiliates typically market themselves based on their broadcast network affiliation and channel position (e.g., FOX 5) and their on-air news talent. Programming from broadcast networks can attract large audiences and provides network affiliates with popular entertainment

(Continued from previous page) _____

Analysis, Economists Inc., May 27, 2011, at 7, attached as Exhibit 1 to the Sinclair Comments); CBS Affiliates 10-71 Comments at 13-15.

⁶³⁵ See *Retransmission Consent NPRM*, 26 FCC Rcd at 2731-32, ¶ 23 (noting that consent for Joint Negotiations “might be reflected in local marketing agreements (“LMAs”), Joint Sales Agreements (“JSAs”), shared services agreements, or other similar agreements.”).

⁶³⁶ See, e.g., Time Warner Cable Comments, MB Docket No. 09-182, at 7 (filed July 12, 2010) (citing an economist who believes that it is “very likely” that retransmission consent is jointly negotiated where stations are involved in some sort of sharing agreement); ACA Comments, MB Docket No. 09-182, at 2, 13-17 (filed July 12, 2010) (arguing that “available evidence . . . suggests” that higher rates are being paid by cable operators where one broadcast station negotiates retransmission consent on behalf of another station in the same market).

⁶³⁷ NAB 7/8/11 Reply, Attachment A at 27-32.

⁶³⁸ Nexstar 2010 Form 10-K at 7; Gray 2010 Form 10-K at 8-9; Sinclair 2010 Form 10-K at 22.

⁶³⁹ Signal coverage and assigned frequency also impact a television station’s competitive position. Gray 2010 Form 10-K at 21.

⁶⁴⁰ SNL Kagan, *TV Station Deals Databook*, 2012 Edition, at 6-7.

⁶⁴¹ *Id.*

programming and sporting events, such as the Olympics, National Football League games, Major League Baseball games, and the Academy Awards, that are extremely popular with both viewers and advertisers.⁶⁴² Networks also tend to schedule their most popular programming during the months of the year when Nielsen measures television audiences for all 210 markets (February, May, July, and November) to determine local advertising rates.⁶⁴³

198. Local news programming is another source of product differentiation for broadcast television stations, in their competition for both advertisers and viewers.⁶⁴⁴ This programming, which stations produce, is typically the largest source of their income, accounting for 35-40 percent of their advertising base.⁶⁴⁵ Some stations seek to increase their local advertising revenues in part by producing programming with local advertising appeal and sponsoring or co-promoting local events and activities.⁶⁴⁶ To attract audiences, stations also strive to provide exclusive news stories, unique features such as investigative reporting, coverage of community events and to secure broadcast rights to regional and local sporting events.⁶⁴⁷ Between 2006 and 2007, the average number of hours of news aired on weekdays by local television stations remained steady at 4.1 hours, increased to 4.6 hours in 2008, and 5.0 hours in

⁶⁴² Nexstar 2010 Form 10-K at 3; Sinclair 2010 Form 10-K at 11. The network affiliation agreements, generally exclusive for each of the 210 television markets, provide affiliates with the right to air network programming first. The contracts may run from two to 10 or more years. The Commission's right-to-reject rule grants an affiliate the right to (1) reject or refuse network programs which the station reasonably believes to be unsatisfactory, unsuitable, or contrary to the public interest and (2) substitute a program which, in the station's opinion, is of greater local or national importance. 47 C.F.R. § 73.658(e). The financial arrangements between networks and their affiliated stations regarding payments for programming are evolving. *See infra*, Sec. III.B.4.b.

⁶⁴³ While networks and stations consider May to be the most important measuring period of the year, they also compete intensely in February and November, when audiences are likely to stay at home. Vogel at 291. *See also* Nielsen Media Research, *Glossary of Media Terms*, <http://www.nielsenmedia.com/glossary/> (visited Mar. 22, 2012). Nielsen refers to these months as "sweep months." Nielsen excludes the Honolulu, Fairbanks, and Juneau DMAs from its July measurement period.

⁶⁴⁴ Gray 2010 Form 10-K at 7; LIN 2010 Form 10-K at 7-8; Sinclair 2010 Form 10-K at 9.

⁶⁴⁵ Vogel at 304. *See also* Robert Papper, *Part I: More Jobs, Higher Profits in TV News*, Hofstra University, 2011, http://www.rtdna.org/pages/media_items/2011-tv-and-radio-news-staffing-and-profitability-survey2033.php?id=2033 ("RTNDA/Hofstra 2011 Survey") (visited Mar. 22, 2012).

⁶⁴⁶ *See, e.g.*, Nexstar 2010 Form at 6; LIN 2010 Form 10-K at 8. Nexstar states that each of the stations it owns, operates, programs, or provides sales and other services to create a highly recognizable brand, primarily through the quality of news programming and community presence. Nexstar asserts that strong local news typically generates higher ratings among attractive demographic groups and enhances audience loyalty, potentially resulting in higher ratings for programs preceding and following the newscasts. Nexstar claim that high ratings and strong community identities also makes stations attractive to advertisers. In 2010, Nexstar earned approximately one third of its advertising revenues from spots aired during local news programming. Nexstar's stations produce between 10 to 15 hours per week of local news programming. Nexstar 2010 Form 10-K at 3.

⁶⁴⁷ Nexstar 2010 Form 10-K at 7; Gray 2010 Form 10-K at 8-9.

2009.⁶⁴⁸ In 2010, the average television station aired 5.3 hours of weekday news.⁶⁴⁹ NAB contends that operating agreements among non-commonly owned broadcasters enable stations to maintain and sometimes expand news on stations, despite a difficult economic climate.⁶⁵⁰

199. Stations also air syndicated programming, such as original series *Judge Judy*, off-network programs such as *Friends*, or sporting events such as the NCAA basketball and football games from the Southeastern Conference.⁶⁵¹ Competition for programming involves negotiating with national program distributors or syndicators that sell first-run and rerun packages of programming in their respective markets.⁶⁵² Stations compete against in-market broadcast stations for exclusive access to syndicated programming within their markets. In addition, cable networks occasionally acquire programs that might otherwise be offered to stations.⁶⁵³ Syndicated programming can be expensive for stations, and may represent long-term financial commitments.⁶⁵⁴ Stations usually purchase syndicated programming two to three years in advance, and sometimes must make multi-year commitments.⁶⁵⁵ An average broadcast station spends about 24.3 percent of its expenses on acquiring syndicated programming.⁶⁵⁶ Expenses may range, however, from about eight percent of revenues for a Spanish-language station, which tends to rely on network programming for a majority of its schedule to nearly two-thirds of revenues for an

⁶⁴⁸ Steven Waldman and the Working Group on Information Needs of Communities, *The Information Needs of Communities*, FCC, July 2011, at 77, [http://transition.fcc.gov/osp/inc-report/The Information Needs of Communities.pdf](http://transition.fcc.gov/osp/inc-report/The%20Information%20Needs%20of%20Communities.pdf). The data are based on the *RTNDA/Hofstra University Annual Survey*, conducted by Robert Papper for the Radio Television Digital News Association and Hofstra University. See *RTNDA/Hofstra 2011 Survey*. Note that surveys from 2007-2009 are unavailable on the website as of March 2012.

⁶⁴⁹ *RTNDA/Hofstra 2011 Survey, Part II: Record Amount of Local News Produced on TV*. Note that while RTNDA/Hofstra released survey results in 2011, Professor Robert Papper conducted the survey during the fourth quarter of 2010.

⁶⁵⁰ NAB 6/8/11 Comments at 29-31. Such arrangements include joint sales agreements, shared services agreements, and local marketing agreements. Our attribution rules currently make attributable certain LMAs, also referred to as time brokerage agreements (“TBAs”), in which a broker purchases discrete blocks of time from a licensee and supplies programming and sells advertising for the purchased time. According to commenters, a local news service (“LNS”) agreement is as an agreement in which multiple local broadcast television stations contribute certain news staff and equipment to a joint news gathering effort coordinated by a single managing editor. According to commenters in the ownership proceeding, a shared service agreement (“SSA”) is an agreement, or series of agreements, in which one in-market station provides operational support and programming for another in-market station. We are currently seeking comment on LNS agreements and SSAs in the Media Ownership proceeding. See *Media Ownership NPRM*, 26 FCC Rcd at 17564-70, ¶¶ 195-208.

⁶⁵¹ ESPN Inc., *WDCW-TV/DC50 Named SEC Network Affiliate in Washington DC – DC50 to Air Men’s SEC Basketball and Football Through ESPN Regional Television’s Syndicated Network* (press release), Jan. 4, 2012. ESPN, a cable network, has a division called ESPN Regional Television that produces and syndicates collegiate sporting events. See also Sinclair 2010 Form 10-K at 11.

⁶⁵² Nexstar 2010 Form 10-K at 7.

⁶⁵³ *Id.*; Gray 2010 Form 10-K at 9; Sinclair 2010 Form 10-K at 22.

⁶⁵⁴ Syndicated programming can impose financial risks on stations. Broadcast stations cannot predict whether a particular show will be sufficiently popular to enable it to sell enough related advertising time to cover the costs of the program. A station may have to replace a poorly performing program before it has recovered the costs of obtaining it. Sinclair 2010 Form 10-K at 25; Gray 2010 Form 10-K at 20; Belo 2010 Form 10-K at 11. In 2010, Gray wrote down the value of its programming contract assets by \$0.4 million. Gray 2010 Form 10-K at 20.

⁶⁵⁵ Gray 2010 Form 10-K at 20; Belo 2010 Form 10-K at 11.

⁶⁵⁶ NAB, *Television Financial Report*, 2011, at 3 (“2011 NAB Television Financial Report”).

independent station, which relies primarily on syndicated programming.⁶⁵⁷ For example, syndication rights for the series *The Big Bang Theory* and *Modern Family* cost stations about \$2.5 million per episode in barter and cash.⁶⁵⁸

200. Despite its price tag, a popular program may be a profitable investment for a station, if it provides a lead-in audience for a station's local newscasts, differentiating it from competing stations, and increasing audience and revenues. Other factors may help to reduce the costs of syndicated programming for stations. For example, large group owners can use economies of scale to negotiate favorable contractual terms with program suppliers.⁶⁵⁹

201. *Viewing Experience.* Since the last report, several major patterns of consumer behavior have emerged which impact broadcast stations' non-price rivalry. The first is the dramatic increase in the number of television households with sets capable of displaying and/or receiving digital signals, including HD television signals. The number of households equipped with an HD television set and HD tuner who received at least one HD network or station increased from 15.4 million, or 13.6 percent of all television households, in 2007, to 68.8 million, or 59.4 percent in 2010, and again in 2011 to 80.3 million, or 70 percent of all television households.⁶⁶⁰ The second is the doubling of penetration of digital video recorders (DVRs), which rose from 20.4 million or 18.6 percent of television households in 2007, to 42.5 million, or 36.8 percent in 2010, and 46.3 million, or 40.4 percent of television households in 2011.⁶⁶¹ The availability of DVRs coupled with other technological developments has spurred consumers' desire to watch video on a time-shifted basis on television sets, personal computers, and mobile devices. As digital video recorders have gained popularity, Nielsen began reporting "live-plus-same-day playback," or "LSD" viewing as the currency for buying and selling local television time, where such ratings are available.⁶⁶² In August 2010, it found that while the total effect of DVR playback on ratings was small, the audience composition changed.⁶⁶³

⁶⁵⁷ FCC staff analysis of data. See NAB, *Television Financial Report*, 2009 ("2009 NAB Television Financial Report").

⁶⁵⁸ Deana Myers, *What is a Sitcom's Chance of Success*, SNL Kagan, Feb. 9, 2012.

⁶⁵⁹ Nexstar 2010 Form 10-K at 3.

⁶⁶⁰ *National Universe Estimates – Market Breaks*, Nielsen, Jan. 1, 2007 – Jan. 1, 2011; *National Media Related Universe Estimates – Media UE Trends*, Nielsen, Feb. 2011; Nielsen, *TELEVISION AUDIENCE 2010 & 2011*, 2011, at 4 ("Nielsen 2010 & 2011 Television Audience Report"). MVPD households with HD television sets wishing to receive HD service must have HD service included in their subscriptions.

⁶⁶¹ *National Universe Estimates – Market Breaks*, Nielsen, Jan. 1, 2007 – Jan. 1, 2011; *National Media Related Universe Estimates – Media UE Trends*, Nielsen, Feb. 2011; Nielsen 2010 & 2011 Television Audience Report at 4.

⁶⁶² Katy Bachman, *Nielsen Returns 'Live' to the Ratings*, ADWEEK, July 1, 2010, <http://www.adweek.com/news/advertising-branding/nielsen-returns-live-ratings-102743> (visited July 10, 2012). See also The Nielsen Company, *Measurement, Television Measurement, 2011-12 Sweeps Dates*, <http://www.nielsen.com/us/en/measurement/television-measurement.html> (visited July 10, 2012).

⁶⁶³ Katy Bachman, *Nielsen Releases Analysis of LSD Data*, ADWEEK, Aug. 5, 2010, <http://www.adweek.com/news/advertising-branding/nielsen-releases-analysis-lsd-data-115873> (visited July 10, 2012). LSD viewers tended to be younger and higher-income than live viewers generally. As described in Section III.B.4, *infra*, advertisers buy time on broadcast and cable networks on the basis of viewership of commercials.

Table 15: Television Households and Media Usage Estimates (in thousands)⁶⁶⁴

	2006	2007	2008	2009	2010	2011
Total U.S. Households	113,673	114,890	115,760	116,170	117,220	118,590
U.S. TV HHs	111,400	112,800	114,500	114,900	115,900	114,700
Broadcast Only	15,660	14,340	13,600	11,830	11,080	10,970
MVPD	95,740	98,460	100,900	103,070	104,820	103,730
DVR Owner ⁶⁶⁵	N/A	20,970	27,950	36,160	42,540	46,320
HD TV Households ⁶⁶⁶	N/A	15,350	29,010	49,640	68,810	80,290

202. In response to these consumer trends, stations have taken a number of steps to enhance consumers' viewing experience. First, stations are increasingly distributing their programming in HD. At the end of 2010, about 1,036, or almost 87 percent of the 1,196 commercial television stations surveyed by SNL Kagan, broadcast in HD, up from 957 commercial television stations as of August 31, 2009 (or about 79 percent of the 1,010 commercial stations surveyed by SNL Kagan).⁶⁶⁷ Stations have also invested in building new sets and on-air graphics in order to accommodate their HD broadcasts. The deployment of newscasts in HD, at least from station studios, slowed in 2008 and 2009 as broadcast stations tried to hold costs down, but began to accelerate in 2010.⁶⁶⁸ According to a survey conducted by consulting firm Positive Flux, as of 2010, about 63 percent of large market stations (which the firm categorizes as stations in DMAs 1-79) had begun broadcasting fully in HD. On the other hand, 90 percent of stations in small markets (i.e., stations in DMAs 140-210) were not broadcasting fully in HD at that time.⁶⁶⁹

⁶⁶⁴ *National Universe Estimates – Market Breaks*, Nielsen, Jan. 1, 2007 – Jan. 1, 2011; *National Media Related Universe Estimates – Media UE Trends*, Nielsen, Feb. 2011; Nielsen 2010 & 2011 Television Audience Report at 4. Nielsen estimates are as of January 1. We use Nielsen's January 1 estimates for December 31 of the previous year (e.g., we report Nielsen's January 1, 2007 estimate as our 2006 data in this chart).

⁶⁶⁵ Nielsen began tracking DVR penetration in May 2007.

⁶⁶⁶ Nielsen began tracking HD penetration in February 2008. HD data as of February and reported here for the previous year, except for 2011 when the data are based on November 2011 estimates. We report the number of households with an HD television with an HD tuner that receives at least one HD network or station.

⁶⁶⁷ 2011 SNL Kagan TV Stations Databook at 10; Justin Nielson, *TV Stations Multiplatform Analysis: Digital Conversion Creates Opportunities for Multicasting*, SNL Kagan, Jan. 22, 2010. The 1,196 commercial stations surveyed by SNL Kagan in 2010 represents 86 percent of the 1,390 commercial stations counted by the Commission at the end of 2010. The 1,010 commercial stations surveyed by SNL represent 72 percent of the 1,394 commercial stations counted by the Commission at the end of the third quarter of 2009. See 2011 SNL Kagan TV Stations Databook at 7.

⁶⁶⁸ Harry A. Jessell, *Tracking TV's Top Tech Trends of 2010*, TVNEWSCHECK, Dec. 23, 2010, <http://www.tvnewscheck.com/article/2010/12/23/47961/tracking-tvs-top-tech-trends-of-2010?ref=search> (visited Jan. 13, 2012).

⁶⁶⁹ Positive Flux, *Executive Summary*, U.S. TV Stations Infrastructure 2011, April 4, 2011, at 4, <http://positiveflux.com/store#Stations%20Full> (visited Feb. 27, 2012).

203. To respond to viewers' desire to view video programming in more places at more times, broadcast station owners have developed online and mobile media platforms, using their websites as extensions of their local brands, and offered advertisers online promotions coordinated with the on-air advertisements. SNL Kagan estimates that at the end of 2010, 95.4 percent of full-power commercial television stations operated a website and about 88.6 percent streamed video content.⁶⁷⁰ Local news and weather updates were provided by 78.8 percent of broadcast television station websites and 64.5 percent provided local classified advertisements.⁶⁷¹ About 74.1 percent of websites contained links to articles via Facebook, and 68 percent had links via Twitter.⁶⁷² Nearly 40 percent of station websites had mobile app downloads for smartphones.⁶⁷³ A study by the Radio Television Digital News Association ("RTNDA") and Hofstra University found that two-thirds of television stations surveyed distributed news programming online and via mobile devices, as well as over-the-air *i.e.*, they are taking a "three-screen approach."⁶⁷⁴ The larger the news department, the more likely the station was to use the three-screen approach. While most stations with a three-screen approach were broadcast network affiliates, the size of their markets did not appear to impact their decision to utilize this approach.⁶⁷⁵

204. NAB states that the roll-out of mobile DTV will enable viewers to receive live, local broadcast television programming on a mobile basis, on any mobile DTV capable device.⁶⁷⁶ In 2007, eight major broadcast station groups, including Belo Corp.; FOX Television Stations; Gannett Broadcasting; Gray Television; ION Media Networks; NBC & Telemundo Television Stations; Sinclair Broadcast Group; and Tribune Broadcasting Company formed the Open Mobile Video Coalition ("OMVC") to promote the development of industry technical standards, technical requirements, conditions, protocols, reference implementations, test suites, and best practices related to enabling mobile digital television.⁶⁷⁷ The first rollout of live mobile broadcast channels began in 2010.⁶⁷⁸ OMVC worked with the Advanced Television Systems Committee (ATSC) to develop a comprehensive standard and to develop field trials. The first ATSC – Mobile/Handheld (ATSC-M/H), or mobile DTV stations, went live in three OMVC consumer test markets, Washington, D.C., Seattle, and Atlanta.⁶⁷⁹ Participants

⁶⁷⁰ 2011 SNL Kagan TV Stations Databook at 10.

⁶⁷¹ *Id.*

⁶⁷² *Id.* at 11.

⁶⁷³ *Id.*

⁶⁷⁴ RTNDA/Hofstra 2011 Survey, *Part III: Stations Sharing Content, Resources* at 4-5. This study also found that that between 2009 and 2010 stations shifted from primarily using social media as a promotional tool to using it as a tool for conversations with their audiences. Belo notes that the websites of its television stations provide consumers with news and information as well as a variety of other products and services. Belo obtains immediate feedback through online communication with its audience, which allows the Belo to tailor the way in which it delivers news and information to serve the needs of its audience. Belo 2010 Form 10-K at 4.

⁶⁷⁵ RTNDA/Hofstra 2011 Survey, *Part III: Stations Sharing Content, Resources* at 4-5.

⁶⁷⁶ NAB 6/8/11 Comments at 22.

⁶⁷⁷ Open Mobile Video Coalition ("OMVC"), *Open Mobile Video Coalition to Promote Mobile Digital Broadcast TV in U.S.* (press release), Apr. 13, 2007.

⁶⁷⁸ OMVC, *Open Mobile Video Coalition Launching Comprehensive Mobile Digital Television Consumer Showcase During First Quarter of 2010* (press release), Jan. 5, 2010. OMVC opened its membership to equipment manufacturers, application developers, and service providers in 2011. OMVC Comments, ET Docket No. 10-235, at 1 (filed Mar. 18, 2011).

⁶⁷⁹ 2011 SNL Kagan TV Stations Databook at 6.

announced successful trial results in September 2010. Television station groups have formed coalitions to develop applications. At the end of 2010, 60 operating commercial mobile DTV stations broadcast more than 80 live mobile video channels in major markets.⁶⁸⁰ This number increased to 105 live mobile DTV stations at the end of 2011.⁶⁸¹

205. In April 2010, twelve major broadcast groups created a joint venture, Mobile Content Venture (“MCV”), to develop a national mobile content service.⁶⁸² MCV is working with original equipment and device manufacturers to develop devices capable of receiving ATSC-MH, encrypted with standards-based conditional access.⁶⁸³ Under the brand name Dyle Mobile TV, MCV plans to deliver live mobile television from twelve major broadcast television group owners in 2012.⁶⁸⁴ In January 2012, MCV and MetroPCS Communications, Inc. announced that they are partnering to enable MetroPCS customers to watch live, local broadcast television on their mobile phones, making MetroPCS the first wireless service provider to offer Dyle Mobile TV on devices pre-loaded with the Dyle application.⁶⁸⁵ Likewise, the Mobile500 Alliance is a group of 50 member companies, including two public broadcasters, holding licenses to 437 television stations, reaching 94 percent of U.S. households, incorporated in December 2010 to develop Mobile DTV.⁶⁸⁶ The Mobile500 Alliance plan calls for launching 15-20 Mobile DTV channels in markets across the country. The proposed service will provide mobile device users with a mix of free and subscription channels along with video-on-demand content and data services delivered via mobile DTV and through 3G/4G and Wi-Fi networks.⁶⁸⁷

4. Broadcast Television Industry Performance

206. In this section of the Report, we examine broadcast stations’ performance in terms of their audiences, revenue, and profitability as well as their investment and innovation. We also review the interplay between the trends in broadcasters’ sources of revenues and expenses, their strategies for distributing video programming, and other factors influencing broadcasters’ performance. The majority

⁶⁸⁰ Justin Nielson, *TV Stations Multiplatform Analysis ’11 Update: Multicasting Expands Programming Options, Mobile DTV Goes Live*, SNL Kagan, Jan. 28, 2011, at 8. As of 2012, OMVC’s members own and operate more than 900 commercial and noncommercial television stations nationwide, reaching 103 million households in 96 of the top 100 DMAs. OMVC, *About OMVC: Overview*, <http://www.openmobilevideo.com/about%2Domvc/> (visited Jan. 19, 2012).

⁶⁸¹ Justin Nielson, *TV Stations Multiplatform Analysis ’12 Update: New Digital Networks and Mobile TV Channels Expand Content Options*, SNL Kagan, Jan. 31, 2012, at 10.

⁶⁸² The twelve founding broadcast groups of Mobil Content Venture (“MVC”) are O&O groups FOX, NBC (including the Telemundo stations), and ION and nine affiliate groups – Belo Corp., Cox Media Group, E.W. Scripps, Gannett Broadcasting, Hearst, Media General, Meredith Corp., Post-Newsweek Stations, Inc., and Raycom Media – that separately formed Pearl Mobile DTV Company LLC, as a vehicle for their involvement in MCV. MVC, *Twelve Major Broadcast Groups to Form Joint Venture to Develop National Mobile Content Service* (press release), Apr. 13, 2010.

⁶⁸³ MVC, *About MVC*, <http://www.themcv.com/about-mcv> (visited Jan. 13, 2012).

⁶⁸⁴ These group owners include the original twelve founders described above, as well as Bahakel and Univision. See Samsung Electronics Co., *Samsung Mobile to Supply First Live Mobile TV-Enabled Smartphone with Dyle™ Mobile TV* (press release), Jan. 4, 2012.

⁶⁸⁵ Samsung Telecommunications America (Samsung Mobile) will provide the first smartphone with Dyle, and Android device, using ATSC-Mobile technology. *Id.*

⁶⁸⁶ The Mobile 500 Alliance, *About*, <http://www.mobile500alliance.com/aboutus.html> (visited Jan. 13, 2012).

⁶⁸⁷ *Id.*

of broadcast television station licensees are part of parent companies that are involved in other industries. To provide context, in the evaluation of the performance of the broadcast television station industry as a whole, we examine a select group of companies that are only involved in this industry, *i.e.*, “pure play” broadcast television station group owners. As publicly traded pure-play companies, they provide detailed information about their performance in the broadcast industry. Throughout this section, we examine the performances of the five companies used by research firm SNL Kagan in its tracking index for the broadcast television station industry as of December 31, 2010: Belo Corporation, Gray Television Inc., LIN TV Corporation, Nexstar Broadcasting Group, and Sinclair Broadcasting Group.⁶⁸⁸

207. Because of its dependence on advertising revenues, which are highly correlated with overall economic conditions, broadcasting is a highly cyclical industry.⁶⁸⁹ This is in part because marketers often view advertising as a discretionary expense and cut back when the economy declines.⁶⁹⁰ In addition, some categories of advertisers, especially the automobile sector, are responsible for a large proportion of stations’ advertising revenues. Automobile dealers can account for 25 percent of a typical television station’s revenues in good times.⁶⁹¹ In 2009, the automobile sectors’ share of station groups’ overall advertising fell to teen levels in the first quarter.⁶⁹² Station revenues tend to be higher in even years, due to political advertising, which tends to peak immediately before elections.⁶⁹³ In addition, NBC affiliates can charge higher rates during the Olympic Games, which air in even years.⁶⁹⁴

208. Moreover, broadcast television stations face changing technology. Industry participants note that information delivery and programming alternatives such as MVPDs, the Internet, mobile devices, DVRs, and home video entertainment systems have fractionalized television viewing and audiences, expanded the number of outlets for advertisers, and increased competition for the acquisition of programming.⁶⁹⁵ Belo adds that these trends, combined with rising production and programming costs, may impair broadcast stations’ ability to acquire and develop programming.⁶⁹⁶ Industry participants also

⁶⁸⁸ While Sinclair has invested in non-broadcast businesses in order to diversify its risks, these only represent a small portion of its overall operating results. Sinclair 2010 Form 10-K at 11. We exclude Belo in our analysis of profits and investment trends between 2006 and 2010, since Belo operated newspapers as well as television stations until February 2008, when it spun off its newspaper businesses and related assets into a separately traded company, A. H. Belo Corporation. Belo 2010 Form 10-K at 5.

⁶⁸⁹ Vogel at 301-03. “We [are dependent] on advertising revenues, which are seasonal and cyclical” Gray 2010 Form 10-K at 15. *See also* Nexstar 2010 Form 10-K at 12; LIN 2010 Form 10-K at 21; Sinclair 2010 Form 10-K at 23.

⁶⁹⁰ “Advertisers generally reduce their spending during economic downturns” Belo 2010 Form 10-K at 10. *See also* Nexstar 2010 Form 10-K at 18.

⁶⁹¹ Vogel at 309.

⁶⁹² Robin Flynn, *Broadcasters’ Auto Revenues Down 52% in First-Quarter 2009*, SNL Kagan, May 14, 2009. Gray TV states that in 2010 and 2009, approximately 17 percent of its total revenues came from the automotive category. Gray 2010 Form 10-K at 4. Belo, which in 2010 generated 19.8 percent of all of its advertising from the automotive industry, notes that the success of automotive manufacturers and dealers in meeting the economic challenges of the automotive industry will continue to affect the amount of their advertising spending, which in turn will impact Belo’s revenues and operations. Belo 2010 Form 10-K at 10. *See also* LIN 2010 Form 10-K at 21.

⁶⁹³ Nexstar 2010 Form 10-K at 6; Gray 2010 Form 10-K at 8.

⁶⁹⁴ Belo 2010 Form 10-K at 10.

⁶⁹⁵ Belo 2010 Form 10-K at 9; Nexstar 2010 Form 10-K at 19; Gray 2010 Form 10-K at 21; Sinclair 2010 Form 10-K at 30-31; LIN 2010 Form 10-K at 26.

⁶⁹⁶ Belo 2010 Form 10-K at 9.

note that video compression techniques enable MVPDs' and competing television stations to carry more programming (*e.g.*, via multicasting), potentially fractionalizing audiences and advertisers even further.⁶⁹⁷

209. In the short run, most of a station's operating costs are fixed.⁶⁹⁸ Regardless of the amount of advertising inventory it sells, a station must pay for the cost of operating its facilities as well as the costs of programming rights. Therefore, when economic conditions are favorable and a station is able to charge high prices for its commercial inventory, it can be profitable. Conversely, because stations remain dependent on advertising revenues, when they decline, aside from laying off employees and reducing sales commissions, stations usually are unable to reduce expenses, and thus profits can decline sharply. Other sources of stations' revenues include retransmission consent fees, ancillary DTV services, and online advertising.⁶⁹⁹

a. Audiences

210. The industry relies on Nielsen data to measure broadcast television station audiences. Nielsen measures television ratings as a percentage of households with television sets who view a program.⁷⁰⁰ Nielsen estimates that between 2006 and 2010, the total number of U.S. households grew from 113.7 million to 117.2 million. As of 2011, Nielsen estimates that there were 118.6 million total households. Nielsen estimates that the percentage of households with television sets remained steady at 98 percent for thirty years between 1980 and 2010, but then increased to 99 percent in 2010 or about 115.9 million total television households.⁷⁰¹ For 2011, however, Nielsen adjusted its estimates of television penetration downward to 97 percent, or about 114.7 million households.⁷⁰² Nielsen believes the factors that may have contributed to this downward trend include the digital transition, the economic downturn leading rural and lower-income households to conclude that the price of acquiring television sets is too high, and younger, urban consumers who may substitute online viewing for traditional television viewing.⁷⁰³

211. After a steady decline over the last few years, the percentage of television households relying exclusively on over-the-air broadcast service (as opposed to access to broadcast stations via an MVPD) has remained stable since 2010, although the absolute number continued to decline as the number of television households declined. At the end of 2006, about 14.1 percent of all U.S. television households, or 15.66 million households, were broadcast only.⁷⁰⁴ This figure declined to 12.7 percent of all U.S. television households, or 14.34 million households, at the end of 2007. This figure dropped further to 11.9 percent (13.60 million households) at the end of 2008, 10.3 percent (11.83 million

⁶⁹⁷ Nexstar 2010 Form 10-K at 19; Sinclair 2010 Form 10-K at 31.

⁶⁹⁸ Vogel at 304.

⁶⁹⁹ See *infra*, Sec. III.B.4.b.

⁷⁰⁰ Nielsen, *News & Insights: Top Tens & Trends, Television*, <http://www.nielsen.com/us/en/insights/top10s/television.html> (visited Mar. 23, 2012).

⁷⁰¹ Nielsen 2010 & 2011 Television Audience Report at 4-5.

⁷⁰² Nielsen, *Advance/Preliminary 2012 National Universe Estimates* (client communication), May 2, 2011. Nielsen data suggest that television penetration had actually begun to decline in late 2008 or early 2009, but waited for additional information to confirm whether this trend was temporary due to the digital television transition.

⁷⁰³ Other studies indicate that college students are watching video content on computers and laptops in lieu of television sets. See *College-Age TV Watchers Have No Cords to Cut*, eMarketer, Dec. 15, 2011, <http://www.emarketer.com/Article.aspx?id=1008735&R=1008735> (visited Mar. 5, 2012).

⁷⁰⁴ See *supra*, Table 15.

households) at the end of 2009 and again at the end of 2010 to 9.6 percent (11.08 million households), remaining steady at 9.6 percent (10.97 million households) at the end of 2011.⁷⁰⁵

212. While viewing shares of broadcast network affiliates declined between the 2005-2006 and 2010-2011 television seasons, viewing shares of independent and non-commercial broadcast television stations, whose shares are relatively low, fluctuated, but generally held steady. In contrast, the combined viewing shares of advertising-supported cable networks increased during this period. As shown in Table 16, the total day share of viewing for broadcast network affiliates declined from 36 percent in the 2005-2006 television season to 28 percent in the 2010-2011 television season.⁷⁰⁶ During prime time,⁷⁰⁷ their share fell from 40 percent to 33 percent between the 2005-2006 and 2010-2011 television seasons. Independent stations' total share was three percent in both the 2005-2006 season and 2010-2011 seasons. During prime time, their share was two percent in the 2005-2006 season and 2010-2011 seasons. Noncommercial stations' total and prime time shares were two percent in the 2005-2006 and 2010-2011 seasons.⁷⁰⁸

⁷⁰⁵ Nielsen, *National Universe Estimates*, Jan. 1, 2008-Jan. 1, 2012. For the purposes of this Report, we use Nielsen's January 1 estimates for our December 31 estimates of the prior year. For 2006, we use Nielsen's estimates from its 2007 Television Audience Report. See Nielsen, *Television Audience 2007* (2008), at 3.

⁷⁰⁶ Nielsen 2010 & 2011 Television Audience Report at 18. Total day viewing includes viewing Monday-Sunday, 6 a.m.-6 a.m. A share is the percentage of television households watching television who are watching a particular programming source. Due to simultaneous multiple-set viewing, Nielsen reports audience shares that exceed 100 percent when totaled. We have normalized the audience shares by recalculating them on a base (or denominator) equaling 100 percent and adjusting the numerators accordingly.

⁷⁰⁷ Monday-Saturday, 8-11 p.m. Eastern and Pacific Time (7-10 p.m. Central and Mountain Time), Sunday 7-11 p.m. Eastern and Pacific Time (6-10 p.m. Central and Mountain Time).

⁷⁰⁸ Since the last report, Nielsen has altered its methodology of measuring television viewing to include viewing on a time-shifted basis. For the 2009-2010 television season, Nielsen began releasing "C3" ratings data for television viewing, which measures the commercials watched both live and for three days via DVR playback. This is the metric under which much of broadcast and cable network advertising is bought and sold. See Nielsen, "C3" *TV Ratings Show Impact of DVR Ad Viewing*, Oct. 14, 2009, http://blog.nielsen.com/nielsenwire/media_entertainment/c3-tv-ratings-show-impact-of-dvr-ad-viewing/ (visited Mar. 23, 2012). To include VOD, and online viewing in their ratings, networks must include the same set of commercials that appear in the initial live telecast. This measurement does not apply to local ratings.

Table 16: Audience Shares

Total Day	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010	2010-2011
Viewing Source:						
Network Affiliates	36	34	32	30	29	28
Independents	3	2	2	2	2	3
Non-Commercial Networks	2	2	2	1	2	2
Ad Supported Cable	50	49	50	52	52	53
Premium Pay Networks	4	4	4	4	4	4
All Other Cable Networks	5	5	5	5	5	5
All Other Tuning ⁷⁰⁹	1	4	6	6	6	5
Total Day Total:	100	100	100	100	100	100

Prime Time	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010	2010-2011
Viewing Source:						
Network Affiliates	40	39	37	35	34	33
Independents	2	2	2	2	2	2
Non-Commercial Networks	2	2	2	2	2	2
Ad Supported Cable	46	47	48	49	50	51
Premium Pay Networks	4	3	3	4	3	4
All Other Cable Networks	5	4	4	4	4	4
All Other Tuning	1	3	5	5	5	4
Prime Time Total:	100	100	100	100	100	100

213. In addition, stations are attracting audiences on their digital multicast signals. For example, WVUE in New Orleans, after launching Bounce TV on a digital multicast channel in November 2011, earned higher ratings than several basic cable networks and is competing strongly with several broadcast outlets.⁷¹⁰ Stations also are attracting consumers to their websites. In this regard, one report citing a Fall 2010 survey indicates that out of 80 markets measured, television websites attracted more

⁷⁰⁹ “All other tuning” refers to tuning where the source was not encoded and Nielsen was not able to measure what was watched. Bill Gorman, *Where Did the Primetime Broadcast TV Audiences Go?*, TV by the Numbers, April 12, 2010, <http://tvbythenumbers.zap2it.com/2010/04/12/where-did-the-primetime-broadcast-tv-audience-go/47976/> (visited July 10, 2012).

⁷¹⁰ *Bounce TV Powers Ratings on WVUE*, TVNEWSCHECK, Jan. 13, 2012, <http://www.tvnewscheck.com/article/2012/01/13/56717/bounce-tv-powers-ratings-on-wvue> (visited Jan. 13, 2012). In December 2011, WVUE reported that its Bounce TV signal earned a 0.4 total day local market rating, tying CNN’s Headline News (0.4) and outranking cable networks TV One (0.2), Oxygen (0.2), BBC America (0.2) and CNBC (0.1).

visitors than newspaper websites in 22 markets (or 27 percent), while the major daily newspapers' websites led in the amount of traffic attracted in the remaining markets.⁷¹¹

b. Revenue

214. This section of the Report describes broadcast television stations revenue from advertising during the relevant period. It then considers other sources of broadcast television station revenue during the period, including network compensation, retransmission consent fees, revenues from non-broadcast ancillary services, online revenues, and other revenues.

215. Overall, broadcast television station revenues began dropping after 2000, when they reached a high of \$26.30 billion.⁷¹² By contrast, in 2006, broadcast stations earned \$24.62 billion in revenues. In 2007, industry revenues declined by seven percent to \$22.84 billion; in 2008, they declined by one percent to \$22.60 billion. In 2009, industry revenues dropped by 20 percent, to \$18.13 billion. In 2010, industry revenues showed some recovery and, rose by 23 percent to \$22.22 billion. Thus, while the broadcast television station industry lost about \$4.5 billion between 2008 and 2009, it regained about \$4.1 billion between 2009 and 2010.

Table 17: Broadcast Television Station Industry Revenue Trends (in millions)⁷¹³

Revenue Sources	2006	2007	2008	2009	2010
Advertising	\$23,574.7	\$21,575.5	\$21,062.1	\$16,337.2	\$19,943.7
Network Compensation	\$246.7	\$170.0	\$133.6	\$81.6	\$48.2
Retransmission Consent	\$214.6	\$313.5	\$500.1	\$757.8	\$931.8
Online	\$586.9	\$775.9	\$903.6	\$948.8	\$1,086.6
Total	\$24,623	\$22,835	\$22,599	\$18,125	\$22,010
Percentage Change		7%	1%	20%	21%

216. *Advertising Revenue.* On-air advertising is by far the most significant source of revenue for television stations, although its share of overall broadcast television station industry revenues is declining. It represented about 96 percent of broadcast television station industry net revenues in 2006 and 91 percent of industry revenues in 2010.⁷¹⁴ Advertising sold by broadcast television stations falls into two categories: local spot and national spot.

⁷¹¹ Borrell Associates Inc., *Benchmarking TV's Local Online Sales*, February 2011, at 19, http://www.tvb.org/media/file/Borrell_2010_TV_Internet_Growth_Feb2011.pdf ("Borrell Study"). Citing data from the Media Audit, Borrell measured the number of visitors who logged onto a major newspaper website during a month within the Fall of 2010 and compared it with the number of visitors who had logged onto individual television stations' sites.

⁷¹² Tony Lenoir, *Negative Growth Outlook for TV Station Revenue in '11 but Double-Digit Gains Seen in '12*, SNL Kagan, Oct. 3, 2011. As noted above, revenues tend to be higher in even years.

⁷¹³ *Id.*

⁷¹⁴ Net revenues equal all advertising, online revenues, and network compensation received by stations, plus retransmission consent revenues received from MVPDs, minus retransmission consent revenues network affiliates pay networks.

217. Local advertisers purchase local spot advertising to reach viewers within a station's market. They may work with local advertising agencies or directly with a station's sales staff.⁷¹⁵ Local advertising is more sensitive to the economic climate of a station's geographic market. For example, even if a station is attracting large audiences, if the local economy is suffering, local businesses may choose not to advertise or to limit their advertising.⁷¹⁶ Based on our analysis of SNL Kagan data, local advertising represented about 53.3 percent or \$12.2 billion of broadcast television station industry revenues in 2007, and 50.7 percent or \$11.3 billion of industry revenues in 2010.⁷¹⁷ NAB estimates that, in 2007, on average, about 61.6 percent of a station's gross advertising revenues were from local advertising,⁷¹⁸ compared with 56.1 percent in 2010.⁷¹⁹ The percentages may vary depending on the station and the DMA a station serves. Local advertisers may choose to advertise using local broadcast television or radio stations, newspapers, regional cable networks, geographically-targeted websites, or other local media. Between 2007 and 2010, broadcast stations' share of local advertising revenue increased from 12.7 percent to 15.8 percent. During that same period, however, total advertising spending across all local media dropped from \$96.2 billion nationwide to \$71.3 billion, and broadcast television stations' collective local advertising revenues declined from \$12.2 billion to \$11.3 billion.

⁷¹⁵ Nexstar 2010 Form 10-K at 28.

⁷¹⁶ Smaller local businesses generally feel a recession's impact more immediately than a large national business, and would be more likely to curtail local television advertising spending. Vogel at 303.

⁷¹⁷ Some broadcast station groups cite higher percentages. Nexstar states that local advertising, excluding political, represented 52.9 percent of its stations' gross revenues (that is, revenues before subtracting agency commissions) in 2010, 60.6 percent in 2009, and 57.0 percent in 2008. Nexstar 2010 Form 10-K at 30. Gray's percentages were nearly identical: 52.9 percent in 2010, 63.2 percent in 2009, and 57.0 percent in 2008. Gray 2010 Form 10-K at 33. LIN's percentages were: 55.1 percent in 2010, 63.2 percent in 2009, and 61.6 percent in 2008. LIN 2010 Form 10-K at 41-42.

⁷¹⁸ NAB, Television Financial Report, 2008, at 2 ("*2008 NAB Television Financial Report*").

⁷¹⁹ *2011 NAB Television Financial Report* at iv. Nexstar states that national advertising represented 18.8 percent of its stations' gross revenues (that is, revenues before subtracting agency commissions) in 2010, 21.2 percent in 2009, and 22.0 percent in 2008. Nexstar 2010 Form 10-K at 30. Gray TV's percentages were nearly identical: 16.7 percent in 2010, 19.9 percent in 2009, and 20.9 percent in 2008. Gray 2010 Form 10-K at 33. LIN's percentages were: 30.6 percent in 2010, 29.9 percent in 2009, and 30.6 percent in 2008. LIN 2010 Form 10-K at 41-42.

Table 18: Local Advertising Revenue by Sector (in millions)⁷²⁰

Revenue	2006	2007	2008	2009	2010
Broadcast TV Stations	\$12,944	\$12,167	\$11,936	\$9,310	\$11,265
Cable TV	\$4,293	\$4,213	\$4,258	\$3,464	\$4,336
Radio	\$15,478	\$15,133	\$13,607	\$10,842	\$11,300
Internet	\$5,871	\$7,576	\$9,023	\$9,233	\$11,146
Daily Newspaper	\$39,124	\$35,204	\$28,744	\$20,397	\$18,574
Regional Sports Networks	\$628	\$718	\$731	\$685	\$759
Mobile	\$0	\$13	\$42	\$81	\$184
Telco	\$1	\$10	\$52	\$60	\$105
Other ⁷²¹	\$21,379	\$21,131	\$19,187	\$15,210	\$13,612
Total Local	\$99,718	\$96,165	\$87,580	\$69,282	\$71,281

218. National advertising time is sold through national sales representative firms (reps) working with advertising agencies, whose clients typically include automobile manufacturers and dealer groups, telecommunications companies, fast food franchisers, and national retailers.⁷²² In exchange for representing the stations, the rep firms typically earn commissions of about seven to eight percent of net billings, defined as dollars paid for advertising minus ad agency commissions.⁷²³ National advertising is generally bought through advertising agencies. The advertising agencies generally receive commissions of 15 percent of the gross advertising rates paid for advertising they place.⁷²⁴ National spot advertising represented about 41.2 percent of total broadcast television station industry revenues, or \$9.4 billion, in 2007, and about 39.1 percent, or \$8.7 billion, of industry revenues in 2010.⁷²⁵ In its television financial reports, NAB estimates that as of 2007, about 36.0 percent of an average station's revenues come from national and regional advertising,⁷²⁶ compared with about 32.0 percent in 2010.⁷²⁷ National advertisers may choose to advertise on broadcast stations but are more likely to utilize arrangements with broadcast networks, cable networks, television syndicators, or DBS. National sales tend to represent a larger proportion of revenues for stations in larger markets.⁷²⁸ Broadcast television stations' share of the

⁷²⁰ SNL Kagan, *Advertising Forecasts: U.S. Market Trends & Data for All Major Media*, 2011 Edition, at 23 ("2011 SNL Kagan Advertising Forecasts").

⁷²¹ "Other" includes the combined advertising revenue totals for the yellow pages, outdoor/out of home, and weekly newspapers for each year.

⁷²² Nexstar 2010 Form 10-K at 6.

⁷²³ Vogel at 312-13, n. 7. Gross advertising revenues refer to the total amount spent by advertisers, while net revenues refer to amount of advertising revenues received by stations.

⁷²⁴ Nexstar 2010 Form 10-K at 28.

⁷²⁵ Tony Lenoir, *Negative Growth Outlook for TV Station Revenue in '11 but Double-Digit Gains Seen in '12*, SNL Kagan, Oct. 3, 2011.

⁷²⁶ 2008 NAB Television Financial Report at 2.

⁷²⁷ 2011 NAB Television Financial Report at 2.

⁷²⁸ Vogel at 312-13, n. 7. Sinclair states that it has focused on decreasing its dependence on national advertising, as overall spending by national advertisers has declined, and other outlets have merged. Sinclair 2010 Form 10-K at 38.

national advertising market dropped from 6.8 percent in 2006 to 5.9 percent in 2007. Between 2007 and 2010, broadcast television stations' share of national advertising remained relatively flat, increasing from 5.9 percent to 6.1 percent. Once again, the figures declined during this period from \$9.4 billion (out of \$154.6 billion nationwide) in 2007 to \$8.7 billion (out of \$141.4 billion nationwide) in 2010. In 2006 and 2007, broadcast television networks outranked cable networks and VOD in their collective share of national advertising revenue. In 2008, cable networks and VOD surpassed broadcast television networks in their share. Broadcast television network advertising increased between 2006 and 2008, from \$19.4 billion to \$19.7 billion, fell in 2009 to \$18.1 billion, and rose again in 2010 to \$19.1 billion.

Table 19: National Advertising Revenue by Sector (in millions)⁷²⁹

Revenue	2006	2007	2008	2009	2010
Broadcast TV Stations	\$10,631	\$9,408	\$9,126	\$7,027	\$8,678
Broadcast Networks	\$19,386	\$19,495	\$19,686	\$18,127	\$19,128
Cable & VOD Networks	\$17,728	\$19,228	\$20,629	\$20,452	\$22,372
DBS	\$524	\$691	\$901	\$901	\$842
Internet	\$11,008	\$13,371	\$14,081	\$13,302	\$15,747
Radio	\$3,553	\$3,343	\$2,930	\$2,361	\$2,881
Satellite Radio	\$89	\$98	\$82	\$61	\$76
Radio Network	\$1,112	\$1,153	\$1,150	\$1,048	\$1,102
Daily Newspaper	\$7,495	\$7,005	\$5,996	\$4,424	\$4,221
Barter Syndication	\$2,902	\$2,823	\$3,015	\$2,878	\$2,819
Mobile	\$0	\$238	\$486	\$727	\$1,347
Other ⁷³⁰	\$81,281	\$83,640	\$76,479	\$61,706	\$62,187
National Total	\$155,709	\$160,493	\$154,561	\$133,014	\$141,400

219. Political advertising can be both local and national.⁷³¹ For example, a mayoral candidate may only need to purchase advertising in one DMA in order to reach potential voters, in which case the advertising is local.⁷³² Candidates running for statewide offices, however, or presidential candidates seeking to reach audiences in swing states, will frequently purchase time within multiple DMAs, in which case a national rep firm may purchase time on behalf of the candidates. To get a sense of the trends of political advertising, we examine the historical political revenues of four pure play companies: Gray, LIN, Nexstar, and Sinclair. In 2006, these stations groups collectively earned \$211 million in political advertising, representing nine percent of their net revenues.⁷³³ In 2008, this figure climbed to \$226 million, again representing nine percent of their net revenues. In 2010, it rose to \$244 million, representing ten percent of their revenues. SNL Kagan estimates that, in 2010, broadcast television

⁷²⁹ 2011 SNL Kagan Advertising Forecasts at 23.

⁷³⁰ "Other" includes the combined advertising revenue totals for direct mail, magazines, outdoor/out of home, business publications, yellow pages and farm publications for each year.

⁷³¹ See, e.g., Sinclair 2010 Form 10-K at 42.

⁷³² Kate Brady, *Political Ads: Final Tips From the Rep*, TVNEWSCHECK, Oct. 1, 2010, <http://www.tvnewscheck.com/article/2010/10/01/45773/political-ads-final-tips-from-the-rep> (visited Mar. 3, 2012).

⁷³³ Tony Lenoir, *Broadcast TV Guide to the 2012 Elections*, SNL Kagan, Aug. 24, 2011, at 14.

stations received 75 percent of political advertising revenues.⁷³⁴ NAB estimates that for an average station, political advertising represented 9.0 percent of revenues in 2006,⁷³⁵ 10.1 percent of revenues in 2008,⁷³⁶ and 11.9 percent of its revenues in 2010.⁷³⁷

220. The ability of advertisers to switch among media depends on how they plan their media budgets. Broadcast television media can be purchased in several ways: by flight (*e.g.*, for a one-week period, such as for movie openings or sales), monthly, quarterly, or annually, *i.e.*, the entire media plan at once.⁷³⁸ Annual buys give media buyers leverage to negotiate the best rates. The closer the media buyer is to the beginning of the schedule when placing the buy, the higher the rates will likely be. If the media is sold out, the rates may need to be high enough to bump another advertiser's spots. At times, it may be so close to the flight that the station does not have any space available to sell. On the other hand, buyers who plan annually run the risk of unexpected scheduling changes. For example, a buyer may have purchased advertising time on an NBC affiliate on a Thursday evening, but reached fewer people than expected when a program turned out to be less popular than expected, or a competing network schedules a more popular program during the same time period.

221. *Network Compensation.* Compensation from broadcast networks previously was the second largest revenue stream for network-affiliated broadcast stations. Traditionally networks have compensated affiliates with cash payments closely related to affiliates' local market ratings performances. Since the late 1990s, however, broadcast networks began to phase out these payments. SNL Kagan estimates that between 2006 and 2010, total network affiliate compensation dropped from about \$246.7 million, or 1.0 percent of the total \$24.6 billion in broadcast television station industry revenues, to \$48.2 million, or 0.2 percent of the total \$22.2 billion in industry revenues.⁷³⁹ Belo and Sinclair note that as a condition of renewing their network affiliation agreements, they are required to make cash payments to the networks.⁷⁴⁰

222. *Retransmission Consent Fees.* Retransmission consent fees have replaced network compensation as the second largest source of revenue for broadcast television stations.⁷⁴¹ Like cable networks, broadcast stations are negotiating per subscriber fees from MVPDs in exchange for carriage rights. According to NAB, broadcasters typically offer a menu of options in return for carriage of their stations, among them cash payment, MVPD promotion of the station, purchase of additional advertising

⁷³⁴ *Id.* at 10.

⁷³⁵ NAB, *Television Financial Report*, 2007, at 2.

⁷³⁶ 2009 NAB *Television Financial Report* at 2.

⁷³⁷ 2011 NAB *Television Financial Report* at 2.

⁷³⁸ Kerri Byrd, *What to Know About an Annual Media Buy*, Evok Advertising, Dec. 21, 2010, <http://www.evokad.com/2010/12/what-to-know-about-an-annual-media-buy/> (visited Dec. 2, 2011).

⁷³⁹ SNL Kagan, *TV Station Deals Databook*, 2009 Edition, at 9; Tony Lenoir, *A Look at the Evolution of the Networks/Affiliates Relationship*, SNL Kagan, Jan. 3, 2011, at 9-10.

⁷⁴⁰ Belo states that in 2010 it renewed its network agreements with ABC in four DMAs and CBS in three DMAs. Belo 2010 Form 10-K at 5. Sinclair specifies that it pays an annual license fee to ABC and a programming fee to FOX. Sinclair 2010 Form 10-K at 26. Likewise, Nexstar, referring to affiliation agreements with ABC and FOX, notes that as its network affiliation agreements come up for renewal, it may be required to make cash payments to the networks or accept other material modifications of existing affiliation agreements. Nexstar 2010 Form 10-K at 14. See also LIN 2010 Form 10-K at 27. As of 2011, NAB began reporting network programming as an expense rather than a revenue source. See 2011 NAB *Television Financial Report* at ii.

⁷⁴¹ 2011 SNL Kagan *TV Stations Databook* at 5.

by the MVPD, payment by the MVPD for video-on-demand rights, and carriage of other commonly owned stations, other program services, or digital multicast streams.⁷⁴² Since the last report, retransmission consent fees have increased in dollar terms and as a share of industry revenues. Based on Commission staff analysis of data from SNL Kagan, retransmission consent fees represented about 0.9 percent, or \$214.6 million in broadcast television station industry revenues in 2006, and about 4.2 percent, or \$931.8 million in 2010.⁷⁴³

223. NAB estimates that in 2009 affiliates of the four major broadcast networks received on average about \$0.14 per subscriber per month in retransmission consent fees, which it contends are less than fees earned by cable networks.⁷⁴⁴ Broadcast television networks have asserted to their affiliates that they, as owners or licensees of programming that the affiliates broadcast and offer for retransmission, are entitled to a portion of the compensation under the retransmission consent agreements. Networks have proposed to include a requirement to share retransmission consent fees in their network affiliation agreements.⁷⁴⁵

224. In recent years, the broadcast networks have streamed their content on the Internet and other distribution platforms, and in some cases, in close proximity to network programming broadcast on local television stations.⁷⁴⁶ In addition, in January 2010 FOX reportedly reached an agreement with Time Warner Cable to provide a direct feed of its network programming for up to one year in the event of a retransmission consent standoff with an affiliate group. Concerns about the potential of Comcast to bypass NBC affiliates with a direct network feed to Comcast systems led the Commission to impose an “affiliate integrity” condition when it approved the Comcast-NBC Universal transaction.⁷⁴⁷ The provision

⁷⁴² NAB 7/8/11 Reply Comments, Attachment B at 38.

⁷⁴³ Tony Lenoir, *Negative Growth Outlook for TV Station Revenue in '11 but Double-Digit Gains Seen in '12*, SNL Kagan, Oct. 3, 2011. *See also supra*, Table 17. For Nexstar, retransmission consent revenues (consisting of a per-subscriber-based compensatory fee and excluding advertising revenue) represented 4.8 percent of net revenues in 2008, 9.3 percent in 2009, and 9.1 percent in 2010. Nexstar 2010 Form 10-K at 30. Nexstar explains that the increases are due to renegotiated contracts providing for higher rates per subscriber, as well as the addition of another television station in 2009. Similarly, Gray’s retransmission consent revenues increased due to improved terms of renegotiated contracts, representing 0.9 percent of revenues in 2008, 5.8 percent in 2009, and 5.4 percent in 2010. Gray 2010 Form 10-K at 33. Neither LIN nor Sinclair break out retransmission consent revenues separately. *See* 2010 Form LIN 10-K at 41-42; Sinclair 2010 Form 10-K at 42.

⁷⁴⁴ NAB 7/8/11 Reply Comments, Attachment A at 43-44. Nexstar CEO Perry Sook has noted that MVPDs may be less willing to pay for broadcast stations than cable networks, because they are unable to sell advertising time during broadcast network programming, while cable networks give MVPDs a fixed amount of inventory to sell. Robin Flynn, *Network, Affiliates Defend Retrans Stance at SNL Kagan Event*, SNL Kagan, June 22, 2011, at 10.

⁷⁴⁵ According to CBS CEO Leslie Moonves, “[a]s each new affiliate agreement comes up, there will be a sharing of [retransmission consent] fees; it’s in the very early stages. There’s a realization that . . . [affiliates are] getting [retransmission consent fees] because of [a] network providing NFL, 60 Minutes, and Letterman.” Claire Atkinson, *CBS Retrans Fees Expected to Double in 2010*, BROADCASTING & CABLE, Nov. 5, 2009, http://www.broadcastingcable.com/article/383011-CBS_Retrans_Fees_Expected_to_Double_in_2010.php (visited Jan. 20, 2012). In the Fall of 2011, Moonves predicted that the combined O&O retransmission consent revenues and fees the network will collect from affiliates will represent a total of \$600 million to \$700 million “over the next three to five years” CBS Corp., *2Q Earnings Call*, Corrected Transcript, Aug. 2, 2011, at 11-12.

⁷⁴⁶ LIN 2010 Form 10-K at 27; Belo 2010 Form 10-K at 10. *See also infra*, Sec. V.A.

⁷⁴⁷ The Commission made this determination based on its belief that “once Comcast obtains a controlling interest in NBCU, it will have an even greater incentive and ability to bypass the NBC affiliates to advantage its cable systems in retransmission consent disputes. Moreover, since the *News Corp-Hughes Order*, the retransmission consent process has become more contentious. In this heated negotiating atmosphere, we believe that Comcast, as the (continued....)

bans NBC from sending a direct feed of its network to Comcast cable systems until 2021 (ten years from the order's adoption) or until one of NBC's major competitors – ABC, CBS, or FOX – opts to authorize a same-day linear feed to one or more major cable system operators, whichever is later.⁷⁴⁸

225. Station groups vertically integrated with broadcast networks, such as CBS and ABC, and those affiliated with cable networks, may have more leverage than other station owners, since they can integrate retransmission consent negotiations with carriage of their networks. Group owners may be able to earn more than individual station owners because they have more experience and leverage with MVPDs.⁷⁴⁹ Stations in smaller markets may not earn as much in total dollars from retransmission consent fees because there are not as many subscribers, but they may earn the same per-subscriber fees as stations in larger markets.⁷⁵⁰

226. *Ancillary DTV Revenues.* DTV allows broadcasters to use part of their licensed spectrum to provide non-broadcast “ancillary or supplementary” services (e.g., subscription video, data transfer, or audio signals), provided they pay the Commission a five percent fee of gross revenues received from such services.⁷⁵¹ Compared with other revenue sources, revenues from ancillary services are nascent, but growing. Commercial and noncommercial educational DTV broadcast station licensees report annually whether they have provided ancillary services at any time during the 12 month period preceding September 30. Licensees that earn revenues from such services are required to pay fees to the Commission. As of the 2011, gross revenues from feeable services are modest.⁷⁵² Yearly numbers are as follows:

(Continued from previous page) _____

nation's largest cable operator with control of a broadcast network, would have an increased incentive to engage in affiliate bypass.” *Comcast-NBCU Order*, 26 FCC Rcd at 4311, ¶ 174.

⁷⁴⁸ The Commission decided to sunset this condition given that “the video marketplace is changing.” “[I]n light of [this] evolution,” the Commission was “reluctant to impose indefinite terms for [a] condition[] based upon the contractual provisions with fixed terms negotiated by the parties.” *Id.* at 4312, ¶ 178.

⁷⁴⁹ Nexstar Broadcasting President and CEO Perry Sook states that “size matters . . . when dealing with networks and MVPD[s] . . .” Nexstar Broadcasting Group, Inc., *4Q Earnings Call*, Transcript, Mar. 10, 2011, <http://seekingalpha.com/article/257622-nexstar-broadcasting-group-s-ceo-discusses-q4-2010-results-earnings-call-transcript?part=qanda> (visited Jan. 12, 2012).

⁷⁵⁰ Titan Broadcast Management, *Titan Marches to a Different Drummer*, Aug. 11, 2010, <http://www.titanbroadcast.com/story/12962571/titan-marches-to-a-different-drummer> (visited Jan. 12, 2012).

⁷⁵¹ *Filing of FCC Annual DTV Ancillary/ Supplementary Services Report*, Public Notice, 18 FCC Rcd 23972, 23973 (MB 2003). *See also* 47 U.S.C. § 336(a)(2), (e).

⁷⁵² FCC Form 317. Fees are reported in the year received, although they may be for services rendered in past years, in future years, or both. This occurs very few times and involves small sums of money. The 2006 numbers are higher than those provided in the *13th Report* because of late filers. Starting in 2009, some licensees reported that they provided some ancillary and supplemental services that generate fees and some services that do not generate fees. As broadcast stations decide to use DTV for broadcasting rather than ancillary services, e.g., to launch a new network such as Bounce TV, fluctuations in the reported figures for non-broadcast ancillary services may occur.

Table 20: Ancillary DTV Revenues

Predominant Year	Number of DTV Licensees That Reported Feeable Services	Gross Revenues From Feeable Services	Fees Collect From Feeable Services
1999	0	\$0	\$0
2000	4	\$570,000	\$28,500
2001	2	\$390,000	\$19,500
2002	6	\$148,280	\$7,414
2003	3	\$45,000	\$2,250
2004	10	\$78,625	\$3,931
2005	11	\$176,777	\$8,839
2006	38	\$798,153	\$39,888
2007	35	\$417,649	\$20,868
2008	54	\$337,857	\$16,897
2009	57	\$2,044,454	\$102,223
2010	99	\$7,125,374	\$356,268
2011	85	\$841,177	\$42,059

227. *Online Revenues.* In addition to selling advertising time over-the-air, stations sell advertising on their websites. While estimates of the percentage of revenue broadcast television stations earn from online advertising vary, they all indicate that such revenue has grown since the last report. SNL Kagan estimates that online revenues represented about \$586.9 million, or 2.4 percent of \$24.6 billion in the total broadcast station industry revenues in 2006, and 4.9 percent, or \$1.1 billion of the \$22.0 billion in total broadcast television station industry revenues in 2010.⁷⁵³ Other sources have slightly higher or lower estimates. For example, Borrell estimates that, based on its survey of a select number of television stations, online revenues were six percent of total broadcast television station revenues in 2010, compared with 3.5 percent in 2007.⁷⁵⁴ In its TV Financial Reports, NAB estimates that in 2010, online advertising represented about \$353,145, or 0.2 percent of an average station's \$16.175 million in net revenues,⁷⁵⁵ compared with \$226,892, or 0.3 percent of an average station's \$16.148 million in net revenues in 2007.⁷⁵⁶

228. Borrell also estimated the total amount of money advertisers spent on local online advertising nationwide, and the share represented by broadcast television station websites. Borrell considers broadcast television stations sites to primarily compete with the websites of other local media, such as newspapers' websites as well as online sites unaffiliated with a media entity, *e.g.*, Craigslist and

⁷⁵³ Tony Lenoir, *Negative Growth Outlook for TV Station Revenue in '11 but Double-Digit Gains Seen in '12*, SNL Kagan, Oct. 3, 2011. According to NAB, in 2010, Internet revenues represented 2.2 percent of an average station's net revenues. *2011 NAB Television Financial Report* at 2.

⁷⁵⁴ Borrell Study at 6.

⁷⁵⁵ *2011 NAB Television Financial Report* at 2. NAB calculates online revenue as a percentage of a broadcast station's net revenue (*i.e.*, the amount spent by advertisers on a station (gross advertising revenues) – advertising agency commission – national and regional sales rep firm commission = all other sources of station revenue).

⁷⁵⁶ *2008 NAB Television Financial Report* at 2.

Patch.⁷⁵⁷ According to Borrell, between 2009 and 2010, broadcast television stations increased their market share of local online advertising. Borrell estimates that television broadcasters accounted for 10.4 percent, or about \$1.4 billion of the \$13.5 billion spent on local online advertising in 2010, up from 9.3 percent, or \$1.2 billion in 2009.⁷⁵⁸ It states that the average station's market share depended on market size, with the stations in the smallest markets averaging 2.2 percent of local online advertising and larger-market stations averaging 0.5 percent of local online advertising, due to heavy competition from stand-alone sites and other local media. Borrell posits that a performance gulf has emerged between stations that have invested heavily in their websites and those that have not.⁷⁵⁹ One percent of television station websites surveyed made more than \$5 million in 2010, while 52 percent of station sites surveyed by Borrell made less than \$500,000.

229. *Other Revenues.* Advertising revenues from mobile services and applications are still nascent for most stations. NAB estimates that mobile revenues represented \$7,089, less than 0.05 percent of an average station's total \$16,175,476 in net revenues in 2010.⁷⁶⁰ In Borrell's survey, few stations reported any advertising revenue from mobile applications in 2010, and of those that did, mobile advertising represented on average 2.5 percent of total revenues, with the typical station getting between \$20,000 and \$50,000.⁷⁶¹ NAB estimates that in 2010 advertising revenues from multicast channels represented about 0.4 percent of an average station's total net revenues.⁷⁶²

c. Profitability

230. To assess profitability trends in the broadcast television station sector between 2006 and 2010, we consider data on a station-level basis, using benchmarks in NAB's Television Financial Reports and, on a company-level basis, examining companies that have been pure-play broadcast television companies throughout the relevant period. When entering the broadcast television station industry, companies often buy or sell individual stations or the portfolio of assets of a broadcast television station group owner based on a multiple of profitability.⁷⁶³

⁷⁵⁷ Borrell Study at 14.

⁷⁵⁸ *Id.* at 6, 8. For its calculations, Borrell relied on two databases: one that estimated online advertising spending by more than 15 million U.S. and Canadian companies, and one that estimates online advertising receipts by more than 4,400 U.S. and Canadian online media companies that participate in its surveys. *Id.* at 32.

⁷⁵⁹ *Id.* at 6. For example, LIN has invested heavily in websites, mobile applications, and other digital technologies. It states that since the launch of its digital businesses in 2007, digital revenues, including retransmission consent revenues, have grown nearly 309 percent and as of 2010 comprised 15 percent of its total net revenues. LIN 2010 Form 10-K at 8. In addition to paying LIN retransmission consent revenues for carriage of its broadcast signals, MVPDs pay LIN for online and advertising media services through its subsidiary online Red McCombs Media, LP. *See id.*

⁷⁶⁰ 2011 NAB Television Financial Report at 2. NAB defines mobile revenue as any revenue derived directly from streaming to mobile devices. *Id.* at 164.

⁷⁶¹ Borrell Study at 22. Borrell defines mobile advertising as advertising derived from mobile applications. *Id.* at 5-7. Borrell states that "[b]y 2015, most forecasters agree, the majority of all 'online' advertising will become untethered from desktops and delivered to mobile devices such as iPads, smart phones, and GPS-enabled laptops." *Id.* at 7.

⁷⁶² 2011 NAB Television Financial Report at 2. To calculate total net revenues, NAB subtracts agency and rep firm commission for gross advertising revenues, and adds all other forms of revenue.

⁷⁶³ Vogel at 307-10. *See also* Price Colman, *For Sale: Young Broadcasting for Just \$350M*, TVNEWSCHECK, June 30, 2011, <http://www.tvnewscheck.com/article/2011/06/30/52237/for-sale-young-broadcasting-for-just-350m> (visited Mar. 25, 2012).

Table 21: Broadcast Television Station Industry Profitability⁷⁶⁴**a. Net Operating Revenue (in thousands)**

	2006	2007	2008	2009	2010
Nexstar	\$265,169	\$266,801	\$284,919	\$251,979	\$313,350
Gray	\$332,137	\$304,288	\$327,176	\$270,374	\$346,058
LIN	\$420,468	\$395,910	\$399,814	\$339,474	\$420,047
Sinclair	\$706,222	\$718,100	\$754,474	\$656,477	\$767,186
Average NAB Station	\$16,850	\$16,147	\$15,837	\$13,454	\$16,175

b. (Recurring) EBITDA (in thousands)

	2006	2007	2008	2009	2010
Nexstar	\$88,710	\$84,443	\$95,741	\$59,958	\$112,656
Gray	\$125,538	\$92,511	\$113,507	\$68,623	\$136,160
LIN	\$133,348	\$120,297	\$122,619	\$81,091	\$141,806
Sinclair	\$244,853	\$221,083	\$232,905	\$199,550	\$295,696
Average NAB Station	\$6,290	\$5,258	\$4,704	\$3,072	\$5,498

c. Net Income before Taxes (in thousands)⁷⁶⁵

	2006	2007	2008	2009	2010
Nexstar	(\$5,173)	(\$13,966)	(\$83,375)	(\$12,414)	\$4,926
Gray	\$21,534	(\$35,694)	(\$313,027)	(\$34,307)	\$36,610
LIN	(\$300,748)	\$46,755	(\$1,052,552)	\$23,400	\$56,724
Sinclair	\$55,091	\$39,215	(\$369,884)	(\$170,460)	\$113,851
Average NAB Station	\$4,210	\$3,321	\$2,686	\$1,126	\$3,863

231. We use NAB average station financial statistics as an indicator of profitability: station EBITDA (which NAB calls “cash flow”) and station pre-tax profits. NAB calculates an average broadcast television station’s cash flow by subtracting station operational expenses (expenses from all of the station’s departments: engineering, programming, production, news, sales, advertising and promotions, and general administrative expenses) from total net revenues, which are gross advertising revenues minus agency commissions and national and regional rep firm commissions. Similarly, we can examine the recurring EBITDA⁷⁶⁶ of a select group of broadcast television station group owners (Nexstar,

⁷⁶⁴ FCC staff estimates based on data from NAB Financial Reports and SNL Kagan.

⁷⁶⁵ Each of the station groups incurred non-cash expenses by writing down the values of, among other assets, their broadcast licenses, including Nexstar in 2008 and 2009, Gray in 2008, LIN in 2008 and 2009, and Sinclair in 2008, 2009, and 2010.

⁷⁶⁶ Recurring earnings before interest, taxes, depreciation and amortization. SNL Kagan, Nexstar EBITDA and FCF (Free Cash Flow) Analysis. Free cash flow is a measure of financial performance calculated as operating cash flow minus capital expenditures. It represents the cash that a company is able to generate after laying out the money required to maintain or expand its asset base. Investopedia, *Dictionary: Free Cash Flow*, <http://www.investopedia.com/terms/f/freecashflow.asp#axzz1qAPFGRjM> (visited Mar. 25, 2012).

Gray, LIN, and Sinclair) that have been pure-play broadcast television station companies between 2006 and 2010. Recurring EBITDA excludes earnings or losses from nonrecurring events, such as the gain or sale of assets, early retirement of debt, restructuring, or asset write-downs, and facilitates consideration prior to widely varying debt-financing arrangements.⁷⁶⁷ For the purpose of this Report, we believe recurring EBITDA and EBITDA are better indicators of profitability within the broadcast television industry than pre-tax income, which incorporates revenues and expenses from extraordinary events, as well as interest payments on debt.

232. To better compare trends among a single station and select station groups, we can calculate the profit margins, *i.e.*, EBITDA (or recurring EBITDA) divided by net operating revenues, (*i.e.*, revenues earned by the station or station group, minus commissions from advertising agencies and rep firms). Generally, the broadcast station groups performed in the range of the NAB figures. As measured by recurring EBITDA/net operating revenues, profit margins in 2007 ranged from 30.1 percent for Gray, to 31.7 percent for Nexstar, slightly lower than NAB's average of 32.6 percent. In 2008, the station groups' profit margins were higher than NAB's average of 29.7 percent, ranging from 30.7 percent for LIN, to 34.7 percent for Nexstar. In 2009, the NAB average station and the station groups all recorded a marked decline in profitability. The average NAB station was at the low end, with a 22.8 percent margin. For the station groups, profit margins ranged from 23.8 percent for Nexstar to 30.4 percent for Sinclair. Profitability bounced back in 2010, with the NAB average station's profitability in the middle. The NAB average station had a profit margin of 34.0 percent, while the margins for the station groups ranged from 33.8 percent (LIN) to 38.5 percent (Sinclair).

233. As noted above, broadcast station revenues tend to be higher in even-numbered years, primarily due to the influx of political advertising, but NBC affiliates also earn additional revenues during NBC's coverage of the Olympics. Additional reasons for the improvement in 2010 include an overall upswing in economic conditions, recovery in advertising spending by the top advertising categories, strong political spending, rapid growth and high incremental margins in both station website revenues, and retransmission consent revenues.⁷⁶⁸ In addition, some stations have increased profit margins by decreasing expenses.⁷⁶⁹ Several station groups incurred non-cash expenses by writing down the values of, among other assets their broadcast licenses, including Nexstar in 2008 and 2009, Gray in 2008, LIN in 2008 and 2009, and Sinclair in 2008, 2009, and 2010.⁷⁷⁰

d. Investment and Innovation

234. As in our analysis of profitability, we analyze broadcast station industry investment trends by examining (1) an average television station's average capital expenditures divided by net operating income and (2) a sample of pure-play television broadcasting companies' capital expenditures divided by net income.

⁷⁶⁷ Vogel at 308-09.

⁷⁶⁸ Nexstar 2010 Form 10-K at 29.

⁷⁶⁹ For example, in 2009, Nexstar began regionalizing certain accounting and traffic functions, resulting in layoff of 93 employees. Nexstar estimates that the restructuring saves the company about \$2.2 million per year. Nexstar 2010 Form 10-K at 34.

⁷⁷⁰ Nexstar 2010 Form 10-K at 34; Gray 2010 Form 10-K at 39; LIN at 43; Sinclair 2010 Form 10-K at 38-39.

Table 22: Broadcast Television Station Industry Investment⁷⁷¹

a. Capital Expenditures (in thousands)					
	2006	2007	2008	2009	2010
Nexstar	\$26,345	\$18,541	\$30,793	\$19,028	\$13,799
Gray	\$41,139	\$24,605	\$15,019	\$17,756	\$19,395
LIN TV	\$22,294	\$25,290	\$28,537	\$10,247	\$17,648
Sinclair	\$16,923	\$23,226	\$25,169	\$7,693	\$11,694
Average NAB Station	\$785	\$826	\$970	\$495	\$541

b. Net Operating Revenue (in thousands)					
	2006	2007	2008	2009	2010
Nexstar	\$265,169	\$266,801	\$284,919	\$251,979	\$313,350
Gray	\$332,137	\$304,288	\$327,176	\$270,374	\$346,058
LIN	\$420,468	\$395,910	\$399,814	\$339,474	\$420,047
Sinclair	\$706,222	\$718,100	\$754,474	\$656,477	\$767,186
Average NAB Station	\$16,850	\$16,147	\$15,837	\$13,454	\$16,175

235. The capital expenditure ratio for the NAB average station tended to fall in the mid-range of the ratios of the television station groups. Sinclair consistently spent the lowest proportion of net revenues on capital expenditures, in part because Sinclair's net revenues are nearly twice as large as the revenues of the other station groups we examined.⁷⁷² The average NAB station spent 5.1 percent of net revenues on capital expenditures in 2007. This compares with a range of 3.2 percent for Sinclair to 8.0 percent for Gray. In 2008, the average NAB station spent 6.1 percent of net revenues on capital expenditure, compared with a range of 3.3 percent for Sinclair Broadcasting to 10.8 percent for Nexstar. In 2009, these figures fell to 3.7 percent for the NAB average station, and a range of 1.2 percent for Sinclair Broadcasting to 7.6 percent for Nexstar. In 2010, these figures fell to 3.3 percent for the NAB average station, and a range of 1.5 percent for Sinclair to 5.6 percent for Gray Television.

236. Between 2006 and 2008, the majority of Nexstar's capital expenditures went towards preparing for the transition from analog to digital television.⁷⁷³ Nexstar attributes its decline in capital expenditures between 2008 and 2010 primarily to the completion of the digital conversions in 2009 and early 2010.⁷⁷⁴ Station groups have also been upgrading their newscasts to HD format, purchasing new studio equipment, and adding programming to their digital multicast channels.⁷⁷⁵ Stations also are investing in creating multimedia products to attract new audiences and increase loyalty to their stations.⁷⁷⁶ For example, in 2009, LIN purchased an online advertising and media services company to expand its

⁷⁷¹ FCC staff estimates based on data from NAB Financial Reports and SNL Kagan.

⁷⁷² Sinclair also claims that duopolies and LMAs enable it to realize significant economies of scale in capital expenditures. Sinclair 2010 Form 10-K at 10.

⁷⁷³ Nexstar 2010 Form 10-K at 36.

⁷⁷⁴ *Id.*

⁷⁷⁵ Gray 2010 Form 10-K at 22, 46.

⁷⁷⁶ LIN 2010 Form 10-K at 7-8.

online and mobile offerings; it also has developed iPhone, BlackBerry, Droid, and iPad applications for each of its television stations. In addition, LIN has launched a website called onPolitix.com, that provides local, regional, and national political coverage.

C. Online Video Distributors

1. Introduction

237. For the purposes of assessing the OVD industry in this Report, we define OVDs as entities that distribute video content to consumers over the Internet.⁷⁷⁷ This section of the Report examines the structure, conduct, and performance of OVDs. Internet-based distribution of video content has increased substantially since the last report, evolving from a niche service into a thriving industry.⁷⁷⁸ Today, online video reaches consumers via multiple devices, including computers, smartphones, tablets, gaming consoles, television sets, and other equipment connected to the Internet. According to Nielsen, approximately 48 percent of Americans now watch video online, and 10 percent watch mobile video.⁷⁷⁹ Consumers stream or download video content at home, as well as at libraries, work, airports, Wi-Fi hotspots, and other locations. The number and diversity of OVD industry participants also have grown, and now include stand-alone distributors, programmers, content producers/owners (including broadcasters), and subsidiaries of the largest hardware, software, and online delivery companies.

238. For the purposes of assessing the OVD industry in this Report, we examine entities that offer video content that is similar to the professional programming traditionally exhibited by broadcast stations, or broadcast and cable networks, and which is usually created or produced by media and entertainment companies using professional-grade equipment, talent, and production crews that hold or maintain the rights for distribution. We distinguish professionally-produced content from both (1) semi-professionally produced video, which refers to consumer or user-generated content that has professional or industrial qualities (e.g., shot with professional-grade equipment, using professional talent), and which may be produced exclusively for online audiences; and (2) user-generated content that is publicly available, created or produced by end users, often with little to no brand equity or brand recognition.⁷⁸⁰

239. As discussed in more detail below, the OVD marketplace is continuing to grow and develop. Indeed, as the Commission noted in the recent *Comcast-NBCU Order*, “[b]y all accounts, OVD services have just begun” and “[n]ew OVD services and new deals are announced seemingly daily.”⁷⁸¹ Businesses continue to enter and exit the marketplace, as well as change their approaches to providing OVD service. As a result, while this section covers several of the major players in the OVD space, it does not attempt to address all, or even most, of the providers currently in the market.

⁷⁷⁷ See *supra*, n. 6; *Further Notice*, 26 FCC Rcd at 14112, ¶ 52. To the extent that MVPDs also provide video to their subscribers online, for example as part of triple-play or TV Everywhere service, those offerings are discussed *supra*, Sec. III.A. We note, however, that, in the future, some MVPDs may distribute video content online to non-subscribers as well. See, e.g., *infra*, ¶ 281.

⁷⁷⁸ See, e.g., Comcast 6/8/11 Comments at 31-36; NCTA 6/8/11 Comments at 19-21; DIRECTV 6/8/11 Comments at 22-24; Google 6/8/11 Comments at 5-6.

⁷⁷⁹ See Nielsen, *The Cross-Platform Report, Quarter 2, 2011*, at 1.

⁷⁸⁰ See, e.g., *Comcast-NBCU Order*, 26 FCC Rcd at 4298-99, ¶¶ 144-46 & n. 365; Letter from William T. Lake, Chief, Media Bureau, to Michael H. Hammer, Counsel, Comcast Corporation, *et al.*, MB Docket No. 10-56, Attach. at 3-6, 8-9, 14 (May 21, 2010).

⁷⁸¹ *Comcast-NBCU Order*, 26 FCC Rcd at 4268-69, ¶¶ 78-80.

240. In the *Comcast-NBCU Order*, the Commission found that, while the amount of online viewing is growing, cord-cutting of traditional video programming service is relatively infrequent, and most consumers consider OVD service to be a complement to, rather than a substitute for, their MVPD service.⁷⁸² While recognizing that the Internet has evolved into a powerful method of video content distribution, the Commission did not determine whether or not online video competes with MVPD services.⁷⁸³ Instead, the order concluded that, regardless of whether online video currently is a complement to or a substitute for MVPD service, it is potentially a substitute product.⁷⁸⁴ The state of the current market suggests no reason to revisit this conclusion for purposes of this Report.

2. OVD Structure

241. We begin our consideration of OVDs with an examination of the industry structure. This discussion will address some of the major players in today's OVD marketplace, including programmers and content producers/owners, affiliates of online services and affiliates of manufacturers, retailers and other businesses. We then explain horizontal concentration and vertical integration in the market. Next we describe conditions affecting market entry during the relevant period, including an overview of existing regulations and market conditions that might influence entry decisions. Finally, we describe recent entry into and exit from the OVD market.

242. Since the last report, the OVD marketplace has expanded tremendously, with the industry's structure and operations continuing to develop. Most notably, there has been an increase in the number and type of OVDs, the amount of online video content available, and the devices used for delivery of that programming.⁷⁸⁵

243. While the structure of the OVD industry is still evolving, a few trends have emerged. To begin with, unlike an MVPD, whose market typically is tied to the provider's own facilities-based infrastructure, or a broadcaster, whose market typically is defined by the station's signal coverage area and DMA, an OVD's market generally covers the entire national broadband footprint. Also, much of the OVD industry does not provide stand-alone, unaffiliated delivery of video content. Rather, as discussed below, many OVD providers are affiliated with other video content owners or programmers (including broadcasters); online services; or manufacturers, retailers, or other businesses.

244. *Programmers and Content Producers/Owners.* Individual content owners or programming networks make their programming available online on their websites, sometimes referred to as "verticals" or "portals."⁷⁸⁶ The websites may be brand extensions of existing media properties and/or contain content unique to the Internet. Mobile applications, which often provide access to video content,

⁷⁸² *Id.* at 4269, ¶ 79.

⁷⁸³ *Id.* at 4256, ¶ 41.

⁷⁸⁴ *Id.* Some commenters in this proceeding argue that OVDs already are becoming true substitutes for traditional MVPD service or that consumers may well see OVDs as substitutes for MVPD service in the future. *See, e.g.*, DIRECTV 6/8/11 Comments at 22-25; Digital Broadcasting 6/8/11 Comments at 32.

⁷⁸⁵ *See* OVD viewership information, *infra*, Sec. III.C.4.a.

⁷⁸⁶ *See, e.g.*, ABC, <http://abc.go.com/watch> (visited Feb. 13, 2012) ("ABC Network Portal"); NBC, <http://www.nbc.com/> (visited Feb. 13, 2012) ("NBC Network Portal"); CBS, <http://www.cbs.com/> (visited Feb. 13, 2012) ("CBS Network Portal"); FOX, <http://www.fox.com/> (visited Feb. 13, 2012) ("FOX Network Portal"). In addition, local television stations often act as OVDs by making video content, for example clips from their own newscasts, available online. *See, e.g.*, KLAS-TV, <http://www.8newsnow.com/category/28259/8-news-now-video> (visited Feb. 13, 2012); WFAA-TV, <http://www.wfaa.com/video/> (visited Feb. 13, 2012). *See also* NAB 6/8/2011 Comments at 27-29 (noting extensive efforts of local television stations to make news content available online).

also are an integral part of the user interface strategy for many content producers and programming networks.⁷⁸⁷

245. Portals take different approaches to making content available online, often reflecting concern that online strategies may undercut revenues for the portal's traditional mode of distribution or due to contract restrictions. For example, Comedy Central distributes the most recent episodes of *The Daily Show* and *The Colbert Report* online right after those programs initially air.⁷⁸⁸ FOX, on the other hand, limits free next-day streaming of its shows to subscribers of approved cable and satellite distributors (currently, only DISH Network) and subscribers of the Hulu Plus OVD; all others must wait eight days.⁷⁸⁹ Similarly, HBO Go – HBO's mechanism for making its content available online – is available only to those who already subscribe to HBO via an MVPD.⁷⁹⁰

246. Hulu, which is owned by News Corporation, NBCUniversal, The Walt Disney Company, and Providence Equity Partners, brings together content from over 260 content companies, including its joint venture participants.⁷⁹¹ Hulu began as a free service, with programming available only via computer and only in standard definition.⁷⁹² In June 2010, Hulu added a subscription service, Hulu Plus, which allows consumers to view programming in 720p high definition (where available) on Internet-connected televisions and other devices, and includes additional content with limited advertisements.⁷⁹³

247. Sports leagues participate in the OVD marketplace as well. The four largest U.S. professional sports leagues – Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League – make a large amount of their programming

⁷⁸⁷ See, e.g., TBS, *TBS Mobile*, <http://www.tbs.com/mobileapp.jsp> (visited Feb. 13, 2012) (providing a TBS mobile app with access to some TBS shows, including *Conan*, *Meet the Browns*, and *The Office*); NBC, *Apps & Mobile*, <http://www.nbc.com/mobile/> (visited Feb. 13, 2012) (featuring link to NBC app, which allows mobile users to watch full episodes of NBC shows); Vlad Savov, *HBO Go App Set to Stream its Way to iPhones, iPads and Android Devices*, Engadget, Apr. 19, 2011, <http://www.engadget.com/2011/04/19/hbo-go-app-set-to-stream-its-way-to-iphones-ipads-and-android-d/> (visited Feb. 13, 2012) (discussing apps for viewing HBO content on mobile devices).

⁷⁸⁸ See Comedy Central, *The Daily Show*, <http://www.thedailyshow.com/> (visited Feb. 13, 2012); Comedy Central, *Colbert Nation*, <http://www.colbertnation.com/> (visited Feb. 13, 2012).

⁷⁸⁹ Brian Stetler, *FOX to Limit Next-Day Streaming on Hulu to Paying Cable Customers*, N.Y. TIMES, July 26, 2011, http://www.nytimes.com/2011/07/27/business/media/fox-to-limit-next-day-streaming-on-hulu.html?_r=1 (visited Feb. 13, 2012).

⁷⁹⁰ John Paul Titlow, *HBO Go Expands, But Cord Cutters Are Still Out of Luck*, ReadWriteWeb, Dec. 19, 2011, http://www.readriteweb.com/archives/hbo_go_not_without_cable.php (visited Feb. 13, 2012); Jeff Roberts, *HBO To Cord Cutters: You'll Never See Our Shows*, PaidContent.org, Nov. 30, 2011, <http://paidcontent.org/article/419-hbo-to-cord-cutters-youll-never-see-our-shows/> (visited Feb. 13, 2012).

⁷⁹¹ Hulu, *About*, <http://www.hulu.com/about> (visited Feb. 13, 2012) ("About Hulu"). Hulu began in March 2007 as a joint venture between News Corp., NBC Universal and Providence Equity Partners, with Disney joining the fold in April 2009. See Hulu, *Company Timeline*, http://www.hulu.com/about/company_timeline (visited Feb. 13, 2012) ("Hulu Timeline"); Hulu, *Disney to Join NBC Universal, News Corporation and Providence Equity Partners as an Equity Owner of Hulu* (press release), Apr. 30, 2009.

⁷⁹² See Hulu Timeline; Hulu, *Hulu Blog*, *Introducing Hulu Plus: More Wherever. More Whenever. Than Ever.*, June 29, 2010, <http://blog.hulu.com/2010/06/29/introducing-hulu-plus-more-wherever-more-when-ever-than-ever/> (visited Feb. 24, 2012) ("Introducing Hulu Plus").

⁷⁹³ See *id.*; Hulu Timeline; *Introducing Hulu Plus*; Robert Briel, *Hulu Launches Premium Service Hulu Plus*, Broadband TV News, June 29, 2010, <http://www.broadbandtvnews.com/2010/06/29/hulu-launches-subscription-service-hulu-plus/> (visited Feb. 13, 2012); David Einstein, *Going Mobile With Internet, TV*, S.F. CHRONICLE, May 23, 2011, <http://www.sfgate.com/cgi-bin/article.cgi?f=c/a/2011/05/22/BU221JHC9S.DTL> (visited Feb. 13, 2012).

available online through paid subscription services.⁷⁹⁴ Collegiate sports leagues are following a similar path. For example, the Atlantic Coast Conference recently announced the launch of the ACC Digital Network, a fully programmed video network designed, produced, and distributed exclusively for audiences watching on connected devices such as laptops and smartphones.⁷⁹⁵ The ACC Digital Network is a joint venture between Raycom Sports, the conference's long-standing broadcast and marketing partner, and Silver Chalice Ventures, a digital media company.⁷⁹⁶ The content is available without charge, supported by sponsorship and advertising.⁷⁹⁷ Similarly, the Big Ten recently unveiled a new Internet offering, BTN2Go, which provides streams of Big Ten games, as well as original and studio programming, to consumers who subscribe to the Big Ten Network on Time Warner Cable, Charter Communications, DIRECTV or DISH Network.⁷⁹⁸ The league makes the content available via the web, smartphones, and tablets.⁷⁹⁹ Content is available for free to consumers who already subscribe separately to the Big Ten Network.⁸⁰⁰

248. Sony is, among other things, a producer and owner of video content. Sony's Crackle OVD service, which launched in Summer 2007, offers a wide variety of free, streaming online content, including movies, television shows, and original programming, much of which comes from Sony's own content library.⁸⁰¹

⁷⁹⁴ See Major League Baseball, *MLB.tv*, <http://mlb.mlb.com/mlb/subscriptions/index.jsp?product=mlbtv&affiliateId=MLBTVREDIRECT> (visited Feb. 13, 2012); National Basketball Association, *NBA League Pass*, <http://www.nba.com/leaguepass/index.html> (visited Feb. 13, 2012); DIRECTV, *NFL Sunday Ticket*, <http://www.directv.com/DTVAPP/content/sports/nfl> (visited Feb. 13, 2012) ("NFL Sunday Ticket"); National Hockey League, *NHL Gamecenter Live*, <https://gamecenter.nhl.com/nhlgc/secure/gclsignup> (visited Feb. 13, 2012). NFL Sunday Ticket is available through DIRECTV, which makes games available via multiple platforms, including smartphones, tablets, and the Sony Playstation 3. See NFL Sunday Ticket; Playstation, *NFL Sunday Ticket*, <http://us.playstation.com/psn/nfl/> (visited Feb. 13, 2012). A customer who subscribes to NFL Sunday Ticket via the PlayStation Network need not be a DIRECTV subscriber. See Scott Stein, *NFL Sunday Ticket Comes to the PlayStation 3*, CNET, Aug. 17, 2011, http://news.cnet.com/8301-17938_105-20093727-1/nfl-sunday-ticket-comes-to-the-playstation-3/ (visited Feb. 29, 2012) ("NFL To PlayStation"). NBA, MLB, and NHL games are also available via Apple's digital media receiver, Apple TV. See Dan Frommer, *Apple TV Now Has MLB.TV And NBA Live Game Streaming*, Business Insider, Mar. 9, 2011, http://articles.businessinsider.com/2011-03-09/tech/30032181_1_boxee-roku-mlb-tv (visited Feb. 13, 2012); Jonathan Seff, *Apple TV 4.4 Update Adds Photo Stream, NHL, and More*, MACWORLD, Oct. 12, 2011, http://www.macworld.com/article/162974/2011/10/apple_tv_4_4_update_adds_photo_stream_nhl_and_more.html (visited Feb. 13, 2012).

⁷⁹⁵ See Atlantic Coast Conference, *ACC Launches Digital Network* (press release), Oct. 17, 2011 ("ACC Launches").

⁷⁹⁶ See *id.*

⁷⁹⁷ See *id.*

⁷⁹⁸ Mike Reynolds, *BTN2GO Kicks Off With Four Distributors*, MULTICHANNEL NEWS, Sept. 1, 2011, http://www.multichannel.com/article/473187-BTN2GO_Kicks_Off_With_Four_Distributors.php (visited Feb. 13, 2012) ("BTN2GO Kicks Off").

⁷⁹⁹ See *id.*; BTN2GO, *What is BTN2GO?*, <http://www.btn2go.com/btn2go/FAQ.jsp> (visited Feb. 13, 2012) ("BTN2Go FAQ").

⁸⁰⁰ See *id.*

⁸⁰¹ See Crackle, *About Crackle*, <http://www.crackle.com/about/> (visited Feb. 13, 2012) ("About Crackle"); Crackle, *Crackle FAQ: General Questions*, http://www.crackle.com/outreach/faq#general_questions (visited Feb. 14, 2012) ("Crackle FAQ"); Daniel Frankel, *Sony's Crackle Launches On Xbox Live*, PaidContent.org, Jan. 31, 2012, (continued....)

249. *Affiliates of Online Services.* YouTube launched in February 2005, primarily as a portal for niche, user-generated-content.⁸⁰² In its early years, much of the professional content on YouTube was posted by individual users without the permission of the relevant rights holders.⁸⁰³ Since Google purchased YouTube for \$1.65 billion in 2006,⁸⁰⁴ however, the service has evolved into a destination for a wide variety of free content, produced by both amateur and professional content creators.⁸⁰⁵ YouTube began renting movies to users in January 2012,⁸⁰⁶ and currently boasts an extensive catalog of online movie rental content.⁸⁰⁷

250. In 2011, Facebook entered the OVD market and began offering online movie rentals for a fee. In March 2011, Warner Brothers announced that “The Dark Knight” would be the first Warner Brothers movie to be made available for purchase or rental on Facebook.⁸⁰⁸ Since then, Warner Brothers has made several additional movies, as well as an original series, available via Facebook.⁸⁰⁹ In July 2011, Facebook began to offer a limited selection of movies from Paramount,⁸¹⁰ and in August 2011 the service

(Continued from previous page) _____

<http://paidcontent.org/article/419-sonys-crackle-launches-on-xbox-live/> (visited Feb. 14, 2012) (“Crackle on Xbox”).

⁸⁰² See, e.g., Tony Long, *Feb. 15, 2005: YouTube and Your 15 Minutes of Fame*, WIRED, Feb. 15, 2012, <http://www.wired.com/thisdayintech/2011/02/0215youtube-launched/> (visited Feb. 14, 2012) (“YouTube 15 Mins.”).

⁸⁰³ See, e.g., *id.*; Kenneth Li & Richard Waters, *YouTube “Knew of Copyright Violations,”* FINANCIAL TIMES, Mar. 19, 2010, <http://www.ft.com/cms/s/2/56cacfc0-32c2-11df-a767-00144feabdc0.html#axzz1j5CtASMq> (visited Feb. 14, 2012).

⁸⁰⁴ See, e.g., YouTube 15 Mins.

⁸⁰⁵ See, e.g., YouTube, *Partner Showcase*, http://www.youtube.com/t/partnerships_showcase (visited Feb. 14, 2012); NPR, *A War To Watch: YouTube Takes On Television*, Jan. 12, 2012, <http://www.npr.org/2012/01/12/145099987/a-war-to-watch-youtube-takes-on-television> (visited Feb. 14, 2012); Graeme McMillan, *YouTube Confirms New Professionally-Created Channels*, TIME, Oct. 29, 2011, <http://techland.time.com/2011/10/29/youtube-confirms-new-professionally-created-channels/> (visited Feb. 14, 2012).

⁸⁰⁶ Adam Ostrow, *YouTube Debuts Movie Rentals*, Mashable, Jan. 20, 2010, <http://mashable.com/2010/01/20/youtube-movie-rentals-2/> (visited Feb. 27, 2012).

⁸⁰⁷ YouTube, *Movies*, <http://www.youtube.com/movies> (visited Feb. 27, 2012) (“YouTube Movies”).

⁸⁰⁸ Time Warner, *Warner Bros. Entertainment Becomes First Hollywood Studio To Offer Movies Directly On Facebook* (press release), Mar. 8, 2011.

⁸⁰⁹ Emil Protalinski, *Warner Bros. Offers Five More Movies on Facebook*, ZDNet, Mar. 28, 2011, <http://www.zdnet.com/blog/facebook/warner-bros-offers-five-more-movies-on-facebook/1003?tag=content;siu-container> (visited Feb. 14, 2012); Emil Protalinski, *Warner Bros. Announces the First Facebook Show*, ZDNet, Sept. 29, 2011, <http://www.zdnet.com/blog/facebook/warner-bros-announces-the-first-facebook-show/4254> (visited Feb. 14, 2012); Facebook, *Aim High*, <http://www.facebook.com/AimHighSeries> (visited Feb. 14, 2012).

⁸¹⁰ Erik Gruenwedel, *Paramount Posts Entire “Jackass” Catalog on Facebook*, HOME MEDIA MAGAZINE, July 28, 2011, <http://www.homemediamagazine.com/paramount/paramount-posts-entire-jackass-catalog-facebook-24627> (visited Feb. 14, 2012); Kurt Orzeck, *Paramount Places “Mission: Impossible” for Rent on Facebook*, TheWrap.com, Nov. 22, 2011, <http://www.thewrap.com/movies/article/mission-impossible-flicks-coming-facebook-32993> (visited Feb. 14, 2012).

added movie content from Universal Studios⁸¹¹ and Miramax.⁸¹²

251. In October 2011, Yahoo launched Yahoo Screen, a revamped portal for its television shows and premium video content.⁸¹³ Yahoo Screen content includes original shows as well as content secured through licensing deals with entities, such as Hulu, CBS, ABC News, Ultimate Fighting Championship, and special interest video network Revision3.⁸¹⁴ Yahoo Screen provides “multiple channels filled with thousands of videos and television shows” and boasts an interface that looks “very similar to Hulu.”⁸¹⁵

252. *Affiliates of Manufacturers, Retailers, and Other Businesses.* A variety of other businesses also operate OVDs as well. Netflix launched in 1999 as an Internet-based DVD rental service.⁸¹⁶ In 2007, Netflix added its Watch Instantly service (originally called “Watch Now”).⁸¹⁷ Watch Instantly, a subscription service, allows consumers to stream video content to computers, mobile devices, and televisions connected to a Netflix-enabled device.⁸¹⁸ By the end of 2010, a majority of Netflix subscribers viewed more of Netflix’s television shows and movies via streaming than from its DVD rental service.⁸¹⁹

253. Similarly, Apple is a designer, manufacturer, and marketer of electronic hardware and software, with online video representing only a small portion of its revenues.⁸²⁰ In 2005, Apple

⁸¹¹ Cooper Smith, *Facebook: “The Big Lebowski” Now Available To Watch Via Social Theater App*, HUFFINGTON POST, Aug. 19, 2011, http://www.huffingtonpost.com/2011/08/19/facebook-the-big-lebowski-watch_n_931350.html (visited Feb. 14, 2012).

⁸¹² Bianca Bosker, *Miramax Brings More Movies To Facebook: A Look At The Movie Rental App*, HUFFINGTON POST, Aug. 22, 2011, http://www.huffingtonpost.com/2011/08/22/watch-movies-on-facebook-miramax-movie-rental-app_n_933058.html#s335352 (visited Feb. 14, 2012).

⁸¹³ Ben Parr, *Yahoo Launches Revamped Premium Video Portal*, Mashable, Oct. 4, 2011, <http://mashable.com/2011/10/04/yahoo-screen/> (visited Feb. 14, 2012).

⁸¹⁴ See *id.*; Revision 3, *Inside Revision3: About Us*, <http://revision3.com/about> (visited Feb. 14, 2012). Revision3 is an Internet television network that produces original content, including lifestyle and technology video shows geared to 13-34 year old males. See Andy Plessner, *Revision3 Is “Biggest” Internet TV Network With 70 Million Monthly Video Views*, Business Insider, May 19, 2011, http://articles.businessinsider.com/2011-05-19/tech/30038978_1_revision3-video-views-network (visited Feb. 27, 2012). According to figures provided by Revision3’s CEO in May 2011, the network had 17 million monthly unique viewers who watched 70 million video views. See *id.*

⁸¹⁵ Graeme McMillan, *Yahoo! Screen: Your New TV on the Internet*, TIME, Oct. 4, 2011, <http://techland.time.com/2011/10/04/yahoo-screen-your-new-tv-on-the-Internet/> (visited Feb. 14, 2012).

⁸¹⁶ Netflix, *Company Timeline*, <https://signup.netflix.com/MediaCenter/Timeline> (visited Feb. 14, 2012).

⁸¹⁷ See *id.*; Bumpershine, *Netflix “Watch Instantly” Goes Unlimited*, Dec. 17, 2007, <http://www.bumpershine.com/2007/12/17/netflix-watch-instantly-goes-unlimited.html> (visited Feb. 14, 2012).

⁸¹⁸ Netflix, *Signup*, <https://signup.netflix.com/home?country=1&rdirdc=true> (visited Feb. 14, 2012) (“Netflix Signup”); Netflix, *How It Works*, <https://signup.netflix.com/HowItWorks> (visited Feb. 14, 2012) (“Netflix How It Works”).

⁸¹⁹ See Netflix Inc., *SEC Form 10-K for the Fiscal Year Ended December 31, 2010*, at 22 (“Netflix 2010 Form 10-K”).

⁸²⁰ For example, Apple’s revenue from “net sales of other music related products and services” – which includes, among other things, online video and music sales – accounted for just nine percent of the company’s 2009 net sales, eight percent of the company’s 2010 net sales, and six percent of the company’s 2011 net sales. See Apple Inc., *SEC Form 10-K for the Period Ended September 24, 2011*, at 30-32 (“Apple 2011 Form 10-K”).

announced that it would begin offering certain movies and television episodes for download on a per movie or per program fee basis.⁸²¹ In January 2008, Apple announced the introduction of its iTunes Movie Rentals service, which allows users to rent movies from all the major studios and watch them on their computers, Apple mobile devices, or Apple TV.⁸²² Consumers also can now buy television shows and movies via iTunes.⁸²³ Some analysts have noted that for Apple, providing worthwhile online video content is not merely an end in itself, but is also a tool to promote the company's digital devices.⁸²⁴

254. In 2006, online retailer Amazon.com launched its Unbox service, which allowed consumers to download television and movie content for rental or purchase, on a pay-per-download basis.⁸²⁵ Two years later, Amazon announced that consumers could stream movies and television programs on their computers, without advertisements, through its Amazon Video on Demand streaming service.⁸²⁶ In 2011, Amazon announced that customers who pay an annual fee for the company's Amazon Prime service will receive commercial-free, instant streaming of thousands of movies and television shows at no extra charge.⁸²⁷ OVD content provided by Amazon can be viewed on multiple devices.⁸²⁸

255. In addition to being a producer of content, Sony also manufactures consumer electronics equipment. As discussed in more detail below, Sony's Crackle OVD service is available on numerous devices, many of which are manufactured by Sony. Indeed, the ability to use Crackle to access Sony's library of movies, television shows, and original programming⁸²⁹ is a potential selling point for these electronics products.

⁸²¹ Apple Inc., *Apple Announces iTunes 6 With 2,000 Music Videos, Pixar Short Films & Hit TV Shows* (press release), Oct. 12, 2005.

⁸²² Apple Inc., *Apple Premieres iTunes Movie Rentals With All Major Film Studios* (press release), Jan. 15, 2008.

⁸²³ Apple, *iTunes, What's On iTunes*, <http://www.apple.com/itunes/whats-on/> (visited Feb. 14, 2012) ("What's On iTunes").

⁸²⁴ See, e.g., Geoffrey A. Fowler & Sam Schechner, *A New Digital Battlefield*, WALL ST. J., Sept. 2, 2010, <http://online.wsj.com/article/SB10001424052748703431604575468051468814036.html#articleTabs%3Darticle> (visited Feb. 14, 2012) ("Fowler & Schechner").

⁸²⁵ Marshall Kirkpatrick, *Amazon Unbox Goes Live*, Tech Crunch, Sept. 7, 2006, <http://techcrunch.com/2006/09/07/amazon-unbox-goes-live/> (visited Feb. 14, 2012).

⁸²⁶ See Amazon.com, *Amazon Instant Video Compatible Devices*, <http://www.amazon.com/gp/video/ontv/devices> (visited Feb. 29, 2012) ("Amazon Devices").

⁸²⁷ Amazon Devices: Amazon.com, Inc., *Amazon Prime Members Now Get Unlimited, Commercial-free, Instant Streaming of More Than 5,000 Movies and TV Shows at No Additional Cost* (press release), Feb. 22, 2011. The company's Amazon Prime service provides other, non-video benefits, including for instance two-day shipping on some purchases. See Amazon.com, *Amazon Prime*, <http://www.amazon.com/gp/help/customer/display.html?nodeId=13819211> (visited Feb. 14, 2012) ("Amazon Prime").

⁸²⁸ See Amazon.com, *Watch Anywhere*, <http://www.amazon.com/gp/feature.html?ie=UTF8&docId=1000663511> (visited Feb. 14, 2012); Amazon.com, *Help, Watching Amazon Instant Videos*, http://www.amazon.com/gp/help/customer/display.html/ref=hp_3757_watchfaq?nodeId=200238920 (visited Feb. 14, 2012); Amazon.com, *Help, Amazon Instant Video Support*, http://www.amazon.com/gp/help/customer/display.html/ref=hp_13819211_aiv?nodeId=3757 (visited Feb. 14, 2012).

⁸²⁹ See About Crackle; Crackle FAQ; Crackle on Xbox.

256. In 2007, Vudu launched a service that provided consumers with a television set-top box that enabled instant viewing of movies via rent or purchase.⁸³⁰ Wal-Mart purchased the company in February 2010.⁸³¹ Today, Vudu offers its movie store and interactive services as a feature that consumer electronics manufacturers can build into their devices,⁸³² many of which are available for sale at Wal-Mart.

257. Consumer electronics retailer Best Buy's CinemaNow service allows users to rent or purchase movie and television show content.⁸³³ CinemaNow, a non-subscription service, provides customers with same-day instant access to new release movies and television shows.⁸³⁴ Users can access CinemaNow content via a variety of devices, some of which can be purchased at Best Buy, including computers and certain Internet-connectable televisions and Blu-ray players.⁸³⁵

a. Horizontal Concentration and Vertical Integration

258. *Horizontal Concentration.* It is difficult to measure horizontal concentration in the OVD marketplace. To begin with, it is hard to get a handle on the number and identity of players in the market. As described in the examples above, all of the major providers in this industry segment have either entered the market, or dramatically retooled their approach to the distribution of video content, during the last few years. Players continue to enter and exit the OVD marketplace, and business models appear to be evolving.

259. Even if it were possible to get a firm handle on the players in the OVD marketplace, it is difficult to obtain the revenue or ratings/viewing information required for a horizontal concentration analysis. As discussed above, many OVDs are parts of companies with multiple non-OVD business lines. This often makes it difficult or impossible to obtain useful OVD revenue figures. As noted above, for example, Apple reports revenue from a category called "net sales of other music related products and services," which includes, among other things, online video and music sales, but does not break out what portion of that revenue comes from OVD services.⁸³⁶ Similarly, while revenues for Netflix are available, the company's most recent SEC Form 10-K filing notes that because Netflix subscribers were able to receive both streaming and DVDs-by-mail under a single hybrid plan prior to the fourth quarter of 2011,

⁸³⁰ See Brad Stone, *Wal-Mart Adds Its Clout to Movie Streaming*, N.Y. TIMES, Feb. 23, 2010, <http://www.nytimes.com/2010/02/23/technology/23video.html?partner=rss&emc=rss> (visited Feb. 15, 2012) ("Wal-Mart Clout"); Azadeh Ensha, *Vudu, Roku, Boxee: What's the Difference?*, N.Y. TIMES, Mar. 24, 2009, <http://gadgetwise.blogs.nytimes.com/2009/03/24/vudu-roku-boxee-whats-the-difference/> (visited Feb. 15, 2012); Brad Stone, *Vudu Casts Its Spell on Hollywood*, N.Y. TIMES, Apr. 29, 2007, <http://www.nytimes.com/2007/04/29/business/yourmoney/29vudu.html> (visited Feb. 15, 2012).

⁸³¹ See Wal-Mart Clout.

⁸³² See Vudu, *VUDU is Available on Virtually Every Internet-Connected Blu-ray Player and HDTV on the Market*, <http://www.vudu.com/devices.html> (visited Feb. 15, 2012) ("Vudu Devices"); Vudu, *VUDU Expands Distribution to HDTVs and Blu-ray Players from LG, Mitsubishi, Samsung, SANYO, Sharp, Toshiba and VIZIO* (press release), Jan. 8, 2010.

⁸³³ CinemaNow, *About Us*, <http://www.cinemanow.com/AboutUs-BBYCinemaNow.aspx> (visited Feb. 15, 2012) ("About CinemaNow").

⁸³⁴ See *id.*; Best Buy Co. Inc., *Best Buy Provides Customers Same-Day Instant Access to New Release Movies and TV Shows with Launch of CinemaNow* (press release), May 18, 2010.

⁸³⁵ See *id.*; About CinemaNow.

⁸³⁶ See *supra*, ¶ 253 & n. 820; Apple 2011 Form 10-K at 30-32.

it is not possible to allocate domestic revenues from prior to that time between the company's streaming and DVD rental segments.⁸³⁷

260. Moreover, while metrics exist to assess MVPD subscribership or broadcast viewership, measuring online video viewership raises unique challenges. Entities like Nielsen and comScore measure hits/views for online video websites, but they use different methodologies and, therefore, achieve different results. Importantly, services that measure online video viewership generally do not separate professional and non-professional video content. For example, entities such as Google/YouTube and Facebook rank high in analyses by comScore and Nielsen,⁸³⁸ but this is almost certainly due in large part to the non-professional video content hosted on both sites.⁸³⁹ Hence, these viewership figures cannot be used to measure horizontal concentration in the market for online delivery of professional video content.

261. *Vertical Integration.* As discussed above, many OVDs are vertically integrated. For example, some OVDs are integrated with content producers and owners, which view online video as another distribution outlet for their programming. In other cases, OVDs are affiliated with online services for which video content is an additional product to offer consumers or with retailers of consumer electronics equipment used to access OVD-delivered content.

262. In addition, OVDs, including those not affiliated with traditional programmers or content owners, are becoming increasingly involved in the creation of original content. For example, Netflix launched an original show, *Lilyhammer*, in February 2012.⁸⁴⁰ In addition, it is developing three additional original series (*House of Cards*, *Orange is the New Black*, and *Hemlock Grove*), and plans to air exclusive new episodes of *Arrested Development* in 2013.⁸⁴¹ Hulu launched its first original series, *Battleground*, in

⁸³⁷ See Netflix Inc., *SEC Form 10-K for the Fiscal Year Ended December 31, 2011*, at 26. On September 1, 2011, Netflix ended its hybrid plan, which, for \$9.99, provided unlimited access to the Netflix streaming video library and allowed customers to rent one DVD at a time. See Greg Sandoval, *Netflix Users, Time to Pick a Plan*, CNET, Aug. 29, 2011, http://news.cnet.com/8301-31001_3-20098921-261/netflix-users-time-to-pick-a-plan/ (visited Mar. 5, 2012); Eric Savitz, *Netflix Jacking Up Prices On Hybrid DVD/Streaming Plans*, FORBES, July 13, 2011, <http://sg.news.yahoo.com/netflix-jacking-prices-hybrid-dvd-streaming-plans-172634671.html> (visited Mar. 5, 2012). As of March 2012, Netflix customers pay \$7.99 per month for unlimited streaming and must pay an additional \$7.99 per month for the DVD rental service (\$9.99 for access to Blu-ray discs). See *id.*; Netflix Signup; Netflix How It Works. Netflix announced plans to split its DVD-rental business from its streaming business in September 2011, but reversed that decision the next month. Bianca Bosker, *Qwikster Is Dead: Netflix Kills DVD-Only Service Weeks After Unveiling It*, HUFFINGTON POST, Oct. 10, 2011, http://www.huffingtonpost.com/2011/10/10/qwikster-dead-netflix-kills_n_1003098.html (visited Mar. 5, 2012).

⁸³⁸ See *infra*, ¶¶ 320-21.

⁸³⁹ See *supra*, ¶ 249; Facebook, *Help Center, Video: Uploading and Viewing Videos*, <http://www.facebook.com/help/?page=157734877627482> (visited Feb. 16, 2012).

⁸⁴⁰ See Lesley Goldberg, *Netflix to Bow Original Series "Lilyhammer" on Feb. 6*, THE HOLLYWOOD REPORTER, Jan. 3, 2012, <http://www.hollywoodreporter.com/live-feed/netflix-bow-original-series-lilyhammer-277530> (visited Feb. 28, 2012).

⁸⁴¹ See *id.*; Chloe Albanesius, *Netflix Original Series, Lilyhammer, to Debut Feb. 6*, PC MAGAZINE, Jan. 3, 2012, <http://www.pcmag.com/article2/0,2817,2398304,00.asp> (visited Feb. 15, 2012); Janko Roettgers, *Netflix, Hulu and the Golden Age of Content*, Gigaom, Jan. 16, 2012, <http://gigaom.com/video/netflix-hulu-exclusive-content/> (visited Feb. 15, 2012) ("Golden Age"). Netflix paid \$100 million, outbidding cable networks, for rights to air 26 episodes of original series *House of Cards*. Paul Bond, *Hollywood's Feelings About Netflix's \$100 Million "House of Cards" Deal*, THE HOLLYWOOD REPORTER, Mar. 23, 2011, <http://www.hollywoodreporter.com/news/hollywoods-feelings-netflixs-100-million-170651> (visited Feb. 28, 2012). According to recent industry reports, CBS has held discussions with Netflix about producing original programming for airing on Netflix as well. See COMM. DAILY (Feb. 17, 2012) at 16-17.

February 2012.⁸⁴² Similarly, in late 2011, Yahoo announced eight original shows targeted at women and featuring Hollywood talent.⁸⁴³ YouTube continues to invest in original content, offering multiple channels from Hollywood celebrities and other content partners.⁸⁴⁴

b. Entry and Exit Conditions

263. Some commenters state that the online video marketplace is relatively open with low barriers to entry.⁸⁴⁵ OVDs generally rely on third-party owned infrastructure for data transport, instead of needing to build their own.⁸⁴⁶ On the other hand, one industry analyst states, “there are huge and very real infrastructure costs associated with massive server farms, transport costs, and hosting fees associated with a large-scale video-over-the Internet model. . . . For a large scale start-up, the cost could run into the billions.”⁸⁴⁷ Moreover, while niche material often can find an audience, in order to compete, an OVD must secure rights to a wide range of compelling content, which can be difficult and quite expensive.⁸⁴⁸ While the extent of these costs will vary depending on an OVD’s business model, it is clear that there are real costs and hurdles involved in entering into, and competing in, the OVD market.

264. Below, we discuss the regulatory conditions potentially affecting entry in this market. Thereafter, we describe the market, or non-regulatory, conditions that may influence entry decisions, including the need for OVDs to acquire rights to content and to secure sufficient, reasonably priced Internet access for transmission of OVD content. We then describe recent entry and exit from the market.

(i) Regulatory Conditions

265. *Open Internet.* OVDs need broadband Internet speeds and capacity in order to transmit video content to their customers. In 2010, the Commission adopted an order seeking to protect the openness of the Internet.⁸⁴⁹ The Commission’s open Internet rules require transparency from fixed and

⁸⁴² See Golden Age; Meg James, *Hulu Introduces “Battleground,” its First Original Scripted Show*, L.A. TIMES, Jan. 15, 2012, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2012/01/hulu-introduces-battleground-first-original-scripted-show.html> (visited Feb. 15, 2012).

⁸⁴³ Georg Szalai; *Yahoo Launches Original Web Shows Targeting Women With Judy Greer, Morgan Spurlock, Niecy Nash*, THE HOLLYWOOD REPORTER, Oct. 4, 2011, <http://www.hollywoodreporter.com/news/yahoo-launches-original-web-shows-243610> (visited Feb. 15, 2012).

⁸⁴⁴ See Golden Age; Ben Sisario, *New Layer of Content Amid Chaos on YouTube*, N. Y. TIMES, Mar. 11, 2012, <http://www.nytimes.com/2012/03/12/technology/youtube-channels-seek-advertisers-and-audiences.html?pagewanted=all> (visited Mar. 12, 2012); Janko Roettgers, *It’s True: YouTube to Take on Cable With A-list Celebs*, Gigaom, Oct. 28, 2011, <http://gigaom.com/video/youtube-premium-content/> (visited Feb. 15, 2012); See also *infra*, ¶¶ 304-05.

⁸⁴⁵ See, e.g., Google 6/8/11 Comments at 1-4.

⁸⁴⁶ See *infra*, ¶¶ 271-75.

⁸⁴⁷ See Craig Moffett, *Weekend Media Blast: Why Haven’t We Seen a Virtual MSO Yet?*, Bernstein Research, Jan. 27, 2012, at 3 (“Virtual MSO”).

⁸⁴⁸ See *Comcast-NBCU Order*, 26 FCC Rcd at 4273, ¶ 86; *infra*, ¶¶ 268-70, ¶¶ 287-89.

⁸⁴⁹ See *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17906, ¶ 1 (2010) (“*Open Internet Order*”). This order is currently on appeal in the D.C. Circuit. See, e.g., Notice of Appeal, *Verizon v. FCC*, No. 11-1355 (filed Sept. 30, 2011, D.C. Cir.). In addition, Southern Company Services recently filed a petition for clarification or reconsideration with the Commission concerning one aspect of the *Open Internet Order*. See Southern Company Services, Petition for Clarification or Reconsideration, GN Docket No. 09-191, WC Docket No. 07-52 (filed Oct. 24, 2011).

mobile broadband providers.⁸⁵⁰ In addition, fixed broadband providers cannot block access to lawful content, applications, and services; mobile broadband providers cannot block access to lawful websites and applications competing with their voice or video telephony services.⁸⁵¹ Fixed broadband providers must also allow access to non-harmful devices and cannot unreasonably discriminate in transmitting lawful network traffic.⁸⁵²

266. *Closed Captioning.* In January 2012, the Commission adopted rules placing closed captioning obligations on the owners, providers, and distributors of video programming delivered using Internet protocol (IP).⁸⁵³ The rules were adopted pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA), which directed the Commission to revise its regulations to require closed captioning of IP-delivered video programming that is published or exhibited on television with captions after the effective date of the new regulations.⁸⁵⁴ An entity intending to enter the OVD marketplace will need to take steps to comply with these requirements.

(ii) Non-regulatory Conditions

267. An OVD entrant faces several non-regulatory costs and challenges to introducing its video content services that influence its decision to enter the market, including program acquisition and the need for sufficient Internet capacity at a reasonable cost.

268. *Program Acquisition.* Just as OVD subscriber growth creates the ability to obtain more content, which in turn drives usage and subscriber growth, lack of compelling content to offer potential customers is a significant deterrent to entry. An entity attempting to enter the OVD marketplace must obtain a robust, if not comprehensive, programming library to offer consumers.⁸⁵⁵

269. One potential barrier to such content acquisition is cost. For example, Netflix recently signed a deal with The CW network, which gives Netflix the streaming rights to repeats of current and future The CW network series. While the cost is undisclosed, and reportedly depends on the performance of certain shows, analysts estimate that it is close to \$1 billion, including approximately \$600,000 an episode for established shows like *Gossip Girl*.⁸⁵⁶ This is a significant cost for what will amount to a

⁸⁵⁰ See *Open Internet Order*, 25 FCC Rcd at 17906, ¶ 1.

⁸⁵¹ See *id.*

⁸⁵² See *id.*

⁸⁵³ See *Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, MB Docket No. 11-154, Report and Order, 27 FCC Rcd 787 (2012). Petitions for reconsideration are currently pending before the Commission.

⁸⁵⁴ 47 U.S.C. § 613(c)(2).

⁸⁵⁵ See *Comcast-NBCU Order*, 26 FCC Rcd at 4273, ¶ 86 (“If an OVD is to fully compete against a traditional MVPD, it must have a similar array of programming.”); Will Richmond, *This Holiday Season, Video Apps’ Purpose is to Sell Devices*, VideoNuze, Nov. 10, 2011, <http://www.videonuze.com/article/this-holiday-season-video-apps-purpose-is-to-sell-devices> (visited Feb. 15, 2012) (“In short, premium video is more valuable than ever, with new players in the ecosystem recognizing that they can’t accomplish their goals without it. Another reminder that content is king.”); Dan Rayburn, *Veoh Should Be A Reminder That Execution & Focus Are More Important Than Vision*, StreamingMediaBlog.com, Feb. 12, 2010, http://blog.streamingmedia.com/the_business_of_online_vi/2010/02/veoh-should-be-a-reminder-that-execution-and-focus-are-more-important-than-vision.html (visited Feb. 15, 2012) (discussing demise of OVD Veoh and noting that it is difficult for an ad-supported OVD to survive without a broad content library).

⁸⁵⁶ Joe Flint & Ben Fritz, *Netflix Deal Makes CW Pay Off for CBS and Warner Bros.*, L.A. TIMES, Oct. 13, 2011, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2011/10/netflix-cw-deal-cbs-warner-bros.html> (visited Feb. 15, 2012) (“Netflix CW Deal”).

small part of Netflix's overall content library. Alternatively, Microsoft put its plans to start an online subscription service for television shows and movies on hold after determining that constant licensing costs would be too high for the company's envisioned business model.⁸⁵⁷ Given the costs faced by established companies, it is even more difficult for new entrants with less capital to enter into the many high-priced content deals required to build an adequate content library.

270. Content acquisition difficulties for OVDs can be exacerbated by vertical integration and pre-existing business relationships in the marketplace. For example, vertical integration or exclusivity arrangements between content producers/owners and cable networks, broadcast networks, or MVPDs can make it difficult for unaffiliated OVDs to obtain content rights.⁸⁵⁸ OVD content acquisition also can be difficult when content owners are vertically integrated with, or enjoy exclusive relationships with, other OVDs.⁸⁵⁹

271. *Internet Capacity and Cost.* Unlike MVPDs such as cable and DBS, which generally own and/or control the infrastructure they use to distribute video content to their customers, as stated above, OVDs rely on high-capacity and high-speed broadband Internet services that are often owned and controlled by unaffiliated MVPDs.⁸⁶⁰ According to one analyst, services and applications such as OVD services represented 60 percent of peak downstream traffic in 2011, with Netflix alone accounting for 32.7 percent of such traffic.⁸⁶¹ OVDs therefore must have access to sufficient, reliable, and reasonably priced broadband capacity in order to operate in the video marketplace. Prospective OVD entrants face several challenges in this regard.

272. First, consumers may lack the broadband capability that is a necessary prerequisite for OVD providers to reach their intended market. Broadband deployment has increased in recent years, but, as the Commission has repeatedly recognized, it is far from ubiquitous. The Commission recently estimated that 26.2 million Americans living in more than 9.2 million households do not have access to

⁸⁵⁷ Yinka Adegoke, *Exclusive: Microsoft Web TV Subscription Plan on Hold*, Reuters, Jan. 11, 2012, <http://www.reuters.com/article/2012/01/11/us-microsoft-video-idUSTRE80A1KL20120111> (visited Feb. 15, 2012).

⁸⁵⁸ See, e.g., Netflix 2010 Form 10-K, at 7 (noting that HBO's license with Warner Brothers provides HBO with the exclusive right to such content against other subscription services, including OVDs like Netflix); *Comcast-NBCU Order* 26 FCC Rcd at 4273, ¶ 86 & 4359-62, Online Conditions IV.A-IV.C (listing Commission-imposed conditions designed to prevent Comcast/NBCU from withholding online rights to programming from unaffiliated OVDs); Rural Associations 6/8/11 Comments at 9; Netflix 6/8/11 Comments at 6-7.

⁸⁵⁹ See, e.g., *The Economics of Online Video* (White Paper), ADVERTISING AGE, June 19, 2010, at 10 ("AD AGE White Paper"); Emma Barnett, *Joost ex-CEO Holds Broadcasters Responsible for Demise of Company*, THE TELEGRAPH, July 7, 2009, <http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/digital-media/5771174/Joost-ex-CEO-blames-broadcasters-for-demise-of-company.html> (visited Feb. 15, 2012) (discussing belief of former CEO of OVD Joost that broadcasters' decision to create their own online video services hindered Joost's ability to acquire the content rights necessary to be competitive).

⁸⁶⁰ See Rovi 6/8/11 Comments at 2. The record indicates that cable operators continue to invest billions of dollars in infrastructure and facility rebuilds and upgrades to improve their video service offerings, as well as to offer more robust Internet and digital telephone services. Since 1996, cable companies have invested over \$170 billion in infrastructure, including \$12 billion in 2010 alone. See NCTA 6/8/11 Comments at 9-10. Telephone companies, including those that are not MVPDs, also provide the broadband Internet services that OVDs require.

⁸⁶¹ Sandvine, *Global Internet Phenomena Report*, Fall 2011 at 2, 5-8. The analyst defined peak period as the time during which aggregate network traffic is within 95 percent of its highest value. *Id.* at 5.

broadband service at or above the Commission's 4 Mbps downstream/1 Mbps upstream broadband speed benchmark.⁸⁶²

273. Second, even where the physical capacity exists to provide broadband service, some of the leading Internet Service Providers ("ISPs") have begun to impose data caps or shift to usage-based billing. Specifically, in 2008 Comcast imposed a data cap of 250 gigabytes per month, disconnecting users who exceeded the cap twice in a six-month period.⁸⁶³ In May 2011, AT&T imposed a cap of 150 GB per month for its DSL service and 250 GB for its U-verse service; if a user exceeds the data limit AT&T will send certain notifications, and then charge an additional \$10 per month for each 50 GB beyond the limit.⁸⁶⁴ Cox imposes monthly usage limits from 30 GB up to 400 GB, depending on the package.⁸⁶⁵ Major wireless providers also have begun to impose data caps.⁸⁶⁶ Broadband providers assert that data caps and usage based billing are mechanisms to manage ISP traffic, address excessive use, alleviate network congestion, ensure that users can access their networks, and provide adequate data speeds to all of their customers.⁸⁶⁷ Some commenters identify moves by broadband ISPs to usage-based billing as being potentially discriminatory against OVDs,⁸⁶⁸ and some claim that this behavior is intended to retard OVD growth to sustain the traditional MVPD subscription model.⁸⁶⁹ In contrast, ISPs indicate

⁸⁶² See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 10-159, Seventh Broadband Progress Report and Order on Reconsideration, 26 FCC Rcd 8008, 8018, 8022, ¶¶ 14, 23 (2011). The Commission is in the process of reforming and modernizing its Form 477 data collection in order to obtain more accurate information about broadband deployment. See *id.* at 8016, ¶ 11; see generally *Modernizing the FCC Form 477 Data Program; Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership; Service Quality, Customer Satisfaction, Infrastructure and Operating Data Gathering; Review of Wireline Competition Bureau Data Practices*, WC Docket Nos. 07-38, 08-190, 01-132, and 11-10, Notice of Proposed Rulemaking, 26 FCC Rcd 1508 (2011).

⁸⁶³ Editorial, *To Cap, or Not*, N.Y. TIMES, July 21, 2011, <http://www.nytimes.com/2011/07/22/opinion/22fri2.html> (visited Feb. 17, 2012) ("To Cap or Not"); Chloe Albanesius, *Comcast to Cap Data Transfers at 250 GB in Oct.*, PC MAGAZINE, July 22, 2011, <http://www.pcmag.com/article2/0,2817,2329170,00.asp> (visited Feb. 17, 2012) ("Comcast to Cap").

⁸⁶⁴ See AT&T, *High Speed Internet Support: Broadband Usage FAQs*, <http://www.att.com/esupport/article.jsp?sid=KB409045&cv=801&ct=9000106&pv=3&title=Broadband+Usage+FAQs#fbid=xw2lZfJ5WmM> (visited Feb. 17, 2012) ("AT&T Broadband Usage").

⁸⁶⁵ See Cox, e.g., *Speeds and Allowances Information for High Speed Internet Service in Rhode Island*, <http://ww2.cox.com/aboutus/rhodeisland/policies/speedsusage.cox> (visited Feb. 17, 2012).

⁸⁶⁶ See, e.g., AT&T, *An Update for Our Smartphone Customers With Unlimited Data Plans* (press release), July 29, 2011 (announcing reduction in speeds for smartphone customers with unlimited data plans who exceed certain bandwidth thresholds) ("Smartphone Update"); Julianne Pepitone, *AT&T Raises Limit for Smartphone Data Slowdown*, CNNMoney, Mar. 1, 2012, http://money.cnn.com/2012/03/01/technology/att_data_slowdown/index.htm?hpt=hp_t2 (visited Mar. 2, 2012) ("Smartphone Data Slowdown"); Trefis Team, *Crowded Pipes Prompt Verizon To Nix Unlimited Data Plans*, FORBES, May 31, 2011, <http://www.forbes.com/sites/greatspeculations/2011/05/31/crowded-pipes-prompt-verizon-to-nix-unlimited-data-plans/> (visited Feb. 17, 2012).

⁸⁶⁷ See, e.g., *To Cap, or Not; Comcast to Cap; AT&T Broadband Usage; Smartphone Update; Smartphone Data Slowdown*; Chloe Albanesius, *Comcast Weighs 250 GB/Month Download Limit*, PC MAGAZINE, May 8, 2008, <http://www.pcmag.com/article2/0,2817,2301203,00.asp> (visited July 16, 2012).

⁸⁶⁸ See, e.g., Netflix 6/8/11 Comments at 8; Public Knowledge 6/8/11 Comments at 4-5, 9-10.

⁸⁶⁹ See e.g., WGAW 6/8/11 Comments at 19.

they have not impeded the growth of OVDs. By continually upgrading their broadband facilities, ISPs argue that they have helped facilitate the growth of high-quality Internet video and its distribution by entities like Netflix.⁸⁷⁰ Comcast also notes that it offers a variety of speed tiers at different price points to accommodate the varying needs of its subscribers.⁸⁷¹

274. Third, MVPDs have the ability and incentive to degrade the broadband service available to unaffiliated OVDs. For example, one party states that a cable provider can constrain broadband capacity available to OVDs in order to prevent them from offering full competitive substitutes for the cable company's MVPD offerings.⁸⁷² Although the Commission's *Open Internet Order* prohibits broadband ISPs from blocking OVD traffic, some worry that exceptions for "reasonable network management" and "specialized services" may still allow MVPDs to have an undue negative impact on online video.⁸⁷³ Several MVPDs counter, however, that cable operators and other MVPDs have continually enabled the development of online video by providing faster broadband speeds and higher-bandwidth services.⁸⁷⁴

275. Finally, costs charged by ISPs to deliver online video traffic could have a negative impact on the ability of OVDs to enter the market and compete. Netflix, for example, asserts that some fees charged by MVPD/broadband network operators to terminate unaffiliated traffic on their networks can increase OVD operating costs.⁸⁷⁵ Netflix also points to a recent dispute between Comcast and Level 3 in support of its allegations that providers of MVPD service have the incentive to use traffic charges to hinder or disrupt the flow of unaffiliated broadband video services over their networks.⁸⁷⁶ MVPDs that are also ISPs dispute such assertions, arguing that while Internet backbone providers that have entered into peering arrangements typically do not charge fees when the traffic they carry for each other is roughly equal, charges are justified when the relative traffic flows are significantly out of proportion.⁸⁷⁷

⁸⁷⁰ See e.g., NCTA 7/8/11 Reply at 2-3.

⁸⁷¹ See Comcast 6/8/11 Comments at 15. Comcast highlights the need for providing a range of speed tiers by stating that 23 percent of its residential high-speed Internet customers subscribe to higher-speed tiers (i.e., speeds above 16 Mbps). See *id.* at 16.

⁸⁷² See Earthlink Reply, MB 10-56, at 9 (filed Aug. 19, 2010).

⁸⁷³ See Public Knowledge 6/8/11 Comments at 4; Rovi 6/8/11 Comments at 3. When approving the Comcast/NBCU transaction, the merged entity agreed to some voluntary commitments, and the Commission imposed conditions, designed to limit the ability of the joint venture to hinder OVD competition by restricting access to or raising the price of unaffiliated OVD content, or blocking, degrading, or otherwise violating Open Internet principles with respect to the delivery of unaffiliated online content. See, e.g., *Comcast-NBCU Order*, 26 FCC Rcd at 4263, 4274-76, 4355-64, ¶ 61, ¶¶ 91-95, App. A, §§ I-IV.

⁸⁷⁴ See, e.g., Comcast 6/8/11 Comments at 5; NCTA 6/8/11 Comments at 5.

⁸⁷⁵ Netflix 6/8/11 Comments at 7. See also Netflix 2010 Form 10-K at 12 (noting that changes in how ISPs charge for access to data on their networks might adversely affect Netflix's business). Netflix states that the ISPs' customers already pay the ISPs to deliver the bits on their network, and requiring Netflix to pay as well, even though Netflix delivers the bits in question at the request of the ISPs' customers, is an inappropriate reflection of their last mile exclusive control of their residential customers. See Letter from Reed Hastings, CEO of Netflix, to Chairman Fred Upton and Ranking Member Henry A. Waxman, Committee on Energy and Commerce, Apr. 6, 2011, at 1 (attached to Letter from Devendra T. Kumar, Attorney for Netflix, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-191, WC Docket No. 07-52 (filed May 10, 2011)).

⁸⁷⁶ See Netflix 6/8/11 Comments at 1-2, 7.

⁸⁷⁷ See, e.g., Virtual MSO at 3; Spencer E. Ante & Amy Schatz, *Web-Traffic Spat Over Netflix Highlights New Tensions*, WALL ST. J., Nov. 30, 2010, <http://online.wsj.com/article/SB10001424052748704679204575646840288688392.html> (visited Feb. 17, 2012); (continued....)

c. Recent Entry and Exit

276. The OVD market has undergone dramatic transformation since the last report, as all of the major providers have either entered the market in the last few years or dramatically retooled their approach to the online distribution of video content in that time. On the other hand, since the OVD marketplace is still evolving, it is not surprising that several entities have exited the marketplace recently as well.

277. *Entry.* While YouTube has been a leading distributor of user-generated video content since it began in 2005, it has taken several steps in the last few years to evolve into an entity that offers both professional and non-professional content. YouTube implemented its “Content ID” – an advanced set of copyright policies and content management tools – in 2009, addressing in large part issues of copyright infringement that previously arose from user-uploads of third-party content and allowing media companies to monetize and manage user-uploaded videos.⁸⁷⁸ YouTube also has entered into partnerships with numerous content providers to create ad-supported channels of short- and long-form programming,⁸⁷⁹ and developed mechanisms to allow its partners to sell advertisements on YouTube more directly.⁸⁸⁰

278. Sony’s Crackle service is another example of recent entry and retooling by an OVD. In 2006, Sony bought Grouper, a website that hosted user-generated videos.⁸⁸¹ Sony shut down Grouper and relaunched it as Crackle the next year.⁸⁸² At that time, Crackle was “something of a filmmaking incubator.”⁸⁸³ User-uploaded videos were entered into contests and judged by editors.⁸⁸⁴ Crackle’s focus has since changed, however. Today, Crackle is an outlet for the distribution of professionally produced

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Nancy Gohring, *FCC Looks Into Level 3, Comcast Content Dispute*, PC WORLD, Nov. 30, 2010, http://www.pcworld.com/businesscenter/article/212078/fcc_looks_into_level_3_comcast_content_dispute.html (visited Feb. 17, 2012); Joe Mullin, *Verizon Chooses Sides, While Level 3 Keeps Fighting With Comcast*, PaidContent.org, Jan. 14, 2011, <http://paidcontent.org/article/419-verizon-chooses-sides-while-level-3-keeps-fighting-with-comcast/> (visited Feb. 29, 2012).

⁸⁷⁸ See YouTube, *Content ID*, <http://www.youtube.com/t/contentid> (visited Feb. 16, 2012); Will Richmond, *Why Did Online Video Consumption Spike in 2009?*, Video Nuze, Feb. 24, 2010, <http://videonuze.com/blogs/?2010-02-24/Why-Did-Online-Video-Consumption-Spike-in-2009-/&id=2446> (visited Feb. 16, 2012).

⁸⁷⁹ Ryan Nakashima, *YouTube Launching 100 New Channels*, USA TODAY, Oct. 29, 2011, <http://www.usatoday.com/tech/news/story/2011-10-29/youtube-original-programming/50997002/1> (visited Feb. 16, 2012); Laura Lee, *Welcome to YouTube, Univision!*, YouTube Biz Blog, Nov. 16, 2009, <http://ytbizblog.blogspot.com/2009/11/welcome-to-youtube-univision.html> (visited Feb. 16, 2012); Diane Pucin, *ESPN and YouTube, Together*, L.A. TIMES, July 13, 2009, http://latimesblogs.latimes.com/sports_blog/2009/07/espn-and-youtube-together.html (visited Feb. 16, 2012).

⁸⁸⁰ Phil Farhi, *Helping Partners Help Themselves*, YouTube Biz Blog, July 27, 2009, <http://ytbizblog.blogspot.com/2009/07/helping-partners-help-themselves.html> (visited Feb. 16, 2012).

⁸⁸¹ Greg Sandoval, *Sony Gets Into Video Sharing with Grouper Hug*, CNET, Aug. 23, 2006, http://news.cnet.com/Sony-gets-into-video-sharing-with-Grouper-hug/2100-1026_3-6108508.html (visited Feb. 16, 2012).

⁸⁸² See Nilay Patel, *Sony Kills Grouper: Say Hello to Crackle*, Engadget, July 16, 2007, <http://www.engadget.com/2007/07/16/sony-kills-grouper-say-hello-to-crackle/> (visited Feb. 16, 2012).

⁸⁸³ See *id.*

⁸⁸⁴ See *id.*

content, such as Sony's television shows and movies, and generally does not accept user video submissions.⁸⁸⁵

279. As noted above, Hulu initiated service in 2007. Its entry into the subscription video service business was more recent however. Specifically, Hulu launched Hulu Plus in June 2010, altering its approach to delivery of online video content to consumers. The service launched as a means for Hulu's media owners to generate new sources of revenue from Hulu without undercutting the cable contracts that have traditionally supported content creation.⁸⁸⁶

280. Providers of niche content have entered the marketplace as well. For example, Mubi, a subscription OVD founded in 2007 and devoted to international, independent, and classic films, now has 1.2 million members worldwide.⁸⁸⁷ Similarly, Fandor, which focuses on independent films, launched on March 8, 2011, charging \$10 per month for access to its large library of films.⁸⁸⁸ Fandor claims that it intends to make the service accessible via multiple devices, such as smartphones, tablets, and televisions.⁸⁸⁹

281. Other competitors are entering the OVD industry as well. In February 2012, for example, Verizon announced a joint venture with Redbox operator Coinstar to launch an online streaming video service in the second half of 2012.⁸⁹⁰ Verizon operates an MVPD service (FiOS TV).⁸⁹¹ RedBox is a video rental kiosk company.⁸⁹² According to reports, the joint venture's service, called "Project Zoetrope," will allow users to subscribe to, download and stream movies and television shows across various devices, including televisions, web browsers, tablets, smartphones, Roku, Xbox and Google TV.⁸⁹³

282. In addition, the continued development of online video distribution is encouraging some established content owners to enter the video content market for the first time. For example, news entities

⁸⁸⁵ Crackle, *Crackle FAQ: The Leftovers*, <http://www.crackle.com/outreach/faq#leftovers> (visited Feb. 14, 2012).

⁸⁸⁶ Dawn C. Chmielewski, *Hulu Launches a Preview of its Subscription Service*, L.A. TIMES, June 29, 2010, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/06/hulu-announces-the-launch-of-its-paid-subscription-service.html> (visited Feb. 16, 2012).

⁸⁸⁷ Mubi, <http://mubi.com/> (visited Feb. 16, 2012); Mubi, *Mubi Press*, <http://mubi.com/about/press> (visited Feb. 16, 2012); Paul Bond & Tim Appelo, *How the Assault on Netflix Will Shake Out*, THE HOLLYWOOD REPORTER, Mar. 17, 2011, <http://www.hollywoodreporter.com/news/how-assault-netflix-will-shake-168562> (visited Feb. 16, 2012).

⁸⁸⁸ Fandor, <http://www.fandor.com/> (visited Feb. 16, 2012); Fandor, *About*, <http://www.fandor.com/company/about> (visited Feb. 16, 2012) ("About Fandor"); Mark Hachman, *Fandor Launches As "Netflix for Indie Films"*, PC MAGAZINE, Mar. 9, 2011, <http://www.pcmag.com/article2/0,2817,2381725,00.asp> (visited Feb. 16, 2012).

⁸⁸⁹ About Fandor.

⁸⁹⁰ David Goldman, *Verizon and Redbox Team Up to Battle Netflix*, CNN Money, Feb. 6, 2012, http://money.cnn.com/2012/02/06/technology/verizon_redbox/index.htm (visited Feb. 28, 2012) ("Verizon and Redbox Team Up"); Verizon, *Verizon and Coinstar's Redbox Form Joint Venture to Create New Consumer Choice for Video Entertainment* (news release), Feb. 6, 2012, <http://newscenter.verizon.com/press-releases/verizon/2012/verizon-and-coinstars-redbox.html> (visited Feb. 28, 2012). Verizon and Redbox hold, respectively, 65 and 35 percent ownership shares of the joint venture. *Id.*

⁸⁹¹ *See supra*, ¶ 32.

⁸⁹² *See infra*, ¶ 288.

⁸⁹³ Todd Haselton, *Verizon and Redbox May be Plotting Movie Streaming Partnership for Early 2012*, BGR.com, Dec. 9, 2011, <http://www.bgr.com/2011/12/09/verizon-and-redbox-plotting-streaming-partnership-early-2012-launch-expected/> (visited Feb. 28, 2012); Verizon and Redbox Team Up.

and organizations like *Politico*, *The Wall Street Journal*, *The Washington Post*, *The Los Angeles Times*, *The Huffington Post*, and Reuters have either entered the OVD marketplace recently or intend to do so in the near future.⁸⁹⁴ For example, *Politico* recently added to its newsroom “a stage set with lights, microphones, an anchor desk and five high-definition cameras so that reporters and editors can produce hours of live programming for Internet viewers.”⁸⁹⁵ *The New York Times* produces a daily taped news show for Internet distribution, *TimesCast*, and in early 2012 added a morning business newscast.⁸⁹⁶ *The Wall Street Journal* produces five hours of live Internet video content per day, and news organizations like *The Washington Post*, *The Los Angeles Times*, and *The Huffington Post* are preparing to provide Internet video content in the near future.⁸⁹⁷ News organizations continue to struggle to adopt new digital business models, and the potential to generate significant advertising revenue is encouraging them to develop and expand online video offerings.⁸⁹⁸

283. *Exit.* Because the OVD marketplace is still developing, it is likely that several entities will exit the marketplace in the upcoming years. MeeVee is one example of a company that entered the OVD marketplace, found it difficult to compete, and, ultimately ceased service. When MeeVee launched in 2005, it claimed to be “the first online destination to bring together traditional television listings and online video from hundreds of sources.”⁸⁹⁹ MeeVee functioned like a highly interactive program guide. A user could enter information concerning the cable and other video services to which he or she subscribed, and MeeVee would sort the user’s various viewing options.⁹⁰⁰ MeeVee also provided users with personalized viewing recommendations based on their selected shows and allowed users to create channels based on their own interests.⁹⁰¹ Through deals with content companies, MeeVee allowed users to watch previews and clips from shows.⁹⁰² The service attracted a large amount of venture capital.⁹⁰³ As of July 2007, MeeVee’s website attracted 3.4 million unique visitors per month, although it had begun losing customers by that time.⁹⁰⁴ By the end of Summer 2007, MeeVee’s traffic had experienced a steep

⁸⁹⁴ Brian Stelter, *Print News Media Go Live With Video Programming*, N.Y. TIMES, February 5, 2012, http://www.nytimes.com/2012/02/06/business/media/news-organizations-plunge-into-video-production.html?_r=1 (visited Feb. 14, 2012) (“Print Media Go Live”).

⁸⁹⁵ *See id.*

⁸⁹⁶ *See id.*; New York Times, *TimesCast*, <http://video.nytimes.com/video/playlist/timescast/1247467375115/index.html> (visited Mar. 5, 2012).

⁸⁹⁷ *See* Wall Street Journal, *Video Center*, <http://online.wsj.com/video-center> (visited Mar. 5, 2012); Print Media Go Live.

⁸⁹⁸ *See id.*

⁸⁹⁹ Clayton Moullynnox, *Meevee Internet TV Guide: Striving to Connect Broadcast & Web TV*, Web TV Wire, July 31, 2007, <http://www.webtvwire.com/meevee-to-become-tv-guide-for-the-Internet/> (visited Feb. 16, 2012).

⁹⁰⁰ Matt Marshall, *MeeVee Wants to be Your TV Guide: Raises \$8 Million More*, SiliconBeat, Aug. 14, 2006, http://www.siliconbeat.com/entries/2006/08/14/meevee_wants_to_be_your_tv_guide_raises_8_million_more.html (visited Feb. 16, 2012) (“MeeVee 8 Million”).

⁹⁰¹ Whitney Reynolds, *2007 Top 100 Undiscovered Web Sites, Number 22*, PC MAGAZINE, http://www.pcmag.com/slideshow_viewer/0,3253,1%253D213934%2526a%253D213919%2526po%253D22,00.asp?p=n (visited Feb. 16, 2012).

⁹⁰² Mark Hopkins, *MeeVee Lays Off 3/4 of Staff; CEO and CTO Step Down*, Mashable, Feb. 29, 2008, <http://mashable.com/2008/02/29/meevee-layoff/> (visited Feb. 16, 2012) (“MeeVee Layoff”).

⁹⁰³ *Id.*; MeeVee 8 Million.

⁹⁰⁴ *Id.*; MeeVee Layoff; Liz Gannes, *MeeVee in Tatters, Drops Staff and CEO*, New Tee Vee, Mar. 3, 2008, <http://gigaom.com/video/meevee-in-tatters-drops-staff-and-ceo/> (visited Feb. 16, 2012) (“MeeVee in Tatters”).

decline, and those numbers remained low.⁹⁰⁵ In February 2008, the company's CEO and CTO resigned, and a large portion of MeeVee's staff was laid off.⁹⁰⁶ MeeVee was purchased by Live Universe in May 2008⁹⁰⁷ but ultimately ceased operations in December 2011.⁹⁰⁸

284. Sezmi – which provided a hybrid of over-the-air, cable, and online video services⁹⁰⁹ – also exited the market recently. The service used a consumer-purchased set-top box with an Internet connection and DVR functionality and a modular DTV antenna to provide access to broadcast stations, cable networks, and Internet content.⁹¹⁰ Sezmi's antenna picked up local digital television broadcast stations off the air, and the service used digital television spectrum leased from local broadcasters, as well as the Internet, to transmit cable networks to subscribers.⁹¹¹ Sezmi's broadband connection also allowed the service to provide on-demand services (e.g., rentals and sales from an extensive library of movies and television shows), as well as access to archived video and Internet content from providers like YouTube and Comedy Central.⁹¹² Sezmi offered very effective content selection. Its set-top box learned customers' content preferences and downloaded programming automatically.⁹¹³ The service provided individualized recommendations,⁹¹⁴ and customers could set up different accounts for different individuals, so that one member of the household did not have to wade through content chosen for someone else.⁹¹⁵ Sezmi never really caught on, however, for many reasons, including a lack of compelling content compared to its rivals.⁹¹⁶ For example, Sezmi offered limited sports content (ESPN

⁹⁰⁵ See MeeVee Layoff.

⁹⁰⁶ See MeeVee in Tatters; MeeVee Layoff.

⁹⁰⁷ Michael Arrington, *MeeVee Finds A Home, Acquired By Live Universe*, Tech Crunch, May 7, 2008, <http://techcrunch.com/2008/05/07/meevee-acquired-by-live-universe/> (visited Feb. 16, 2012).

⁹⁰⁸ Wendy Boswell, *Use MeeVee to Find Local TV Listings*, About.com, <http://websearch.about.com/od/dailywebsearchtips/qt/dnt0812.htm> (visited Feb. 16, 2012).

⁹⁰⁹ See Eric R. Taub, *Sezmi Looks to Bring Broadcast TV to Broadband*, N.Y. TIMES, June 24, 2009 <http://gadgetwise.blogs.nytimes.com/2009/06/24/will-sezmi-say-it-to-you/> (visited Mar. 5, 2012) (“Sezmi Broadband”); Jon Healy, *How Sezmi Stacks Up*, L.A. TIMES, May 28, 2010 <http://latimesblogs.latimes.com/technology/2010/05/how-sezmi-stacks-up.html> (visited Mar. 5, 2012) (“How Sezmi Stacks Up”).

⁹¹⁰ See *id.*; Harry McCracken, *Is Sezmi a Cable TV Killer?*, Technologizer, Nov. 16, 2009, <http://technologizer.com/2009/11/16/sezmi/> (visited Mar. 5, 2012) (“Sezmi Cable Killer”).

⁹¹¹ See *id.*; Sezmi Broadband.

⁹¹² See Sezmi Cable Killer; Mark Hachman, *New Sezmi Set-top Blows Away the TV*, PC MAGAZINE, May 1, 2008, <http://www.pcmag.com/article2/0,2817,2289653,00.asp> (visited Mar. 5, 2012) (“Sezmi Blows Away”).

⁹¹³ See Sezmi Broadband.

⁹¹⁴ See Sezmi Blows Away.

⁹¹⁵ See Sezmi Broadband.

⁹¹⁶ See Richard Lawler, *Sezmi's Cable/Satellite Alternative TV Service to Shut Down Monday, Won't Be Missed*, Engadget, Sept. 24, 2011, <http://www.engadget.com/2011/09/24/sezmi-s-cable-satellite-alternative-tv-service-to-shut-down-mo/> (visited Mar. 5, 2012) (“Sezmi to Shut Down”); Ryan Lawler, *Sezmi Says Goodbye. Here's Why.*, Gigaom, Sept. 26, 2011, <http://gigaom.com/video/sezmi-says-goodbye-heres-why/> (visited Mar. 5, 2012) (“Sezmi Says Goodbye”).

and regional sports networks were unavailable),⁹¹⁷ and did not provide access to OVD content from Hulu or Netflix.⁹¹⁸ Ultimately, Sezmi abandoned its consumer OVD service in September 2011.⁹¹⁹

3. OVD Conduct

285. In addition to industry structure, a second key element of our analysis of OVD competition is an examination of the conduct of industry participants – in particular, the business models and competitive strategies of these entities. In this section of the Report, we discuss OVD competition in terms of both price and non-price rivalry.

286. As the delivery of online video is in its infancy, no single business strategy has emerged as the industry standard. As several commenters recognize, technology, delivery mechanisms, content acquisition, licensing strategies, and consumer demand patterns all remain in flux.⁹²⁰

287. An OVD's business model must account for the existence of broadcasters and MVPDs. MVPDs in particular have taken steps in recent years to expand the libraries of on-demand content they can provide to their customers.⁹²¹ This strategy puts pressure on OVDs to continue to expand their content libraries and/or to offer unique content. Moreover, so-called TV Everywhere services allow MVPDs to compete with unaffiliated OVDs by providing free on-demand Internet video to authenticated MVPD customers.⁹²²

288. An OVD also must contend with competition from DVDs, such as the DVD rental side of Netflix's business,⁹²³ Redbox, which allows customers to rent DVDs and Blu-ray discs from more than 28,000 kiosks nationwide,⁹²⁴ and Blockbuster, which provides DVD rentals by mail.⁹²⁵ In addition, while

⁹¹⁷ See Sezmi to Shut Down; Sezmi Cable Killer; How Sezmi Stacks Up.

⁹¹⁸ See *id.*

⁹¹⁹ See Sezmi Says Goodbye; Sezmi to Shut Down.

⁹²⁰ See, e.g., Google 6/8/11 Comments at 4; NAB 6/8/11 Comments at 31 (noting variety of programming, revenue models, and distribution options in the OVD marketplace).

⁹²¹ See, e.g., Heather Wilner, *The Best Gets Better, and a Whole Lot Bigger: FiOS TV VOD Library Reaches 24,000*, Verizon at Home, Apr. 25, 2011, <http://forums.verizon.com/t5/Verizon-at-Home/The-Best-Gets-Better-and-a-Whole-Lot-Bigger-FiOS-TV-VOD-Library/ba-p/305255> (visited Feb. 16, 2012) (noting that Verizon FiOS offers more than 24,000 monthly VOD titles (movies and television shows), including 3,800 HD VOD titles per month); Todd Spangler, *Comcast: VOD Movie Views In Our Markets Well Ahead Of Netflix's*, MULTICHANNEL NEWS, Apr. 14, 2011, <http://www.multichannel.com/article/466818-Comcast-VOD-Movie-Views-In-Our-Markets-Well-Ahead-Of-Netflix-s.php> (visited Feb. 16, 2012) (noting Comcast's statements that the company offers more than 11,000 VOD movies in many markets and an average of more than 350 million VOD views per month overall, of which tens of millions are movies).

⁹²² See *supra*, ¶¶ 21, 96; Netflix 6/8/11 Comments at 6 (“By bundling traditional MVPD services with Internet delivery of content, vertically integrated MVPDs leverage their dominant market position at the expense of competitive online offerings.”).

⁹²³ Netflix, *Netflix Plans*, <http://www.netflix-dvd.com/netflix-plans.html> (visited Feb. 16, 2012).

⁹²⁴ Redbox, *Redbox Info*, <http://www.redbox.com/facts> (visited Feb. 16, 2012).

⁹²⁵ Blockbuster, *Blockbuster Total Access*, <https://www.blockbuster.com/signup/m/plan> (visited Mar. 5, 2012). In addition to DVD rentals, the company's “Blockbuster Total Access” service includes video games by mail, the ability to exchange discs in Blockbuster stores, and streaming of video content to the TV and PC. See *id.*; Wade Holden, *DISH's Timing Perfect for Blockbuster Streaming Reveal*, SNL Kagan, Sept. 29, 2011.

DVD sales have been declining in recent years, in part due to competition from OVDs,⁹²⁶ DVDs still constitute a competitor to the online delivery of video content. DVDs often offer extras that appeal to consumers, such as a director's cuts, deleted scenes, commentary, and additional content,⁹²⁷ which often are not available via OVDs.⁹²⁸

289. In addition, an OVD's business model needs to account for competition from other OVDs, bearing in mind that, while most consumers subscribe to only one MVPD, it is easy for consumers to access video content via multiple OVDs.

a. Price Rivalry

290. Unlike the broadcasting or MVPD industries, the OVD industry does not have a single revenue model. Depending on the OVD, consumers can gain access to programming in several ways, including: (1) for free, usually with advertising; (2) through a subscription service, with or without advertising; (3) on a per program basis for a fee; or (4) via "electronic sell-through" ("EST"), where a consumer pays a one-time fee to download a television show, movie, or other media to be stored locally on a hard drive.⁹²⁹ Any OVD may implement any one or a combination of these business models.

291. Some OVDs provide video content for free. As a general rule, free OVD content is usually supported by advertisements delivered to viewers. Network portals, for example, generally provide their streams to users free of charge.⁹³⁰ Yahoo Screen and Sony's Crackle service provide free content, and most of the content available on YouTube is free as well.⁹³¹

292. Other OVDs use subscription-based models. For example, while Hulu's basic service is free, Hulu Plus charges subscribers \$7.99 a month for access to premium content, HD video (when available), and the ability to watch video on non-PC devices such as smartphones, tablets, gaming consoles, smart televisions, or Blu-ray players, or through set-top boxes.⁹³² Content delivered to Hulu Plus subscribers also contains advertisements.⁹³³ For a flat monthly fee (as of February 2012, \$7.99),

⁹²⁶ See, e.g., David Lieberman, *DVD Disaster? Study Says Sales Plummeted In 2010, Contrary To Industry Report*, Deadline, May 12, 2011, <http://www.deadline.com/2011/05/dvd-disaster-study-says-sales-plummeted-in-2010-contrary-to-industry-report/> (visited Feb. 16, 2012); Shane Smith, *Dreamworks Exec on DVD Sales Decline: "Greed Killed the Goose"*, Inside Redbox, May 12, 2010, <http://www.insideredbox.com/dreamworks-exec-on-dvd-sales-decline-greed-killed-the-geese/> (visited Feb. 16, 2012).

⁹²⁷ See, e.g., DVD Special Features & Extras, <http://dvdspecialfeatures.net/> (Internet website providing "An Online Database of DVD Extras and Bonus Features" including director's cuts, behind the scenes footage, deleted scenes, bloopers, and other content).

⁹²⁸ See, e.g., Liz Gannes, *DVD Extras Are the Future of the Internet*, Gigaom, Aug. 5, 2008, <http://gigaom.com/video/dvd-extras-are-the-future-of-the-internet/> (visited Mar. 6, 2012).

⁹²⁹ Home Media Magazine, *Digital Glossary*, <http://www.homemediamagazine.com/electronic-delivery/digital-glossary> (visited Feb. 27, 2012) ("Digital Glossary"). When discussing EST, this particular report focuses on situations where video content "is made available to consumers on a download-to-own basis, as opposed to . . . where content is rented for a specific period of time." Anytime On Demand, *Media Centre: Glossary of Terms*, http://www.anytimeondemand.com/glossary_of_terms.html#electronic (visited Feb. 27, 2012).

⁹³⁰ See, e.g., ABC Network Portal, NBC Network Portal, CBS Network Portal, and FOX Network Portal.

⁹³¹ See, e.g., Yahoo, *Yahoo Screen*, <http://screen.yahoo.com> (visited Mar. 22, 2012); YouTube, <http://www.youtube.com>. See also *supra*, ¶ 248.

⁹³² See *Introducing Hulu Plus*; Hulu, *Hulu Plus > Devices*, <http://www.hulu.com/plus/devices> (visited Feb. 29, 2012) ("Hulu Plus Devices"); Hulu, *Hulu Plus*, <http://www.hulu.com/plus-> (visited Feb. 29, 2012).

⁹³³ Hulu, *Help: Why Are There Ads In Hulu Plus?*, <http://www.hulu.com/support/article/20356372> (visited Feb. 24, 2012) ("Ads In Hulu Plus").

Netflix's subscription streaming video service allows a subscriber to access an unlimited amount of online content, commercial free.⁹³⁴ Sometimes OVD subscriptions are part of a larger subscription product. One example is, Amazon Prime, a service from Amazon.com that, for payment of an annual fee, gives subscribers free two-day shipping on many items sold on its website, free book borrowing for Amazon Kindle, and unlimited, commercial-free, instant streaming of thousands of movies and television shows.⁹³⁵

293. As noted above, the four major U.S. professional sports leagues offer subscription-based online video services as well. These services provide live games online, each with its own variations or tiers depending on factors such as in-market availability; home equipment; and/or MVPD subscription.⁹³⁶

294. Some OVDs offer "rental" content on a pay-per-program basis. For example, under YouTube's movie rental service, a user that purchases a "24 hour pass" for a movie may begin streaming that movie any time within the next 30 days, with all viewing completed within 24 hours of initiating playback.⁹³⁷ Other OVDs, such as Facebook, Vudu, and Amazon have similar services, allowing users to view a movie or program during a fixed period of time for a one-time fee.⁹³⁸

295. The EST model is also prevalent. A consumer who purchases video content via EST can watch that content as many times as he or she desires (although certain files might become unusable over time or may not be viewable using competing platforms).⁹³⁹ One well-known EST OVD is Apple, which provides downloadable media files, including movies and television shows, via iTunes.⁹⁴⁰ Once a file is

⁹³⁴ See Netflix Signup; Don Reisinger, *Netflix Not Into Ads*, CNET, Feb. 11, 2011, http://news.cnet.com/8301-13506_3-20031514-17.html (visited Feb. 24, 2012).

⁹³⁵ See Amazon Prime.

⁹³⁶ See, e.g., Mark Newman, *Must-have MLB.TV Features New Lower Prices*, mlb.com, May 2, 2011, http://mlb.mlb.com/news/article.jsp?ymd=20110430&content_id=18432398&vkey=news_mlb&c_id=mlb (visited Feb. 24, 2012); DIRECTV, *NFL Sunday Ticket*, http://www.directv.com/DTVAPP/content/sports/nfl_online_mobile (visited Feb. 24, 2012) ("NFL Mobile"); Phillip Rosenberg, *Kickoff the NFL Season on PS3 With the NFL SUNDAY TICKET App, Available Today on Playstation Network*, PlayStation.Blog, Sept. 6, 2011, <http://blog.us.playstation.com/2011/09/06/kickoff-the-nfl-season-on-ps3-with-the-nfl-sunday-ticket-app-available-today-on-playstation-network/> (visited Feb. 24, 2012); NBA.com, *NBA League Pass*, <http://www.nba.com/leaguepass/index.html> (visited Feb. 24, 2012); NBA.com, *NBA League Pass Broadband*, <https://account.nba.com/leaguepass/broadband/> (visited Feb. 24, 2012); NBA.com, *NBA League Pass Mobile*, <http://www.nba.com/leaguepass/mobile/> (visited Feb. 24, 2012); NHL.com, *NHL GameCenter Live*, <https://gamecenter.nhl.com/nhlgc/secure/gclsignup> (visited Feb. 24, 2012).

⁹³⁷ YouTube World, *YouTube Movie Rental Service Streams 3000 More Movies*, <http://youtubeking10.blogspot.com/2011/05/youtube-movie-rental-service-streams.html> (visited Feb. 24, 2012); Barb Gonzalez, *YouTube Movie Rental Service – Review*, About.com, <http://hometheater.about.com/od/Network-Media-Player-Reviews/fr/Youtube-Movie-Rental-Service-Review.htm> (visited Feb. 24, 2012).

⁹³⁸ See, e.g., Ben Fritz and Jessica Guynn, *Facebook to Offer Movie Rentals*, L.A. TIMES, Mar. 9, 2011, <http://articles.latimes.com/2011/mar/09/business/la-fi-facebook-movies-20110309> (Facebook movie rental allows a user to watch a movie within a 48 hour period for \$3.00) (visited Feb. 24, 2012); Vudu, *Terms of Service*, <http://www.vudu.com/termservice.html> (when content is rented from Vudu, a user "will typically have 30 days to initiate viewing. Once initiated, viewing must typically be completed within 24 hours or before the end of the 30th day from date of initiation, whichever occurs sooner.") (visited Feb. 24, 2012); Amazon.com, *Amazon Instant Video*, http://www.amazon.com/gp/video/ontv/start/ref=sv_mov_aiv_1 ("Rentals start at \$2.99. If you rent, you'll have 30 days from when you rent to start watching, and once you've downloaded or start watching, most movies have a 24-hour window to finish watching.") (visited Feb. 24, 2012).

⁹³⁹ Digital Glossary.

⁹⁴⁰ What's On iTunes.

downloaded, users can watch it as many times as they want on their computers, televisions, iPods, iPhones, and/or iPads.⁹⁴¹ Sales, as opposed to rentals, of movies by Vudu and Amazon follow an EST model as well.⁹⁴²

b. Non-Price Rivalry

296. OVDs compete with, and differentiate themselves from, one another based on several non-price factors. Key points of non-price rivalry include the content of an entity's program library; advertising; and multi-device accessibility.

297. *Content Library.* The breadth and timeliness of an OVD's video content library helps establish its identity and business strategy. Increasingly, OVD consumers expect access to a wide variety of content, including newly released movies and recently aired television shows. As discussed below, many of the major players in the OVD marketplace have worked to expand and improve their content libraries, but face challenges in doing so.

298. The degree to which broadcast and cable networks make their programming available online via their portals varies tremendously. Some networks have been aggressive in making their content libraries fully available, particularly through their applications. For example, through HBO Go, HBO subscribers can obtain unlimited access to every episode of every season of HBO original programming without additional cost.⁹⁴³

299. The bigger OVD players tend to provide large libraries of content to users. For example, NBC, ABC, and FOX all provide content to Hulu, including current and past episodes of television programs.⁹⁴⁴ Hulu Plus subscribers have access to all current-season episodes of many hit shows, plus classic shows, including many full-series runs.⁹⁴⁵ This content is provided in HD, where available.⁹⁴⁶ In late 2011, Hulu acquired licensing rights to make 11 sitcoms from Carsey Werner TV Distribution available to Hulu Plus subscribers, and entered into a five-year licensing agreement to stream in-season episodes of The CW network television shows to its subscribers.⁹⁴⁷ The parent companies that have invested in Hulu have made full-length movies – often library content several years or decades old –

⁹⁴¹ *Id.*

⁹⁴² Vudu.com, *Knowledgebase Home > Billing*, <http://support.vudu.com/questions/93/How+much+does+VUDU+cost%3F+> (visited Feb. 27, 2012); Amazon.com, *Instant Video Terms of Use*, <http://www.amazon.com/gp/help/customer/display.html?nodeId=200026970> (visited Feb. 27, 2012).

⁹⁴³ HBO Go, *What is HBO Go?*, <http://www.hbogo.com/#whatis/> (visited Mar. 12, 2012).

⁹⁴⁴ Hulu, *Frequently Asked Questions*, http://www.hulu.com/about/media_faq (visited Feb. 27, 2012). CBS still has not provided any content for Hulu in the U.S. market. *Id.*; Nikki Finke, *SURPRISE! Holdout CBS To Deliver Content To Hulu – But Only For Japan Market*, Deadline, Sept. 1, 2011, <http://www.deadline.com/2011/09/surprise-cbs-to-deliver-content-to-hulu-for-japanese-subscribers/> (visited Feb. 27, 2012).

⁹⁴⁵ Introducing Hulu Plus.

⁹⁴⁶ *Id.*

⁹⁴⁷ Haseeb Ali, *Report: Hulu Secures Licensing Rights to 11 Sitcoms*, SNL Kagan, Nov. 23, 2011; Tim Kenneally, *CW Strikes 5-Year Deal With Hulu for New Shows*, Reuters, Oct. 28, 2011, <http://www.reuters.com/article/2011/10/28/idUS190340544120111028> (visited Feb. 28, 2012).

available on Hulu as well.⁹⁴⁸ As of December 2011, Hulu's website lists more than 300 content partners.⁹⁴⁹

300. In addition, Hulu has announced plans to raise capital to expand into original programs that it would make available both to free users and paid subscribers.⁹⁵⁰ Hulu may spend as much as \$500 million on new television shows and films.⁹⁵¹ Andy Forssell, chief content officer at Hulu, states that, "[w]e considered giving earlier access to [Hulu] Plus users and other benefits, but right now the aim is to get . . . [shows and films] out to as many folks as possible."⁹⁵²

301. Netflix has expanded its library of streaming content in recent years as well. Netflix first began to allow viewers to watch movies and television shows on their computers in 2007 on a "metered" basis of hours. In January 2008, Netflix offered unlimited PC streaming to consumers with unlimited subscriptions.⁹⁵³ When Netflix first introduced its Watch Instantly streaming video service, its catalog was comprised mostly of older movies.⁹⁵⁴ On October 1, 2008, Netflix announced a partnership deal with Starz to bring 2,500 new movies and television shows to Watch Instantly.⁹⁵⁵ Netflix made a more aggressive move to distribute newer movies when it agreed in August 2010 to pay an estimated \$900 million to cable channel Epix for the five-year streaming rights to films from Paramount Pictures, Lionsgate, and Metro-Goldwyn-Mayer.⁹⁵⁶ Now, Netflix has streaming deals with almost every major television content creator, including, but not limited to, NBC, ABC, CBS, FOX, The CW, and Time Warner.⁹⁵⁷ On the other hand, Starz recently ended its streaming relationship with Netflix, causing the

⁹⁴⁸ Hulu, *Movies, All Universal Pictures Titles*, <http://www.hulu.com/studio/universal-pictures?sort=name> (listing of Universal Pictures movie titles) (visited Feb. 27, 2012); Hulu, *Movies, All Twentieth Century Fox Titles*, <http://www.hulu.com/studio/twentieth-century-fox?sort=name> (listing of Twentieth Century Fox movie titles) (visited Feb. 27, 2012); Hulu, *Movies, All Miramax Titles*, <http://www.hulu.com/studio/miramax?sort=name> (listing of Miramax movie titles) (visited Feb. 27, 2012).

⁹⁴⁹ Hulu, *Content*, <http://www.hulu.com/partners> (visited Feb. 27, 2012).

⁹⁵⁰ Andy Fixmer, *Hulu Plans to Raise Money to Fund Expansion into Original Shows*, BLOOMBERG BUSINESSWEEK, Jan. 18, 2012, <http://www.businessweek.com/news/2012-01-18/hulu-plans-to-raise-money-to-fund-expansion-into-original-shows.html> (visited Feb. 28, 2012).

⁹⁵¹ *Id.*

⁹⁵² *Id.*

⁹⁵³ See Netflix, Press, <https://signup.netflix.com/Press> (visited Feb. 28, 2012); *supra*, ¶ 252.

⁹⁵⁴ See Saul Hansell, *iTunes Movie Rentals and Netflix Online: Different Markets*, N.Y. TIMES, Jan. 16, 2008, <http://bits.blogs.nytimes.com/2008/01/16/itunes-movie-rentals-and-netflix-online-different-markets> (visited Feb. 29, 2012). At the beginning of 2008, Watch Instantly had only 6,000 titles. *Id.*

⁹⁵⁵ Dawn Chmielewski, *More Mainstream Movies for Netflix Online*, L.A. TIMES, Oct. 1, 2008, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2008/10/more-mainstream.html> (visited Feb. 29, 2012).

⁹⁵⁶ Brian Stelter, *Netflix to Stream Films from Paramount, Lions Gate, MGM*, N.Y. TIMES, Aug. 10, 2010, <http://mediadecoder.blogs.nytimes.com/2010/08/10/netflix-to-stream-films-from-paramount-lionsgate-mgm> (visited Feb. 29, 2012).

⁹⁵⁷ See Paul Bond, *What Hollywood Execs Privately Say About Netflix*, THE HOLLYWOOD REPORTER, Jan. 14, 2011, <http://www.hollywoodreporter.com/news/hollywood-execs-privately-netflix-71957> (visited Feb. 29, 2012); Paul Bond, *Netflix Renews Deal With NBCUniversal for Streaming TV Shows, Movies*, THE HOLLYWOOD REPORTER, July 21, 2011, <http://www.hollywoodreporter.com/news/netflix-renews-deal-nbcuniversal-streaming-210792> (visited Feb. 29, 2012) ("Netflix NBC Deal"); Todd Spangler, *Disney/ABC Extends Netflix Deal, Cuts One With Amazon*, MULTICHANNEL NEWS, Oct. 31, 2011, <http://www.multichannel.com/article/475953-Disney-ABC-Extends-Netflix-Deal-Cuts-One-With-Amazon.php> (visited Feb. 29, 2012); Netflix CW Deal.

OVD to lose access to a major source of new movie streaming content.⁹⁵⁸ Many other studios reportedly are reluctant to allow Netflix to stream new titles for fear that doing so would harm DVD sales and video-on-demand rental revenues.⁹⁵⁹

302. In some cases, Netflix is able to stream content to users soon after it initially airs. For example, Netflix's deal with NBC allows it to stream episodes of many shows one day after they are initially broadcast.⁹⁶⁰ In other cases, users must wait before certain content is available for streaming via Netflix. Under Netflix's agreement with Disney/ABC, for example, episodes from the current season's series will not be made available to the OVD until 30 days after the last episode of each season airs.⁹⁶¹

303. Netflix provides an illustrative example of how OVDs acquire and distribute studios' content. Netflix has provided an outlet for studios to recoup their costs for network programming.⁹⁶² For example, in 2011 Netflix purchased streaming rights from Warner Brothers for FX's *Nip/Tuck* (after Warner Brothers failed to sell off-network syndication rights) and from Lionsgate for AMC's *Mad Men*.⁹⁶³ The latter was unusual because *Mad Men* has not aired in syndication, as have most other programs included in subscription video-on-demand ("SVOD").⁹⁶⁴ As of 2011, 60 percent of Netflix streams were television episodes.⁹⁶⁵ Netflix has been increasing the number of television series it offers (from 477 to 1,080 between January 2011 and September 2011) faster than the number of movies it offers (from 8,950 to 9,342 during the same period).⁹⁶⁶ Moreover, as discussed above, Netflix has also commissioned several original television series.⁹⁶⁷ Netflix develops programming based on analysis of its database of its customers' viewing patterns and quality ratings. Its intent is to attract a smaller but more dedicated cadre of viewers than network programming. Netflix offers television consumers the ability to view sequentially episodes of television series that they may have missed. Thus, Netflix may create demand for in-season viewing of network series. Netflix's impact on movie audiences may be different, leading studios to limit delivery of streaming content.⁹⁶⁸

⁹⁵⁸ Ben Fritz, Joe Flint & Dawn C. Chmielewski, *Starz to End Streaming Deal with Netflix*, L.A. TIMES, Sept. 2, 2011, <http://articles.latimes.com/2011/sep/02/business/la-fi-ct-netflix-starz-20110902> (visited Feb. 29, 2012).

⁹⁵⁹ Netflix CW Deal.

⁹⁶⁰ Netflix NBC Deal.

⁹⁶¹ Netflix Inc., *Netflix and Disney-ABC Television Group Announce Extension of Existing Licensing Agreement to Stream TV Shows* (press release), Oct. 31, 2011.

⁹⁶² Andrew Wallenstein, *Digital Dollars Amp Syndie Biz*, VARIETY, July 21, 2011, <http://www.variety.com/article/VR1118040194> (visited Feb. 29, 2012).

⁹⁶³ Deana Myers, *Digital Rights in Off-Network Syndication Deals*, SNL Kagan, Apr. 20, 2011.

⁹⁶⁴ Andrew Wallenstein, *ABC-WBTV Deal Rewrites Syndie, Digital Rights*, VARIETY, Nov. 14, 2011, <http://www.variety.com/article/VR1118046062Cached> (visited Feb. 29, 2012). Subscription OVDs, such as Netflix and Amazon Prime, are considered subscription video-on-demand services.

⁹⁶⁵ Ben Fritz & Joe Flint, *Netflix Less About Flicks, More About TV*, L.A. TIMES, Feb. 4, 2012, <http://articles.latimes.com/2012/feb/04/business/la-fi-ct-netflix-20120205> (visited Feb. 29, 2012); Perkin di Grazia, *Netflix's Future is In TV*, SNL Kagan, Oct. 24, 2011.

⁹⁶⁶ *Id.*

⁹⁶⁷ *See supra*, ¶ 262.

⁹⁶⁸ Netflix 2010 Form 10-K at 6-7.

304. YouTube provides a significant amount of streaming television content. Each of the four major broadcast networks has a YouTube channel,⁹⁶⁹ as do a host of basic⁹⁷⁰ and premium⁹⁷¹ cable networks. These channels focus on short clips, however, rather than full episodes. YouTube's ability to acquire distribution rights to long-form broadcast television content is limited by the relationships News Corp., NBC Universal, and Disney have with Hulu.⁹⁷² YouTube also partners with a wide variety of third-party content creators to provide numerous free channels to users.⁹⁷³ In October 2011, YouTube announced plans to launch more than 100 new video channels featuring ad-supported free original content provided by third-party partners such as *The Wall Street Journal*, Jay-Z, Madonna, Ashton Kutcher, and Shaquille O'Neal.⁹⁷⁴ The YouTube channels will feature videos in 20 different categories like sports, comedy, and news.⁹⁷⁵

305. In addition, YouTube allows users to rent (*i.e.*, stream on a pay-per-movie basis) films from the Sundance Film Festival and thousands of full-length feature films from major Hollywood studios.⁹⁷⁶ In November 2011, it announced that hundreds of Walt Disney movies would be coming to

⁹⁶⁹ YouTube, *NBC Network*, <http://www.youtube.com/user/NBC> (visited Feb. 29, 2012); YouTube, *ABC Television*, <http://www.youtube.com/user/abcnetwork?blend=2&ob=4> (visited Feb. 29, 2012); YouTube, *CBS*, <http://www.youtube.com/user/cbs?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *FOX*, <http://www.youtube.com/user/FoxBroadcasting> (visited Feb. 29, 2012).

⁹⁷⁰ See, e.g., YouTube, *TruTV*, <http://www.youtube.com/user/truTVnetwork> (visited Feb. 29, 2012); YouTube, *ESPN*, <http://www.youtube.com/user/espn?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *Discovery Channel*, <http://www.youtube.com/user/discoverynetworks?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *Lifetime Television*, <http://www.youtube.com/user/lifetime?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *History*, <http://www.youtube.com/user/historychannel?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *TLC*, <http://www.youtube.com/user/tlc?blend=1&ob=4> (visited Feb. 29, 2012).

⁹⁷¹ See, e.g., YouTube, *HBO's Channel*, <http://www.youtube.com/user/HBO?feature=watch> (visited Feb. 29, 2012); YouTube, *Showtime*, <http://www.youtube.com/user/showtime?blend=1&ob=4> (visited Feb. 29, 2012); YouTube, *Cinemax's Channel*, <http://www.youtube.com/user/cinemax?blend=1&ob=4> (visited Feb. 29, 2012).

⁹⁷² See, e.g., Peter Kafka, *Hulu Buyers Would Get Exclusive Content, With Strings Attached*, All Things D, June 27, 2011, <http://allthingsd.com/20110627/hulu-buyers-would-get-exclusive-content-with-strings-attached/> (discussing Hulu's content relationships with Disney and News Corp) (visited Feb. 29, 2012).

⁹⁷³ See YouTube, *Add Channels*, <http://www.youtube.com/members?t=a&p=1&s=ms&g=0> (browsable menu of YouTube channels) (visited Feb. 29, 2012).

⁹⁷⁴ See Erik Gruenwedel, *YouTube Bows Original Content Channels; Google TV Gets Reboot*, HOME MEDIA MAGAZINE, Oct. 29, 2011, <http://www.homemediamagazine.com/streaming/youtube-bows-original-content-channels-google-tv-gets-reboot-25503> (visited Feb. 24, 2012); Michael Grotticelli, *YouTube to Launch 100 Online Channels*, BROADCAST ENGINEERING, Nov. 3, 2011, http://broadcastengineering.com/news/youtube_launch_100_channels_110311/ (visited Feb. 28, 2012); *YouTube to Launch 100 Channels; Madonna, Ashton Kutcher, Jay-Z to Produce Shows*, INTERNATIONAL BUSINESS TIMES, Oct. 29, 2011, <http://www.ibtimes.co.uk/articles/239892/20111029/youtube-launch-100-channels-madonna-ashton-kutcher.htm> (visited Feb. 28, 2012).

⁹⁷⁵ See *id.*

⁹⁷⁶ Athima Chansanchai, *Now at YouTube: 3,000 More Movie Rentals*, msnbc.com, May 11, 2011, <http://technolog.msnbc.msn.com/news/2011/05/10/6617922-now-at-youtube-3000-more-movie-rentals> (visited Feb. 29, 2012) ("Now at YouTube"); YouTube, *Broadcasting Ourselves, the Official YouTube Blog, Get More Into Movies on YouTube*, May 9, 2011, <http://youtube-global.blogspot.com/2011/05/get-more-into-movies-on-youtube.html> (visited Feb. 29, 2012).

YouTube.⁹⁷⁷ In many cases, YouTube's movies are available for streaming simultaneously with DVD release.⁹⁷⁸

306. Amazon has 13,000 titles available on Amazon Prime,⁹⁷⁹ and over 100,000 movies and television shows available overall.⁹⁸⁰ The company has been entering into deals recently to grow its television catalog in particular. In July 2011, Amazon acquired the rights to stream thousands of CBS shows online, in a deal estimated to be worth more than \$100 million.⁹⁸¹ Amazon also obtained a license from Disney in October 2011 that will make more than 800 episodes of ABC television shows available to Amazon Prime subscribers.⁹⁸²

307. Vudu's library has more than 30,000 movies and television episodes, and the company claims it has the largest catalog of HD movies available on demand.⁹⁸³ Almost all of its movies are available the same day that they are released on DVD.⁹⁸⁴

308. *Advertisements.* OVDs also compete based on the amount and type of advertising contained in the programming they provide to consumers. Often, OVD content that is provided to users free of charge will contain advertisements, and users expect this to be the case. Subscription or pay-per-program OVD content, however, generally contains fewer or no advertisements.

309. Crackle and Yahoo Screen provide free content that contains advertisements.⁹⁸⁵ Similarly, full television episodes viewed via the network portals for the four major broadcast networks contain advertisements,⁹⁸⁶ as does content provided via Hulu's non-subscription service.⁹⁸⁷ Hulu Plus content contains advertisements as well, purportedly to keep the subscription price low and because of the

⁹⁷⁷ YouTube, *Broadcasting Ourselves, the Official YouTube Blog, Welcoming Your Favorite Disney Movies to Rent on YouTube*, Nov. 23, 2011, <http://youtube-global.blogspot.com/2011/11/welcoming-your-favorite-disney-movies.html> (visited Feb. 29, 2012).

⁹⁷⁸ Now at YouTube.

⁹⁷⁹ See Amazon.com, *What is Prime Instant Video*, <http://www.amazon.com/gp/feature.html?ie=UTF8&docId=1000739191> (visited Feb. 29, 2012).

⁹⁸⁰ Matt Burns, *Watch Out Netflix, Amazon Instant Video Reaches 100,000 On-Demand Titles*, Tech Crunch, Aug. 18, 2011, <http://techcrunch.com/2011/08/18/watch-out-netflix-amazon-instant-video-reaches-100000-on-demand-titles/> (visited Feb. 29, 2012).

⁹⁸¹ *CBS Licenses Shows to Amazon in Challenge to Netflix and Hulu*, ADVERTISING AGE, July 20, 2011, <http://adage.com/article/mediaworks/cbs-licenses-shows-amazon-challenge-netflix-hulu/228815/> (visited Feb. 29, 2012).

⁹⁸² *The Streaming Video Wars: Amazon Prime Adds ABC and Disney TV Shows*, ADVERTISING AGE, Oct. 31, 2011, <http://adage.com/article/mediaworks/streaming-war-amazon-prime-adds-abc-disney-tv-shows/230732/> (visited Feb. 29, 2012).

⁹⁸³ Jillian, *Taking a Swing at Netflix, VUDU Expands TV Content Library*, PadGadget, Sept. 22, 2011, <http://www.padgadget.com/2011/09/22/taking-a-swing-at-netflix-vudu-expands-tv-content-library/> (visited Feb. 15, 2012); Vudu, *The Vudu Difference*, <http://www.vudu.com/difference.html> (visited Feb. 15, 2012).

⁹⁸⁴ See *id.*

⁹⁸⁵ David Jackson, *Sony's Crackle Expands Ad-Supported Video Streaming*, The Stream Report, Mar. 29, 2011, <http://thestreamreport.com/?p=262> (visited Feb. 29, 2012); E.B. Boyd, *Yahoo Launches Video Destination Site*, FAST COMPANY, Oct. 4, 2011, <http://www.fastcompany.com/1784990/yahoo-launches-video-destination-site> (visited Feb. 29, 2012).

⁹⁸⁶ See ABC Network Portal; NBC Network Portal; CBS Network Portal; FOX Network Portal.

⁹⁸⁷ About Hulu.

licensing costs associated with premium content.⁹⁸⁸ Hulu has distinguished itself from its broadcasting counterparts by showing fewer advertisements. For example, it has just two minutes of promotions in an episode of a situation comedy compared to eight minutes of advertising on broadcast television.⁹⁸⁹ Hulu also gives users some control over the advertising experience, sometimes allowing viewers to choose between one long commercial at the beginning of a show or several short ones spread throughout a program,⁹⁹⁰ and to swap out less relevant advertisements for more relevant ones.⁹⁹¹

310. Content provided via Netflix's subscription service is ad free,⁹⁹² as is content provided to Amazon Prime customers.⁹⁹³ Movie rentals via Facebook, Amazon, and YouTube contain no advertisements.⁹⁹⁴ EST OVD programming provided by Vudu, Amazon, and iTunes is free of advertisements as well.⁹⁹⁵

311. *Multi-Device Accessibility.* Consumers increasingly wish to view content whenever they want and wherever they are. As a result, the trend in the OVD marketplace is toward making content available to users via a wide variety of devices. Many of the leading OVDs make their service available via a wide variety of consumer electronics products, including computers, Internet-connected televisions, Blu-ray disc players, home theater systems, DVRs, set-top boxes, Internet video players/boxes, and mobile devices.

⁹⁸⁸ Ads In Hulu Plus.

⁹⁸⁹ Chuck Salter, *Can Hulu Save Traditional TV?*, FAST COMPANY, Nov. 1, 2009, at 4, <http://www.fastcompany.com/magazine/140/the-unlikely-mogul.html> (visited Feb. 29, 2012).

⁹⁹⁰ Kevin Purdy, *Watch Hulu Shows With Only One Commercial*, Lifehacker, Feb. 23, 2009, <http://lifehacker.com/5158623/watch-hulu-shows-with-only-one-commercial> (visited Feb. 29, 2012).

⁹⁹¹ Tom Cheredar, *Hulu's "Ad Swap" Puts Users in Control of What Commercials to Watch*, Venturebeat, Oct. 3, 2011, <http://venturebeat.com/2011/10/03/hulu-commercials/> (visited Feb. 29, 2012).

⁹⁹² Sony, *Crackle Is First to Offer Ad-Supported Full-Length Hollywood Movies and Television Series on Sony's PlayStation 3, BRAVIA, Streaming Player, Blu-Ray Players and on Roku Devices* (press release), Mar. 29, 2011 ("Crackle Full-Length Movies"); Kristie Bertucci, *Netflix vs. Hulu Plus (Comparison)*, Gadget Review, Jan. 8, 2012, <http://www.gadgetreview.com/2012/01/netflix-vs-hulu-plus.html> (visited Feb. 29, 2012); Jeff Bertolucci, *Hulu Plus vs. Netflix: Which Is Better?*, PC WORLD, June 30, 2010, http://www.pcmag.com/article/200246/hulu_plus_vs_netflix_which_is_better.html (visited Feb. 29, 2012).

⁹⁹³ Amazon.com, Inc., *Amazon Prime Members Now Get Unlimited, Commercial-free, Instant Streaming of More Than 5,000 Movies and TV Shows at No Additional Cost* (press release).

⁹⁹⁴ See Facebook, *Movie Rentals*, <http://www.facebook.com/movie.rentals> (visited Mar. 21, 2012); Amazon.com, *Movies & TV > Amazon Instant Video > Rental*, http://www.amazon.com/s/ref=amb_link_357789482_3?ie=UTF8&bbn=2858778011&rh=n%3A2625373011%2Cn%3A%212644981011%2Cn%3A%212644982011%2Cn%3A2858778011%2Cp_drm_rights%3ARental&page=1&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=center-1&pf_rd_r=06WBFJC2JBXXCJ7F8C1E&pf_rd_t=101&pf_rd_p=1324306922&pf_rd_i=2858778011 (visited Mar. 21, 2012); YouTube Movies.

⁹⁹⁵ Simply Sight & Sound, Inc., *Vudu's PC Streaming Now Available*, <http://simplysightandsound.com/audio-video-installation-services/vudus-pc-streaming-now-available/> (visited Feb. 29, 2012); What's On iTunes; Amazon.com, *Movies & TV > Amazon Instant Video > Purchase*, http://www.amazon.com/s/ref=amb_link_357789482_4?ie=UTF8&bbn=2858778011&rh=n%3A2625373011%2Cn%3A%212644981011%2Cn%3A%212644982011%2Cn%3A2858778011%2Cp_drm_rights%3APurchase&page=1&pf_rd_m=ATVPDKIKX0DER&pf_rd_s=center-1&pf_rd_r=06WEAX8VA0ZNK20GZWN9&pf_rd_t=101&pf_rd_p=1324306922&pf_rd_i=2858778011 (visited Mar. 21, 2012).

312. For example, more than 700 devices can stream Netflix, including video game consoles, Video Players, HDTVs, home theater systems, set-top boxes, and smartphones.⁹⁹⁶ Vudu states that its service is available on “virtually every internet-connected Blu-ray player and HDTV on the market,” as well as Xbox 360, Sony PS3, the Apple iPad, and other devices.⁹⁹⁷ While users of Hulu’s free service can view content only on their computers, Hulu Plus subscribers can access Hulu programming on a wide variety of smartphones, tablets, gaming consoles, smart TVs, Blu-ray players, and set-top boxes.⁹⁹⁸ Sony’s Crackle users can access content with their computers (via www.crackle.com, other OVD websites such as YouTube, Hulu, and TV.com, and an app for Google Chrome), Internet-connected televisions, Xbox 360, Sony PlayStation 3, various smartphones, set-top boxes and media players, and Sony HDTVs.⁹⁹⁹ Over 300 devices are compatible with Amazon’s Instant Video service, including computers, various HDTVs, set-top boxes, Blu-ray players, DVRs, and the Kindle Fire.¹⁰⁰⁰ YouTube allows users to view content on computers, Android devices, some Internet-connected televisions, iPhones, and other devices with that have browsers, Adobe Flash Player 11.0+, and a broadband Internet connection of at least 1 Mbps.¹⁰⁰¹

313. Some sports leagues make content available via multiple devices as well. For example, NBA League Pass is available via computers and mobile devices.¹⁰⁰² NHL GameCenter Live is available via computer, iPad, iPhone, or Android devices.¹⁰⁰³ Online NFL games are available via computer, smartphones, tablets, or PlayStation3.¹⁰⁰⁴ The Big Ten makes its online content available via mobile devices,¹⁰⁰⁵ and the ACC Digital Network is viewable on a variety of devices, including computers, iPhones, iPads, and Android devices.¹⁰⁰⁶

4. OVD Performance

314. As we have noted, the performance of OVDs is an evolving story. Virtually all OVDs entered the marketplace within the last ten years, and, because of the nature of the product and services provided, do not necessarily report their financial performance by the indicia traditionally used by other media firms. As such, the details surrounding the finances of OVDs are not readily discerned because many OVDs are divisions of larger media firms and the OVD-related activities are not reported

⁹⁹⁶ Netflix, *Company Overview*, <https://signup.netflix.com/MediaCenter?country=1&rdirdc=true> (visited Feb. 29, 2012).

⁹⁹⁷ See Vudu Devices; Vudu, *Get Vudu On Your iPad*, http://www.vudu.com/setup_ipad.html (visited Feb. 29, 2012).

⁹⁹⁸ See Hulu Plus Devices; Introducing Hulu Plus.

⁹⁹⁹ Crackle, *Platforms*, <http://www.crackle.com/outreach/platforms> (visited Feb. 28, 2012); Crackle Full-Length Movies.

¹⁰⁰⁰ See Amazon Devices.

¹⁰⁰¹ YouTube, *YouTube Help > YouTube on Other Devices*, <http://support.google.com/youtube/bin/answer.py?hl=en&answer=1231722> (visited Feb. 29, 2012); eHow, *How to Use YouTube on an iPhone*, http://www.ehow.com/how_5935516_use-youtube-iphone.html (visited Feb. 29, 2012).

¹⁰⁰² NBA, *NBA League Pass > Features-At-A-Glance*, <http://www.nba.com/leaguepass/3pp/> (visited Feb. 29, 2012).

¹⁰⁰³ NHL, *NHL GameCenter Devices*, <http://mobile.gamecenter.nhl.com/devices/> (visited Feb. 29, 2012).

¹⁰⁰⁴ NFL Mobile; NFL To PlayStation.

¹⁰⁰⁵ BTN2GO Kicks Off; BTN2Go FAQ. BTN2Go indicates that an Android application for viewing the service’s content is expected to launch in early 2012. *Id.*

¹⁰⁰⁶ ACC Launches.

separately. Moreover, our analysis of OVD performance is limited to a few of the most widely recognized industry players, and is not intended to be a comprehensive assessment of the entire OVD industry. With these limitations, in this section of the Report we describe OVD viewership, revenue, investment, and profitability.¹⁰⁰⁷

a. OVD Viewership

315. The most relevant indicators of the viewing of OVD content appear to be the profile of the OVD audience, the overall volume of OVD shows viewed, subscriberships, and consumer purchase transactions.

316. *Audience.* Available data illustrate a steady increase in the online viewing of video content. A May 2011 Pew survey indicates that 71 percent of online adults use online video sites.¹⁰⁰⁸ The data reveal a considerable increase in comparison to Pew survey results from 2009, when it estimated U.S. online video viewership (*e.g.*, television content, movies) at 32 percent of online users, up from 16 percent of online users in 2007.¹⁰⁰⁹

317. Research firm eMarketer estimates that as of April 2010, 66.7 percent of U.S. Internet users, representing 147.5 million people, watch online video each month. Among adults, 18-34 year olds are most likely to watch video online.¹⁰¹⁰ In 2010, about 86.0 percent of 18-24 year olds and 84.1 percent of adults 25-34 watched online video at least once a month, compared with 43.5 percent of 55-64 year olds and 25.8 percent of adults aged 65 years or older. Among the 147.5 million people watching video online, 24.0 percent are 18-24 years old, 30.7 percent are 25-34 years old, and 26.6 percent are 35-44 years old. EMarketer notes that the availability of free long-form videos, typically videos lasting longer than 10 minutes in their entirety, on Hulu has been a factor in making viewing online video an attractive option to a wider range of demographic groups.¹⁰¹¹

318. Recent data reveal that in 2011 online video viewing has surpassed 50 percent penetration among the total U.S. population.¹⁰¹² Forty-nine percent of U.S. adult online video viewers

¹⁰⁰⁷ Our overall performance analysis include data regarding OVDs that distribute professionally produced as well as user-generated video content. Research, ratings and marketing firms that conduct analyses of consumers' use of OVDs do not generally distinguish between these types of video content provided by the OVDs.

¹⁰⁰⁸ Kathleen Moore, *71% of Online Adults Now Use Video Sharing Sites*, Pew Internet, July 26, 2011, <http://pewinternet.org/Reports/2011/video-sharing-sites.aspx> (visited Mar. 9, 2012). Pew reports that among 18-29 year olds, 92 percent have used video sharing sites; and among 30-49 year olds, 80 percent have used video sharing sites. *Id.* Alternatively, comScore reports that 86 percent of U.S. Internet users view online video. comScore Inc., *comScore Releases July 2011 U.S. Online Video Rankings* (press release), Aug. 22, 2011.

¹⁰⁰⁹ Kristen Purcell, *The State of Online Video*, Pew Internet & American Life Project, Pew Internet, June 3, 2010, at 2 & 5, <http://pewinternet.org/Reports/2010/State-of-Online-Video.aspx> (visited Mar. 9, 2012).

¹⁰¹⁰ eMarketer, *Online Video Goes Mainstream*, Apr. 28, 2010, <http://www.emarketer.com/Article.aspx?R=1007664> (visited Mar. 9, 2012).

¹⁰¹¹ *Id.* The Interactive Advertising Bureau (IAB) defines long form video as video content that may be professionally produced or user generated which has a content arc with a beginning, middle and end, and which typically lasts longer than 10 minutes in its entirety. Such content may include professionally produced content from television and cinema that has migrated online, as well as personal videos shared online. See Interactive Advertising Bureau, *Long Form Video Overview*, Sept. 2009, at 4, <http://www.iab.net/media/file/long-form-video-final.pdf> (visited Mar. 9, 2012).

¹⁰¹² eMarketer, *Online Video Viewing Passes 50% of Total US Population*, Dec. 8, 2011, <http://www.public.site1.mirror2.phi.emarketer.com/Article.aspx?R=1008724> (visited Mar. 9, 2012).

watched full-length television shows on the Internet at least monthly according to this report. Full-length movies are popular fare for web viewing, with some 37 percent of U.S. adult online viewers streaming or downloading at least one feature film monthly in 2011.¹⁰¹³

319. *Hits/Views*.¹⁰¹⁴ ComScore Video Metrix counted 40 billion video views in September 2011,¹⁰¹⁵ compared to Nielsen VideoCensus, which measured the online video market at just over 18 billion streams based on a combination of panel and direct site measurement.¹⁰¹⁶ Among other differences, comScore includes advertising and adult content in its sampling and counts each segment of long-form segmented content as a distinct video stream.

320. Over time, the popularity of the most highly viewed online video websites has demonstrated fluctuation. In 2009, according to comScore, in terms of the number of videos viewed, Hulu was the number two site behind YouTube.¹⁰¹⁷ In 2009, Hulu's views increased by more than 763 million from January to December, accounting for about four percent of the 18.4 billion increase in total online video views during that period.¹⁰¹⁸ ComScore estimates that 923.8 million videos were viewed on Hulu during the month of November 2009, compared with more than 12 billion for YouTube.¹⁰¹⁹ SNL Kagan estimates that in February 2010, Hulu had 39.2 million unique visitors, each watching about an estimated 23.3 videos during that month.¹⁰²⁰ Moreover, according to comScore data, Hulu supported 166.5 million viewing sessions by 26.4 million unique viewers in August, 2011.¹⁰²¹

321. According to the Nielsen Video Census, during November 2011, the top five websites (for professionally produced as well as user-generated videos) based on unique U.S. viewers watching

¹⁰¹³ *Id.*

¹⁰¹⁴ Generally, a "hit" or a "page hit" is the retrieval of an item such as a web page or a graphic from a web server. Thus, if a given web page includes four pictures, images or graphics, that web page equals five hits – one hit for the page itself and four hits for the graphics. Accordingly, hits may be an imprecise measure of actual web traffic. Unique hits count the number of different individuals who have generated at least one hit. Page views are measurements often used in advertising where advertisers need to determine the number of page views a website receives in order to assess where to place their ad content. Generally, a "page view" is a web page that has been viewed by one visitor.

¹⁰¹⁵ comScore, Inc., *comScore Releases September 2011 U.S. Online Video Rankings* (press release), Oct. 21, 2011.

¹⁰¹⁶ Nielsen, *September 2011: Top U.S. Online Destinations for Video*, Nov. 3, 2011, http://blog.nielsen.com/nielsenwire/online_mobile/september-2011-top-u-s-online-destinations-for-video/ (visited Mar. 9, 2012); see also *The Economics of Online Video*, AD AGE White Paper at 6.

¹⁰¹⁷ Publicly available data on YouTube hits and views do not distinguish between the number of visitors to the site that view the user-generated content as compared to the site's visitors that view other video content that may be produced professionally. Thus, any data in this Report regarding hits, views or other metrics of consumer engagement with YouTube is assumed to refer to all video content on the website, regardless of whether it is user-generated or professionally produced.

¹⁰¹⁸ Will Richmond, *Why Did Online Video Consumption Spike in 2009*, VideoNuze, Feb. 24, 2012, <http://videonuze.com/blogs/?2010-02-24/Why-Did-Online-Video-Consumption-Spike-in-2009-/&id=2446> (visited Mar. 9, 2012) ("2009 Online Spike").

¹⁰¹⁹ AD AGE White Paper at 1, 16-17.

¹⁰²⁰ Liza Castaneda, *With a Profitable Hulu, Why a Subscription Model?*, SNL Kagan, Apr. 26, 2010, <http://www.snl.com/interactivex/article.aspx?id=11082288&KPLT=6>.

¹⁰²¹ comScore, Inc., *comScore Releases August 2011 U.S. Online Video Rankings* (press release), Sept. 22, 2011.

video content were: (1) YouTube (130.8 million unique viewers); (2) Vevo¹⁰²² (42.7 million unique viewers); (3) Yahoo! (34.4 million unique viewers); (4) Facebook (30.3 million unique viewers); and (5) MSN/WindowsLive/Bing (24.6 million unique viewers).¹⁰²³ Viewers spent the most time watching online video content during the month of November 2011 with these five OVDs: (1) Netflix (10 hours, 43 minutes); (2) Hulu (3 hours, 11 minutes); (3) GorillaVid¹⁰²⁴ (3 hours, 11 minutes); (4) YouTube (3 hours, 7 minutes); and (5) Justin.tv¹⁰²⁵ (3 hours).¹⁰²⁶ Data also show that during November 2011, there were 166.9 million unique U.S. video viewers who streamed 21.9 billion videos. During this same one-month period, video viewers spent on average more than five hours watching online video.¹⁰²⁷

322. Analysts use a viewing session metric to gauge users' engagement with the website and/or associated advertisement. A viewing session is defined as a period of time with continuous video viewing followed by a 30-minute period of video inactivity.¹⁰²⁸ The comScore chart below illustrates, among other things, that 178 million U.S. Internet users watched online video content for an average of 16.8 hours per viewer (*i.e.*, 1008.3 minutes/60 minutes), averaging 35 viewing sessions each (*i.e.*, 6,255,493/178,447) in June 2011.¹⁰²⁹

¹⁰²² Vevo is a joint venture between Sony Music Entertainment and Universal Music Group initiated in 2009. Adweek.com indicates that, as of June 2010, Vevo was delivering one billion views globally each month. The site's growth may be attributed to its U.S. Hispanic audience, which in 2010 was estimated to be 7.4 million Hispanic users. See Mike Shields, *Vevo Climbs Web Video Charts*, ADWEEK, July 30, 2010, <http://www.adweek.com/news/technology/vevo-climbs-web-video-charts-102944>.

¹⁰²³ NielsenWire, *November 2011: Top U.S. Online Destinations for Video*, Dec. 30, 2011, http://blog.nielsen.com/nielsenwire/online_mobile/november-2011-top-u-s-online-destinations-for-video/ (visited Mar. 9, 2012).

¹⁰²⁴ GorillaVid is a file hosting provider that offers online storage, remote backup capacity, uploading and downloading tools. GorillaVid is particularly useful for sending files that may be too large for sending via e-mail. See GorillaVid, *FAQ*, <http://gorillavid.com/faq.html> (visited Feb. 28, 2012).

¹⁰²⁵ Justin.tv is an online destination for watching videos and chatting with friends. See Justin.tv, *Frequently Asked Questions*, <http://www.justin.tv/p/faq> (visited Feb. 28, 2012).

¹⁰²⁶ NielsenWire, *November 2011: Top U.S. Online Destinations for Video*, Dec. 30, 2011, http://blog.nielsen.com/nielsenwire/online_mobile/november-2011-top-u-s-online-destinations-for-video/ (visited Mar. 9, 2012).

¹⁰²⁷ *Id.*

¹⁰²⁸ comScore, Inc., *comScore Releases June 2011 U.S. Online Video Rankings*, July 15, 2011, http://www.comscore.com/Press_Events/Press_Releases/2011/7/comScore_Releases_June_2011_U.S._Online_Video_Rankings (visited Mar. 9, 2012). ComScore reports that the duration of the average online content video was 5.4 minutes and the average online video advertisement was 0.4 minutes long. *Id.*

¹⁰²⁹ *Id.*

Table 23: Top U.S. Online Video Properties Ranked by Unique Views (June 2011)¹⁰³⁰

Property	Total Unique Viewers (in thousands)	Viewing Sessions (in thousands)	Minutes per Viewer
Google Sites ¹⁰³¹	149,281	2,311,116	324.1
VEVO	63,003	399,503	112.0
Yahoo! Sites	52,665	247,834	34.8
Microsoft Sites	50,663	286,892	32.8
Viacom Digital	49,493	274,933	76.8
Facebook.com	47,687	167,137	20.7
AOL, Inc.	43,915	251,987	49.3
Turner Digital	30,063	121,301	46.2
Hulu	26,701	156,939	184.8
Amazon Sites	21,247	43,193	8.3
Total:	178,447	6,255,493	1,008.3

323. Screen Digest estimated that about 11 billion television episodes were viewed via the broadcast networks' own websites in 2010, in contrast to about 19 billion views of television episodes on AOL, MSN, Yahoo!, YouTube and Hulu.¹⁰³² One analyst estimates that YouTube's partnerships with professional content owners, including Disney/ESPN and Univision, enabled it to more than double the number of video streams viewed on its website from 6.3 billion in January 2009 to 13.2 billion in December 2009.¹⁰³³ YouTube recently announced that it "logged 1 trillion hits in 2011" and that it expects to exceed that number in 2012 as politicians and other newsmakers turn to the Internet to distribute web advertisements, speeches and videocasts.¹⁰³⁴ Indeed, one YouTube executive predicts that soon 90 percent of web traffic will be video.¹⁰³⁵

324. From the third quarter of 2008 to the third quarter of 2011, Nielsen reports a gain of 21.7 percent in the number of persons that watch video on the Internet and an increase of 79.5 percent in the amount of time spent watching video online.¹⁰³⁶ Consumer behavior is also reported by age, gender, and

¹⁰³⁰ comScore Video Metrix. These data reflect total U.S. home/work/university locations.

¹⁰³¹ As reflected in this chart, "Google Sites" includes the website YouTube which hosts professionally produced as well as user-generated video content.

¹⁰³² Charlie Jane Anders, *How the Nielsen TV Ratings Work – and What Could Replace Them*, IO9 Backgrounder, Sept. 17, 2010, <http://io9.com/5636210/how-the-nielsen-tv-ratings-work--and-what-could-replace-them> (visited Mar. 9, 2012).

¹⁰³³ 2009 Online Spike.

¹⁰³⁴ Hayley Tsukayama, *YouTube: The Future of Entertainment is on the Web*, WASH. POST, Jan. 12, 2012 (citing comments of Robert Kyncl, YouTube, Vice President of Global Content Partnership, speaking at 2012 International Consumer Electronics Show in Las Vegas).

¹⁰³⁵ *Id.*

¹⁰³⁶ Nielsen State of the Media, *The Cross-Platform Report Quarter 3, 2011 – US*, at 4 ("Nielsen Q3 2011 Cross-Platform Report").

ethnicity in Nielsen's report. Adults aged 25-34 spend the most time each day watching video online (53 minutes).¹⁰³⁷ Hispanics and African Americans spend 34 minutes each day watching video online.¹⁰³⁸

325. *Subscribership.* According to comments filed in this proceeding, Netflix maintains that it is the largest online video subscription service in the United States, with more than 23 million subscribers as of June 2011. It doubled its subscribership from the end of 2009 through the middle of 2010.¹⁰³⁹ According to one report, at the end of the 2011, Netflix had approximately 20 million streaming members in the United States, Canada and Latin America.¹⁰⁴⁰ Hulu Plus supported only 875,000 subscribers as of the second quarter 2011.¹⁰⁴¹ Industry reports indicated that Hulu suffered a loss in subscribers as a result of changes the firm made in 2011 to pricing and other core structural changes.¹⁰⁴²

326. *Consumer Purchase Transactions.* Based on a combination of movie electronic sell-through and Internet VOD revenue, IHS Screen Digest estimates that Apple maintains the lion's share of the consumer transactional market, with Microsoft Zune Video Marketplace, Wal-Mart Vudu, Sony Playstation Store, and Amazon rounding out the top five positions in terms of market share.¹⁰⁴³ IHS notes that iTunes's increase of one percent contrasts with its decline of 12 points from the first half of 2009 to the first half of 2010. Apple's iTunes garnered 64.9 percent of market share in 2010 and 65.8 percent in 2011. The next largest market share was reported by Microsoft's Zune with 18.5 percent in 2010 and 16.2 percent market share in 2011. Wal-Mart's Vudu had 1.0 percent of the market in 2010, and 5.3 percent market share in 2011.¹⁰⁴⁴

b. Revenue

327. There are multiple potential sources of revenue for online video distribution, including subscription fees from consumers; in-video advertising; display advertising around the video; product placement; advergaming,¹⁰⁴⁵ and branded entertainment.¹⁰⁴⁶ We examine each of these in turn below.

¹⁰³⁷ *Id.* at 7.

¹⁰³⁸ *Id.*

¹⁰³⁹ Netflix6/8/11 Comments at 2. In March 2010, Netflix reportedly had 14 million subscribers. See Ed Carson, *Born in the USA: Top 5 American Stocks in IBD 100*, Investors.com, May 17, 2010, <http://blogs.investors.com/capitalhill/index.php/home/35-politicsinvesting/1761-born-in-the-usa-top-5-american-stocks-in-ibd-100> (visited Mar. 9, 2012). Nielsen reports that 89 percent of Hulu users watch video programming using a computer and 20 percent of Hulu users watch video programming using a computer connected to a television. Nielsen, State of the Media Report, *Consumer Usage Report 2011*, at 3 ("Nielsen 2011 Consumer Usage Report").

¹⁰⁴⁰ Netflix, Inc., *Netflix and Disney-ABC Television Group Announce Extension of Existing Licensing Agreement to Stream TV Shows* (press release), Oct. 31, 2011.

¹⁰⁴¹ Vision2mobile Special Report, *New Television Viewing Models*, Aug. 2011, at 20.

¹⁰⁴² See Christina M. Mitchell, *Yahoo, Netflix a Match?*, SNL Marketweek, Jan. 6, 2012. However, Netflix has reported that domestic streaming and DVD gross cancellations have steadily declined during October and November 2011. See Haseeb Ali, *Netflix Provides Negative 2012 Outlook; Streaming, DVD Cancellations Decline*, SNL Kagan, Nov. 23, 2011.

¹⁰⁴³ IHS, *iTunes Gains Share in Online Movies in First Half of 2011* (press release), Aug. 22, 2011.

¹⁰⁴⁴ *Id.*

¹⁰⁴⁵ Advergaming, a type of niche marketing, is the practice of inserting paid advertisements in a video game.

¹⁰⁴⁶ AD AGE White Paper at 4.

328. *Advertising.* Advertising is included with a variety of online video content formats, including television shows, news, short clips, and sports content.¹⁰⁴⁷ Media buyers are purchasing online video advertising often as an add-on component to traditional television ad purchases. Some experts speculate that, even though the television advertising market is still far and away the dominant media venue for advertising,¹⁰⁴⁸ it is a marketplace that has likely peaked in terms of the size of the viewing audience, while the online viewing audience is expected to continue growing.¹⁰⁴⁹ Additionally, advertisers value online video ads because the system allows advertisers to gather information and details about consumer engagement, time spent with the brand, and sharing that are not always readily available with other sources of advertising.¹⁰⁵⁰

329. The Interactive Advertising Bureau (IAB) reports that in the 3rd quarter of 2011 Internet advertising reached \$7.88 billion, a 22 percent increase over the same period in 2010.¹⁰⁵¹ EMarketer reports that total U.S. online ad spending amounted to \$32 billion in 2011, and that it expects online ad spending to grow in 2012 by potentially as much as 23 percent to \$39.5 billion.¹⁰⁵² Screen Digest estimated that the four major broadcast networks earned about 50 percent of the total \$448 million in advertising-supported online video advertising dollars in the United States in 2008, and an additional 25 percent went to the websites of the cable networks.¹⁰⁵³

330. ComScore estimates that U.S. Internet users saw 5.3 billion video advertisements in June 2011.¹⁰⁵⁴ Additionally, slightly more than two billion total ad minutes were viewed during this same time period, with each unique viewer exposed to approximately 35 ads each. This online video advertising content reached 49.2 percent of the U.S. population. ComScore includes in this category streaming video advertisements only, not other types of video monetization such as overlays, branded players, matching

¹⁰⁴⁷ See, e.g., Pete Barlas, *Video Ad Spending Finally Getting Into the Picture*, INVESTOR'S BUSINESS DAILY, May 14, 2010.

¹⁰⁴⁸ In 2009, advertisers spent \$908 million on U.S. online video advertising compared to the \$68.9 billion spent on U.S. television advertising during that same period. See *id.*

¹⁰⁴⁹ Advertising executive Matt Wasserlauf, of online ad agency BBE, has indicated that, "TV viewership has leveled off and viewership is growing in online video." See *id.* Sports programming promises to become a growth sector in online video. NBC announced that the 2012 Super Bowl would be streamed free of charge over the Internet for the first time and would also be available on Verizon's Mobile NFL Wireless apps. See Priya Kanwar, *Watch Super Bowl XLVI 2012 and Other Sports Live Streaming Free on Mobile Phones*, Technorati, Jan. 9, 2012, <http://technorati.com/technology/article/watch-super-bowl-xlvi-2012-and/> (visited Mar. 9, 2012).

¹⁰⁵⁰ See, e.g., Jon Erickson, *Measuring the Total Economic Impact of Customer Engagement*, Forrester Consulting, Sept. 2008; see also *Marketing and Advertising Using New Media*, Baruch New Media, Feb. 27, 2012, http://baruchnewmedia.com/wiki/Marketing_and_Advertising_using_New_Media (visited Mar. 9, 2012).

¹⁰⁵¹ Interactive Advertising Bureau, *Q3 '11 Internet Advertising Revenues Up 22% from Year Ago, Climb to Nearly \$7.9 Billion, According to IAB and PwC* (press release), Nov. 30, 2011.

¹⁰⁵² eMarketer.com, *US Online Ad Spend to Close in on \$40 Billion*, Jan. 19, 2012, <http://www.emarketer.com/Article.aspx?id=1008783&R=1008783> (visited Mar. 9, 2012).

¹⁰⁵³ IBE, *Major US Broadcaster-Backed Online Networks Claim Lion's Share of Free Online TV*, July 9, 2009, <http://www.ibeweb.com/ibe-news/major-us-broadcaster-backed-online-networks-claim-lions-share-free-online-tv> (visited Mar. 9, 2012).

¹⁰⁵⁴ comScore, Inc., *comScore Releases June 2011 U.S. Online Video Rankings*, July 15, 2011, http://www.comscore.com/Press_Events/Press_Releases/2011/7/comScore_Releases_June_2011_U.S._Online_Video_Rankings (visited Mar. 9, 2012). In Table 24, for example, video viewers watched 424 million minutes in the month of June 2011, according to the chart for total U. S. home/work/university locations.

banner ads, or homepage ads.¹⁰⁵⁵ The comScore data also includes several video advertising networks, such as Tremor Media Video Network, BrightRoll Video Network, Specific Media, Undertone and SpotXchange Video Ad Network as well as Adap.tv, a video advertising exchange.¹⁰⁵⁶ The leading five websites and advertising networks for video ads viewed during June 2011 were: (1) Hulu, one billion ads viewed; (2) Tremor Media Video Network, 753 million ads viewed; (3) Adap.tv, 677 million ads viewed; (4) BrightRoll Video Network, 628 million ads viewed; and (5) Specific Media, 421 million ads viewed.¹⁰⁵⁷

Table 24: Top U.S. Online Video Properties by Video Ads Viewed (June 2011)¹⁰⁵⁸

Property	Video Ads (in thousands)	Total Ad Minutes (millions/month)	Frequency (Ads per Viewer)	Reach of Total U.S. Population (%)
Hulu	1,001,736	424	38.8	8.6%
Tremor Media Video Network	753,034	429	12.1	20.7%
Adap.tv	677,708	386	11.0	20.5%
BrightRoll Video Network	628,600	396	9.5	21.9%
Specific Media	421,722	214	6.8	20.4%
Undertone	332,597	171	13.2	8.3%
SpotXchange Video Ad Network	281,859	171	7.8	11.9%
Viacom Digital	275,230	134	10.4	8.8%
Microsoft Sites	226,951	125	9.2	8.2%
AOL, Inc.	217,347	85	7.3	9.9%
Total:	5,286,917	2,286	35.6	49.2%

331. Although its revenues declined in the early part of the studied period, the availability of professional content has enabled YouTube to win back advertisers. YouTube has indicated that, as of January 2010, it sells ads for more than 10 percent of U.S. video streams, up from six percent in January 2009. In May 2010 it reported that it had increased the number of advertisers using display ads by a factor of ten. YouTube typically charges a CPM of \$15.¹⁰⁵⁹ For its music channel, Vevo, it charges a CPM ranging from \$25 - \$35. Branded sites, such as ESPN's channel, can earn a CPM of \$22. YouTube can earn about \$400,000 per day from advertisements on its home page, and generates about \$10 million per month from advertising on its home page alone.¹⁰⁶⁰

332. Hulu's free online service generates revenue from advertising sales based on the number of consumers that view ad impressions on Hulu.com; from video streams; from its distribution partners'

¹⁰⁵⁵ *Id.*

¹⁰⁵⁶ *Id.*

¹⁰⁵⁷ *Id.*

¹⁰⁵⁸ comScore Video Metrix.

¹⁰⁵⁹ Cost per mille (CPM), also referred to as cost per thousand impressions, is a common advertising model. *See supra*, ¶ 192.

¹⁰⁶⁰ AD AGE White Paper at 9.

websites; and from the embeddable Hulu video player.¹⁰⁶¹ Hulu Plus generates revenues from advertising as well as its subscription fees. Hulu currently partners with more than 625 advertisers.¹⁰⁶² The process by which the networks sell inventory within the programs they distribute on Hulu, however, differs substantially from their traditional process. For example, broadcast networks typically prohibit Hulu from selling specific shows to advertisers. Instead, Hulu offers advertisers access to viewers across many shows, *i.e.*, “run-of-schedule.”¹⁰⁶³ Because Hulu cannot guarantee placement in specific shows, it charges lower CPMs than the broadcast network websites (*e.g.*, an average \$35 CPM versus \$45 for ABC.com).¹⁰⁶⁴

333. The broadcast networks, which are equity owners of Hulu, receive 70 percent of the advertising revenue sold on their programs,¹⁰⁶⁵ while other program suppliers receive between 50 percent and 70 percent.¹⁰⁶⁶ Press reports have estimated that Hulu sells out about 50 percent of its inventory.¹⁰⁶⁷ In 2009, Hulu earned \$100 million, and was profitable during the fourth quarter of 2009 as well as the first quarter of 2010.¹⁰⁶⁸

c. Investment

334. As a nascent business model in the provision of video content, the OVD industry’s investment perspective is defined by new content and distribution deals and transactions. As previously discussed, OVDs are entering new partnerships and innovating in products and services in order to retain and attract consumers.¹⁰⁶⁹ Whether it be the joint venture between Redbox and Verizon or YouTube’s partnership with *The Wall Street Journal* and others to create 100 new linear channels, these deals, transactions, and partnerships, as much as any other capital expenditures, demonstrate the investments that companies are making to foster the growth of the OVD sector.

¹⁰⁶¹ See Hulu FAQ.

¹⁰⁶² See About Hulu.

¹⁰⁶³ Hulu divides its advertising into three formats. As part of its standard ad formats, Hulu sells spots in 15- and 30-second increments, which run before, during, or after an ad break. Other standard ad formats include overlay brand bars, which appear over the content at the bottom of the video, and include a logo and targeted message that enable the user to play a full ad, and overlay logo bugs, which appear in the bottom right corner of the screen that users can opt in to play the full video ad. *See id.*

¹⁰⁶⁴ See AD AGE White Paper at 7 & Chart 7 at 12. This compares with a CPM of less than \$20 for a typical broadcast network viewed on a television set via a broadcast station or MVPD. Hulu typically limits sponsorship to one advertiser per episode, which commands ad rates that are up to twice as high for the same ad per thousand viewers than broadcast rates.

¹⁰⁶⁵ AD AGE White Paper at 8-9.

¹⁰⁶⁶ Brian Stelter and Brad Stone, *Successes (and Some Growing Pains) at Hulu*, N.Y. TIMES, Mar. 31, 2010, <http://www.nytimes.com/2010/04/01/technology/01hulu.html?dbk> (visited Mar. 9, 2012) (“Hulu Successes”).

¹⁰⁶⁷ Michael Learmonth, *Hulu’s a Towering Success – Just Not Financially*, ADVERTISING AGE, Mar. 29, 2010, http://adage.com/digital/article?article_id=143011 (visited Mar. 9, 2012); *see also* Brian Morrissey, *Hulu Makes Inroads*, ADWEEK DIGITAL, Oct. 15, 2009, http://www.adweek.com/aw/content_display/news/digital/e3i505f5fdeedc76b4275cd6041e29e5fcd (visited Mar. 9, 2012).

¹⁰⁶⁸ Hulu Successes.

¹⁰⁶⁹ *See, e.g., supra*, ¶ 304.

d. Profitability

335. Many of the prominent OVDs are subsidiaries or operations within a larger business. Because the assets, liabilities, revenues and expenses of the parent company and the subsidiaries are often presented in consolidated financial statements that are reflective of the total resources of the combined entity rather than any of its specific component parts, assessing the profitability of a subsidiary of a larger enterprise is extremely difficult. Even with respect to the standalone OVDs, we either do not have access to their financial information or, if we do, the publicly available information does not include the specifics that are necessary to analyze the OVD's profitability. Thus, for this Report, we are unable to conduct an analysis of the profitability of OVDs. As OVDs continue to mature and evolve, we anticipate that future public reporting may include data on profitability and other metrics to assess the financial viability of this segment of the delivered video market.

5. Consumer Behavior

336. In this section of the Report, we consider how trends in consumer behavior affect the products and services of OVD providers of delivered video content and other categories of video content. Recent data illustrate which consumers are heavy OVD users and how that use affects other types of video content services.

337. Nielsen's *Cross-Platform Report* indicates that, unlike the near-universality of television watching, viewership of streaming video content is highly concentrated – 83 percent of all streaming takes place among the top fifth of consumers who stream.¹⁰⁷⁰ Males aged 18 – 49 years old spent the most time per month viewing Internet video content (six hours, 38 minutes per month) during the second quarter of 2011. Males aged 2 and older spent the second highest amount of time per month viewing Internet video content (five hours, 5 minutes per month) during the same quarter. Females aged 18 – 49 years old spent the third highest amount of time per month viewing Internet video content (four hours, 47 minutes per month) during the same quarter.¹⁰⁷¹ Asian Americans spent the largest amount of time during the second quarter of 2011 watching video content on the Internet (nine hours, 11 minutes per month); followed by Hispanics (six hours, 15 minutes per month); African Americans (five hours, 58 minutes per month) and Whites (three hours, 50 minutes per month).¹⁰⁷² Moreover, Americans are increasingly turning to mobile devices to access video content. Nielsen reports an increase of 36.9 percent in mobile video users from third quarter 2010 to third quarter 2011.¹⁰⁷³

338. In its *2011 Consumer Usage Report*, Nielsen describes the primary methods Americans use to watch television or video content. Traditional television is the dominant device for video consumption as 288 million viewers ages two and up use this method.¹⁰⁷⁴ The data also show that other methods register far behind traditional television in how consumers watch video: Internet, 143 million;

¹⁰⁷⁰ Nielsen State of the Media, *The Cross-Platform Report Quarter 2, 2011*, at 2.

¹⁰⁷¹ *Id.* at 6.

¹⁰⁷² *Id.* at 7. Nielsen's 2011 annual data indicates that among consumers ages 13 and over, 232 million use a mobile phone; 211 million use online; 192 million use a personal computer or laptop at home or at work; and 116 million use mobile web. Nielsen 2011 Consumer Usage Report at 1.

¹⁰⁷³ Nielsen Q3 2011 Cross-Platform Report at 5.

¹⁰⁷⁴ Nielsen 2011 Consumer Usage Report at 2.

time-shifted television, 111 million;¹⁰⁷⁵ and mobile phone, 30 million.¹⁰⁷⁶

339. For years, viewers switched from over-the-air broadcast television to subscribe to cable (and sometimes back again), and more recently, switched between MVPDs to the extent available. The growth and availability of OVDs adds another layer of choice that can be a complement or a substitute.¹⁰⁷⁷ Many consumers of video programming maintain multiple relations with providers of such services, and can easily shift their spending from one to another.¹⁰⁷⁸

340. The record in this proceeding and recent data are mixed regarding the effect of OVDs on the market for the delivery of video programming. Driving the debate are competing explanations for the recent relative drop-off in MVPD video subscribership, the extent of which itself is unclear.¹⁰⁷⁹ However, MVPDs increasingly acknowledge that consumers will find and watch content that appeals to them even if such content is not provided on major broadcast or cable networks or carried on cable television.¹⁰⁸⁰ They recognize that the marketplace is already providing a range of alternative equipment and technology to stream content directly from the Internet or from a networked computer to television sets.¹⁰⁸¹ Many of these devices, which are used with television sets for other purposes such as gaming devices, DVRs, and Blu-ray players, enable consumers to find and stream Internet content to their sets without requiring the use of a computer.¹⁰⁸² And, television sets are increasingly incorporating such Internet access. Sales of such sets are rapidly increasing and are projected to exceed 118 million only a few short years after their introduction. Also, iPads and other tablets have emerged as highly popular alternatives for watching online video. Moreover, consumers now have wider choice among standalone devices dedicated to receiving Internet content on television sets. For example, VeeBeam uses a wireless USB point-to-point connection between a laptop and a television, which enables consumers to transmit anything that is on

¹⁰⁷⁵ The proportion of viewers using time-shifted television grew 11 percent since the second quarter of 2010 according to Nielsen's data. *Id.*

¹⁰⁷⁶ *Id.* Regarding device ownership, Nielsen reports that 290 million people own at least one television; 253 million own a DVD player; 162 million own a video game console; 145 million have digital cable; 129 million have a DVR (digital video recorder) and 95 million have satellite television. *Id.* at 1.

¹⁰⁷⁷ Public Knowledge 6/8/11 Comments at 6 ("in practice online video remains complementary to traditional MVPD or broadcast programming, for most viewers"); *id.* at 10 ("whether OVDs compete with MVPDs is a complex question. In some ways they do and in other ways they do not."). See also John Hudson, *Cable is Still King, Says Netflix CEO*, The Atlantic Wire, June 1, 2011 (citing Netflix CEO Reed Hastings that "[s]tatistically, no one is dropping cable"), <http://www.theatlanticwire.com/technology/2011/06/cable-still-king-says-netflix-ceo/38369/> (visited Mar. 9, 2012).

¹⁰⁷⁸ See Netflix 2010 Form 10-K at 1-2.

¹⁰⁷⁹ See George Szalai, *Analyst: Pay TV Industry to Lose 200,000 Subscribers in 2012*, THE HOLLYWOOD REPORTER, Nov. 28, 2011 (citing Credit Suisse analyst Stefan Anninger), <http://www.hollywoodreporter.com/news/analyst-pay-tv-industry-lose-266589> (visited Mar. 9, 2012); see also Bloomberg News, *Comcast Profit Advances 16% as Video-Subscriber Losses Slow*, L.A. TIMES, Aug. 3, 2011 (citing Craig Moffett of Sanford C. Bernstein & Co.). See *supra*, ¶ 142 (from 2006 through 2010, cable MVPD video penetration decreased from 53.8 percent of all homes passed by cable MVPDs to 46.5 percent).

¹⁰⁸⁰ NCTA 6/8/11 Comments at 20.

¹⁰⁸¹ This is sometimes referred to as over-the-top viewing. Nielsen describes over-the-top as the use of devices that piggyback on normal distribution channels (cable, satellite, etc.) to pull content directly from the Internet and deliver it to the television set. The equipment can include consumer devices such as DVD players, video game consoles and web-enabled televisions. Nielsen Cross-Platform Report Q3 2011, *Glossary*.

¹⁰⁸² NCTA 6/8/11 Comments at 24.

their computer screen wirelessly to their television set.¹⁰⁸³ Likewise, other technologies, like the Google TV and Roku devices, provide direct links to major sources of Internet content (such as Hulu, Netflix and Amazon).¹⁰⁸⁴

341. Some reports indicate that OVD users are beginning to “cut the cord” and drop their MVPD service in favor of OVD or a combination of OVD and over-the-air television.¹⁰⁸⁵ One survey contends that nine percent of respondents have already cancelled their cable subscriptions and an additional 11 percent have stated that they are considering doing so.¹⁰⁸⁶ Cord-cutters, as this group is referred to, tend to be younger consumers, 23–28 years old. Thirteen percent of GenXers indicate that they were considering cutting the cord and seven percent of baby boomers state that they have also considered it.¹⁰⁸⁷ Twenty-two percent of the survey respondents indicated that they had watched their “favorite TV show” on a free online video site, and 21 percent stated that they had viewed that same show on its own video site.¹⁰⁸⁸ Additionally, according to one estimate, 13 percent of consumers with a broadband connection “cord-shaved” in the past year.¹⁰⁸⁹ These data notwithstanding, there are also indications that increased viewing of video content delivered over the Internet does not necessarily

¹⁰⁸³ *Id.*

¹⁰⁸⁴ *Id.*

¹⁰⁸⁵ See Ian Olgeirson and Deana Myers, *Over-the-top Substitution Forecast to Erode Multichannel Penetrations*, SNL Kagan, July 15, 2011 (estimating that nearly 4 percent of occupied U.S. households will employ Internet video in lieu of subscribing to a multichannel video package at year-end 2011); see also Terrance O’Brien, *Netflix Users More Likely to Cut the Cable Cord*, Jan. 15, 2011, <http://www.switched.com/2011/01/05/netflix-users-more-likely-to-cut-the-cable-cord/> (citing a JP Morgan survey that 28 percent of cable subscribers would consider cutting the cord, but that 47 percent of Netflix customers would do so) (visited Mar. 9, 2012); see also Andy Plessner, *Roku Owners are ‘Cutting the Cord’ in Substantial Numbers*, Beet.TV, May 10, 2011, http://www.huffingtonpost.com/andy-plessner/roku-owners-are-cutting-t_b_860280.html (citing interview with Jim Funk of Roku that “[s]ome 15-20 percent of Roku owners are cancelling their cable or satellite services agreement and are relying solely on a broadband connection to get their television programming”) (visited Mar. 9, 2012).

¹⁰⁸⁶ Ryan Lawler, *Deloitte: 9% Have Cut Cable, Another 11% Are Considering It*, GigaOm, Jan. 4, 2012, <http://gigaon.com/video/deloitte-cord-cutting/> (“GigaOn Deloitte Report”); see also *State of the Media Democracy Survey, Sixth Edition*, http://www.deloitte.com/view/en_US/us/Industries/media-entertainment/media-democracy-survey-sixth/index.htm?id=us_furl_tmt_somd_010312 (visited Mar. 9, 2012).

¹⁰⁸⁷ GigaOn Deloitte Report.

¹⁰⁸⁸ *Id.*

¹⁰⁸⁹ Cord-shaving generally refers to a downgrading of pay video services from the subscriber’s MVPD. See Parks Associates, *High-speed Broadband May Accelerate Cord Cutting*, Aug. 24, 2011, <http://www.parksassociates.com/blog/article/high-speed-broadband-may-accelerate-cord-cutting> (visited Mar. 9, 2012). See also, e.g., Brian Santo, *A Shave and a Service Cut – Two bits*, CED, Oct. 26, 2011, <http://www.cedmagazine.com/blogs/2011/10/a-shave-and-a-service-cut-%E2%80%93-two-bits> (visited Mar. 9, 2012). One commenter explains that viewing Internet content on a television set can be relatively simple, as “simple as connecting a cable between the HDMI output of a computer and the HDMI input of a television set” though not many consumers may be inclined to view television programming in this manner. Such direct PC-to-TV connections are deemed infrequent and restricted to tech-savvy consumers, with approximately one-third of broadband users connecting a PC to their TV to enjoy PC or online video on “the big screen” at least once a year. See NCTA 6/8/11 Comments at 23-24. See also *id.* at 24-5 (citing The Diffusion Group, *PC-to-TV Connectivity More Widespread Than Perceived*, Mar. 1, 2011, <http://tdgresearch.com/blogs/press-releases/archive/2011/03/01/pc-to-tv-connectivity-more-widespread-than-perceived.aspx>).

translate into decreased MVPD subscriptions.¹⁰⁹⁰ In that regard, a recent survey indicates that, while more than 50 percent of online consumers watch television shows and movies online at least occasionally, there is still growth in their use of VOD, DVR, and other MVPD-provided options and that, surprisingly, the more alternative platforms consumers use, the more they tend to spend on traditional television subscription services.¹⁰⁹¹

342. Although OVDs have begun to make inroads against traditional distributors, online viewership is still dwarfed by its traditional distributors.¹⁰⁹² According to Nielsen, Americans watched on average 32 hours and 47 minutes a week of traditional television and two hours and 21 minutes a week of time-shifted television, compared to 27 minutes a week of video on the Internet, and only 7 minutes a week of video on a mobile phone.¹⁰⁹³ Screen Digest estimated that all of the a la carte sales of television shows from Apple, Amazon, and other OVD competitors would amount to only \$407 million in 2010, compared to what PriceWaterhouseCoopers estimates would be the \$143 billion spent on television advertising and subscriptions.¹⁰⁹⁴

IV. RURAL VERSUS URBAN COMPARISONS

343. In this portion of the Report, we compare video programming competition in rural and urban areas.¹⁰⁹⁵ We discuss this issue for each of the three categories of video programming discussed above – MVPD, broadcast, and OVD.

344. The availability of satellite-delivered video programming in rural and underserved areas is a goal of Section 628(a) of the Act.¹⁰⁹⁶ In the *15th Mobile Wireless Report*, the Commission adopted a “baseline” definition of the term “rural” to mean a county with a population density of 100 persons or fewer per square mile.¹⁰⁹⁷ Under this definition, roughly 61 million people, or 21 percent of the U.S. population, live in rural counties. These counties comprise 3.1 million square miles, or 86 percent of the geographic area of the United States.¹⁰⁹⁸ We adopt this definition for our analysis.¹⁰⁹⁹ Because data on the delivery of video programming are not generally available in a manner that enables us to aggregate

¹⁰⁹⁰ Franks N. Magid Associates, Inc., *Magid Study: Consumers More Connected to TV Sets Than Ever - TV Purchase Intentions Climb to Pre-Recession Levels, Demand for Smart TVs Impressive* (press release), Nov. 22, 2011. Magid surveyed a nationally representative sample of 1,530 online consumers ages 12 years and older in October 2011 in order to track consumer trends in regards to television, HDTV, 3-D TV, online video and mobile video viewing for this annual survey.

¹⁰⁹¹ *Id.*

¹⁰⁹² For example, Netflix identifies its principal competitors as including MVPDs with TV Everywhere and VOD content; Internet movie and television content providers; DVD rental outlets and kiosk services; and entertainment video retailers. *See* Netflix 2010 10-K at 2.

¹⁰⁹³ Nielsen Cross-Platform Report Q2 2011 at 5.

¹⁰⁹⁴ Fowler & Schechner at B1.

¹⁰⁹⁵ *See Further Notice*, 26 FCC Rcd at 14113-15, ¶¶ 56-58.

¹⁰⁹⁶ 47 U.S.C. § 548(a) (“The purpose of this section is . . . to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming . . .”).

¹⁰⁹⁷ *15th Mobile Wireless Report*, 26 FCC Rcd at 9878, ¶ 378.

¹⁰⁹⁸ *See id.* at 9878, ¶ 379. These figures are based on 2000 Census data. *See id.* at 9880, n. 1126.

¹⁰⁹⁹ *See Further Notice*, 26 FCC Rcd at 14113-14, ¶ 56. We received no comments on our proposal to use the same definition as that used in the Wireless Competition Report, *supra*, n. 1097.

county data by population density, we rely on available evidence provided in the record or from other sources to compare alternatives for the delivery of video programming between rural and urban areas.

A. MVPDs

345. MVPDs serving rural and smaller markets provide a range of services to millions of households, including video via coaxial cable and Internet Protocol television (“IPTV”), digital telephony, and broadband Internet access.¹¹⁰⁰ ACA reports that its membership of nearly 900 cable operators provides these services to 7.6 million households and businesses,¹¹⁰¹ with more than half of its members serving fewer than 1,000 subscribers.¹¹⁰² Many rural MVPDs indicate that they face unique challenges in offering competitive video, voice, and broadband services due to the cost of system build-outs and upgrades in less densely populated areas with a limited consumer base.¹¹⁰³ For instance, NTCA, a trade association representing more than 580 rural telecommunications providers, states that 252 of its members offered cable service in 2010, a decrease from 276 members offered this service.¹¹⁰⁴ In addition, NTCA notes a decline in the number of its members selling DBS service. In 2007, 106 of its members sold DBS service, and in 2010, the figure dropped to 66.¹¹⁰⁵

346. NTCA has, on the other hand, seen a rise in the number of its members delivering IPTV – from 61 members in 2007 to 159 in 2010.¹¹⁰⁶ NTCA and other rural associations predict this number is likely to increase as the number of members offering broadband service rises.¹¹⁰⁷ Overall, NTCA reports that its members are facing increasing competition in the delivery of video services. A 2009 informal NTCA poll indicated that 58 percent of respondents reported facing competition from a cable operator, 92

¹¹⁰⁰ See ACA 6/8/11 Comments at 1; NTCA 5/20/09 Comments at 1-2.

¹¹⁰¹ See ACA 6/8/11 Comments at 1.

¹¹⁰² See ACA 7/29/09 Comments at 3.

¹¹⁰³ See, e.g., ACA 6/8/11 Comments at 2. OPASTCO and NTCA also explain that many rural carriers need to share headends to provide video services given the substantial financial cost of entering the video services market. They claim that this business model is threatened, however, by the practice of some programming networks to deny cable or IPTV systems that share headends access to programming. See OPASTCO 7/29/09 Comments at 20-21; NTCA 5/20/09 Comments at 11-12. In addition, OPATSCO claims that some networks have denied rural MVPDs using an IPTV platform access to their content or imposed unnecessary expenses based on perceived security concerns. See OPASTCO 7/29/09 Comments at 21. Using U.S. Census data as of 2000, the California PUC further reports that a significantly higher percentage of California’s rural census blocks are either unserved or served by a single state video franchisee or locally franchised affiliate. In comparison, over 86 percent of California’s census blocks with two or more providers are urban. See California PUC 6/8/11 Comments at 1-4.

¹¹⁰⁴ See Rural Associations 6/8/11 Comments at 1 nn. 1 & 2. These results are based on a 2010 survey of NTCA’s membership. See *id.* at 2.

¹¹⁰⁵ See *id.*

¹¹⁰⁶ See *id.*

¹¹⁰⁷ See *id.* The Rural Associations view broadband and the provision of video service as key components to their long term viability. See *id.* at 2-3. An NTCA 2008 survey on the offering of broadband services (“2008 Broadband Study”) indicated that rural telcos saw video as a “must have offering” for success in a competitive market. Almost two-thirds of respondents already provided video to customers – an increase from 63 percent in 2007 and 42 percent in 2005. Almost 80 percent of rural telcos with future video plans aimed to offer IPTV service. See NTCA 5/20/09 Comments at 3.

percent faced competition from a satellite provider, and six percent faced competition from an IPTV provider.¹¹⁰⁸

347. Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”), a trade association representing 520 small incumbent LECs serving rural America, found in a 2009 survey of its members that 74 percent of respondents offered subscription video service.¹¹⁰⁹ Almost half of the respondents who did not offer video service indicated that they were likely to offer it in the near future.¹¹¹⁰ Sixty-nine percent of survey respondents also indicated that they faced direct competition from one or more non-satellite video providers.¹¹¹¹ Among these respondents, 22 percent indicated that they competed with two or three non-satellite video providers.¹¹¹²

348. Nielsen finds that rural counties tend to rely on DBS more than urban counties for MVPD services. Nielsen categorizes counties based on Census household counts and proximity to metropolitan areas. It estimates that, as of the end of 2010, the distribution of television households was as follows: 40 percent in highly urbanized counties belonging to the 21 largest Metropolitan Statistical Areas (A Counties); 31 percent in counties with more than 85,000 households that are not defined as A Counties (B Counties); and 29 percent in counties with fewer than 85,000 households (C and D Counties).¹¹¹³ According to Nielsen’s 2011 estimates, in A Counties, 69 percent of television households relied on cable service and 23 percent of television households relied on DBS. Sixty-four percent of television households in B Counties subscribed to cable and 26 percent subscribed to DBS. In C and D counties, 48 percent of television households relied on cable service, compared with 42 percent who subscribed to DBS.¹¹¹⁴

349. One of the biggest challenges small and rural MVPDs report facing is access to video content at competitive rates. These MVPDs indicate that a failure to acquire programming at competitive prices and terms reduces their ability to provide consumers with competitive and affordable video service offerings meeting the economic needs of the community.¹¹¹⁵ For example, several small and rural MVPDs contend that, to gain carriage rights to the most popular networks, they are required by the owners of those networks to carry less-popular co-owned networks on an expanded basic tier.¹¹¹⁶ The

¹¹⁰⁸ See NTCA 5/20/09 Comments at 3.

¹¹⁰⁹ See OPASTCO 7/29/09 Comments at 1, 3.

¹¹¹⁰ See *id.*

¹¹¹¹ See *id.* at 4.

¹¹¹² See *id.*

¹¹¹³ See Nielsen 2010 & 2011 Television Audience Report at 6. Nielsen classifies C Counties as counties not defined as A or B counties that have more than 20,000 households or are in Consolidated Metropolitan Statistical Areas or Metropolitan Statistical Areas with more than 20,000 households. Nielsen classifies D counties as all counties not classified as A, B, or C counties; they are very rural. See Nielsen Media Research, *Glossary of Media Terms* (defining Nielsen’s classifications of A, B, C, and D counties), <http://www.nielsenmedia.com/glossary/> (visited Mar. 21, 2012).

¹¹¹⁴ See Nielsen 2010 & 2011 Television Audience Report at 6.

¹¹¹⁵ See, e.g., Rural Associations 6/8/11 Comments at 5-9; ACA 6/8/11 Comments at 5-10; Rural Telcos 6/8/11 Comments at 3-13; SureWest 7/8/11 Reply at 4-5; NTCA 5/20/09 Comments at 6; OPASTCO 7/29/09 Comments at 10-13.

¹¹¹⁶ See, e.g., Rural Telcos 6/8/11 Comments at 3-4, 8; ACA 5/20/09 Comments at 9. The Rural Telcos also indicate that failure to accept such an agreement results in pricing penalties, and that some programmers now force them to carry HD and 3D channels. See Rural Telcos 6/8/11 Comments at 4, 8.

rural MVPDs claim that these program “tying” and tiering requirements impose on them unreasonably high wholesale costs for programming in comparison to incumbent cable operators, which they then pass on to consumers.¹¹¹⁷ ACA suggests that small and medium-sized MVPDs pay 30 percent more for national cable network programming than major MSOs.¹¹¹⁸

350. In addition, several small and rural MVPDs contend that some programmers condition access to traditional cable networks, such as ESPN, on payment for distribution of the online version of the network, such as ESPN3.¹¹¹⁹ These MVPDs maintain that such programmers require the cost of the online versions of the networks to be bundled into basic broadband packages.¹¹²⁰ They state that the networks charge subscriber fees on the basis of the number of broadband subscribers for the online versions of the networks as well as the number of video subscribers for linear distribution.¹¹²¹ These MVPDs argue that this practice forces them to either absorb the additional cost or raise end-user rates for broadband.¹¹²² Small and rural MVPDs also report having to promote programmers’ websites to broadband customers outside of their video service territory.¹¹²³

351. Several video programmers argue that the programming market is extremely competitive, which has lead to a diverse array of programming choices for consumers.¹¹²⁴ In particular, these programmers suggest no program supplier has market power thereby allowing new programmers and networks to enter the market freely.¹¹²⁵ Additionally, Time Warner and Fox argue that bundling is a prevalent practice in the American economy and provides numerous benefits, such as lowering transaction and production costs. They also note many programmers provide MVPDs with the opportunity to purchase networks on an individual basis.¹¹²⁶ Similarly, Viacom claims that it does not compel any cable operator to negotiate for carriage of multiple networks nor require any cable system to

¹¹¹⁷ See Rural Associations 6/8/11 Comments at 5-6; Rural Telcos 6/8/11 Comments at 9-11. See also SureWest 7/8/11 Reply at 5-7. The Rural Telcos also note that these practices preclude them from promoting the lowest basic service package. For example, NRTC reports that its members must sell their expanded basic packages, which at a minimum contain over 70 channels, at a retail price averaging \$50-\$60 per month. Comparatively, NRTC contends that incumbent rural cable systems not burdened with tying or tiering requirements may carry about 50 channels at \$35 per month per subscriber. See Rural Telcos 6/8/11 Comments at 10. The Rural Telcos further argue that forced tying and tiering requirements prevent the carriage of independent channels on an expanded basic tier. See *id.* at 11.

¹¹¹⁸ See ACA 6/8/11 Comments at 9. OPASTCO further asserts that rural MVPDs lack leverage in negotiating for programming due to mandatory non-disclosure agreements between video programmers and rural MVPDs since these agreements conceal the true market value for programming. See OPASTCO 7/29/09 Comments at 18-20.

¹¹¹⁹ See Rural Telcos 6/8/11 Comments at 11-13; ACA 8/28/09 Reply at 9-11.

¹¹²⁰ See OPASTCO 7/29/09 Comments 13-15; NTCA 5/20/09 Comments at 5-6.

¹¹²¹ See OPASTCO 7/29/09 Comments 13-15.

¹¹²² See, e.g., Rural Telcos 6/8/11 Comments at 11-13; Rural Associations 6/8/11 Comments at 7-8; OPASTCO 7/29/09 Comments at 13-15.

¹¹²³ See Rural Association 6/8/11 Comments at 7; OPASTCO 7/29/09 Comments at 13.

¹¹²⁴ See, e.g., Fox Entertainment Group, Inc. & Fox Television Holdings, Inc. Comments, MB Docket No. 07-198 (filed Jan. 4, 2008) at 19-21 (“Fox 07-198 Comments”); Viacom Inc. Comments, MB Docket No. 07-198 (filed Jan. 4, 2008) at 4-8 (“Viacom 07-198 Comments”); NBC Universal, Inc. & NBC Telemundo License Co. Comments, MB Docket 07-198 (“NBC 07-198 Comments”) at 42-45.

¹¹²⁵ See Fox 07-198 Comments at 20; Viacom 07-198 Comments at 6-8; NBC 07-198 Comments at 42-45.

¹¹²⁶ See Fox 07-198 Comments at 21-22; Time Warner Inc. Reply, MB Docket No. 07-198 (filed Feb. 12, 2008) at 2-5.

purchase any particular network or combination of networks. Viacom further contends that it does not deny small and rural cable operators access to package deals and volume discounts. The company indicates it has adopted a flexible approach in negotiating carriage with small cable operators, including on occasion making certain programming services available to distributors with no license fee or for a nominal amount as well as paying small cable operators for carriage in certain situations.¹¹²⁷

352. Disney also disputes the complaints surrounding ESPN3, which it believes relate to private business negotiations. It asserts nonetheless that ESPN does not force distributors of any size to carry any of its products. Disney indicates that ESPN works collaboratively with ISPs distributing ESPN3 to acquire new high-speed data subscribers as well as retain and upgrade existing high-speed data and video customers.¹¹²⁸

353. Small and rural carriers also argue that they pay disproportionately higher prices for retransmission consent.¹¹²⁹ ACA states that small and medium-sized MVPDs pay double the retransmission consent fees of large providers.¹¹³⁰ ACA submits data indicating that broadcasters receive retransmission consent fees ranging from \$0.14 to \$0.75 per subscriber per month, with smaller and medium-sized cable operators paying the highest fees.¹¹³¹ ACA contends that higher retransmission fees increase consumer costs, which negatively affects entry into the MVPD market and reduces improvements to service and networks.¹¹³²

354. ACA's members also report facing "take-it-or leave-it" retransmission consent offers that may lead them to temporarily or permanently drop broadcast television stations.¹¹³³ For example, in the 2008 retransmission consent negotiations, 20 percent of respondents to ACA's 2009 survey were forced to temporarily drop a broadcast television station since the parties failed to reach a new retransmission consent agreement prior to the expiration of the previous agreement.¹¹³⁴ Similarly, nearly half of the respondents in NTCA's 2010 survey indicated that broadcasters issued "take it or leave it" ultimatums.¹¹³⁵ Sixty percent of NTCA's survey respondents opted to take the offer for fear of losing customers; 22

¹¹²⁷ See Viacom 07-198 Comments at 11-13.

¹¹²⁸ See Disney 8/28/09 Reply at 6-7.

¹¹²⁹ As indicated previously, the Commission has initiated a proceeding to examine certain concerns related to retransmission consent. See *Retransmission Consent NPRM*, *supra*, n. 154.

¹¹³⁰ See ACA 6/8/11 Comments at 6. According to ACA, generally rural providers also must pay transport fees because they operate outside the local broadcaster's signal contours – a cost that is typically passed on to rural consumers. ACA states these fees are as high as \$0.50 per subscriber per signal per month, but are sometimes more. See *id.* at 14-15. In addition, in a 2009 survey of ACA's membership, respondents indicated that retransmission consent fees were rising faster than the cost of other types of programming. According to respondents, retransmission consent fees were about 8 percent of the total video programming expenses in 2009 compared to 2.4 percent in 2008. See ACA 5/20/09 Comments at 6-7.

¹¹³¹ See ACA 6/8/11 Comments at 8. ACA also contends that retransmission consent fees are even higher when two or more broadcasters in the same DMA engage in coordinated retransmission consent negotiations. See *id.* at 10-14.

¹¹³² See ACA 6/8/11 Comments at 8-9; ACA 5/20/09 Comments at 15-16 (indicating that in a 2009 survey of its membership, 88 percent of respondents had or were planning to increase cable rates on their basic service packages). See also SureWest 7/8/11 Reply at 5 (arguing that higher retransmission consent costs for smaller MVPDs limit their ability to effectively compete with the incumbent cable operator, and thus negatively impacts consumer choice).

¹¹³³ See ACA 5/20/09 Comments at 13-15.

¹¹³⁴ See *id.* at 14.

¹¹³⁵ See Rural Associations 6/8/11 Comments at 10.

percent of respondents who declined the offer ultimately were barred from receiving access to the broadcast stations.¹¹³⁶ ACA further explains non-cash/in-kind compensation provides broadcasters with another means to obtain compensation from small MVPDs for programming. These types of concessions may include requiring cable operators to carry multicast feeds, to purchase advertising time from the broadcaster, or to participate in joint marketing campaigns with the broadcaster.¹¹³⁷

355. As previously indicated, broadcasters have asked the Commission to reject requests to significantly alter its retransmission consent rules.¹¹³⁸ With respect to smaller MVPDs, NAB argues that there is no evidence or data to support the assertion that smaller MVPDs receive less favorable retransmission fees, terms, and conditions in comparison to larger MVPDs.¹¹³⁹ NAB also indicates that retransmission consent fees, terms, and conditions are based on economies of scale, which is a trademark of a competitive marketplace.¹¹⁴⁰ NAB therefore contends that even if price differentials exist in the retransmission consent fees between smaller and larger MVPDs, there is no evidence of price discrimination.¹¹⁴¹

B. Broadcast Stations

356. Television markets serving rural populations tend to have fewer local full-power stations. Consumers may also rely more on multicasting than those in large markets for the delivery of major network signals such as ABC, CBS, FOX, and NBC. As of July 2011, 49 of the 210 television markets had three or fewer full-power commercial broadcast stations assigned to them. All of these markets are ranked below 100.¹¹⁴² Combined, all 49 markets with three or fewer stations represent about 4.6 million television households, or four percent of the estimated 115.9 television households nationwide as of the 2010-2011 television season.¹¹⁴³ Of the 49 markets, 28 receive at least one of the four major networks via a digital multicast signal.¹¹⁴⁴ Yet Nielsen estimates for 2011 that the percentage of households relying on over-the-air distribution of broadcast stations is about the same in the three different categories of counties – 9 percent in A Counties, 11 percent in B Counties, and 10 percent in C and D Counties.¹¹⁴⁵

C. OVDs

357. As discussed earlier, consumers need high-speed Internet access in order to have access to OVDs' video content. Unfortunately, many consumers in rural America still lack access to this

¹¹³⁶ See *id.* See also SureWest 7/8/11 Reply at 7-8 (encouraging the Commission to allow MVPDs to substitute network and syndicated broadcast programming from a station in a neighboring market in order to minimize the competitive harm from broadcasters' withholding retransmission consent).

¹¹³⁷ See ACA 5/20/09 Comments at 7-10. ACA indicates requiring the carriage of multicast feeds is a particularly difficult business arrangement for smaller operators with limited bandwidth capacity. See *id.* at 8 & 10.

¹¹³⁸ See *supra*, ¶ 60.

¹¹³⁹ NAB 7/8/11 Reply, Attachment A at 49.

¹¹⁴⁰ *Id.* at 50.

¹¹⁴¹ *Id.* at 51.

¹¹⁴² FCC staff estimates based on data from BIA. DMA ranks and number of stations within each DMA are not directly correlated. See *supra*, ¶ 162.

¹¹⁴³ FCC staff estimates based on data from Nielsen, *Local Television Market Universe Estimates*, used throughout the 2010-2011 season.

¹¹⁴⁴ FCC staff estimates based on data from BIA, July 2011.

¹¹⁴⁵ See Nielsen 2010 & 2011 Television Audience Report at 6. See also *supra*, n. 1113.

important resource. The Commission's 2011 Rural Broadband Report found that 72.5 percent of the 26.2 million Americans that still lack access to 3 Mbps/768 kbps or faster of fixed broadband service live in rural areas, even though only 21.7 percent of all Americans reside in rural areas.¹¹⁴⁶ The report also found that close to three out of ten rural Americans – 28.2 percent – are without access to fixed broadband at 3 Mbps/768 kbps or faster, which is nine times larger than the three percent of Americans without access in non-rural areas.¹¹⁴⁷ Additional data further indicates that rural consumers have fewer options with respect to broadband technologies and providers than other consumers.¹¹⁴⁸

358. As discussed earlier, despite these findings, NTCA finds that a significant majority of rural telcos provide broadband service to at least some portion of their service territory and that several rural telcos include a broadband connection in their service bundles.¹¹⁴⁹ NTCA's members also report operating in an increasing competitive market for broadband service.¹¹⁵⁰ Eighty-one percent of OPASTCO's 2009 survey respondents suggested that the increase of online video has heightened demand for faster broadband speeds – with 91 percent of respondents providing, or planning to offer, tiered broadband services.¹¹⁵¹

V. KEY INDUSTRY INPUTS

359. In this section of the Report, we consider key inputs that may affect competition in the market for the delivery of video programming. Specifically, we discuss below creators and aggregators of video programming and consumer premises equipment.

A. Content Creation and Aggregation of Video Programming

1. Overview

360. Television programs and movies are often created and licensed by major studios that are subsidiaries of entertainment conglomerates that also own broadcast and cable networks. Collectively, the broadcast and cable networks of seven companies – Disney, News Corp., NBC Universal, Time Warner Inc.; CBS; Viacom; and Discovery – account for about 95 percent of all television viewing hours in the United States.¹¹⁵² Of those, only Discovery, which produces its own programming, does not own a

¹¹⁴⁶ See FCC, BRINGING BROADBAND TO RURAL AMERICA: UPDATE TO REPORT ON RURAL BROADBAND STRATEGY (2011), *attached to Chairman Genachowski Releases Update to 2009 Broadband Report*, GN Docket No. 11-16, Public Notice, 26 FCC Rcd 8680, 8688, ¶ 10 (2011) (noting that the analysis is based upon the State Broadband Initiative Data (formerly known as SBDD Data)).

¹¹⁴⁷ See *id.*

¹¹⁴⁸ See *id.*

¹¹⁴⁹ See NTCA 5/20/09 Comments at 2-3.

¹¹⁵⁰ See *id.* at 3. In the 2008 Broadband Survey, 93 percent of NTCA's survey respondents reported facing competition from at least one service provider for at least some of their customers. The typical respondent competed with two national ISPs, two satellite broadband providers, two wireless ISPs, and one cable company. In particular, 55 percent of respondents facing competition reported that their competitors were only serving cities and towns in the respondent's service area; 45 percent of respondents said their competitors were serving customers throughout the respondent's service area. See *id.*

¹¹⁵¹ See OPASTCO 7/29/09 Comments at 5. Tiered broadband service refers to the practice of offering a selection of broadband speeds at different price points. See *id.*

¹¹⁵² Craig Moffett *et al.*, *Weekend Media Blast: Why We Haven't Seen a Virtual MSO Yet*, Bernstein Research, Jan. 27, 2012, at 2.

major television or movie studio.¹¹⁵³ These conglomerates may also produce programs for each other's networks.¹¹⁵⁴ In addition, there are independent studios, such as The Weinstein Company, that create television programming and movies.¹¹⁵⁵ Movie and television studios generally produce and distribute their own programs and movies, and retain ultimate distribution rights.¹¹⁵⁶ In some cases, however, studios distribute programs and movies on behalf of third parties.¹¹⁵⁷ Industry participants claim that the production and distribution of television programming and films are inherently risky businesses.¹¹⁵⁸ While studios invest a substantial amount up front to produce video content, the revenues derived from the production, distribution and licensing of such content depend primarily on a program's acceptance by the public, which is difficult to predict.¹¹⁵⁹

361. GAO estimates for the Fall 2009 broadcast prime time schedule, the top five program producers were the studios affiliated with ABC, CBS, FOX, NBC, and The CW (WBTVG).¹¹⁶⁰ For the individual networks, the 2010 share of in-house productions was: ABC, 60 percent; CBS, 61 percent; The CW, 90 percent; FOX, 72 percent; and NBC, 63 percent.¹¹⁶¹ Industry observers and participants

¹¹⁵³ On the other hand, Sony Corporation operates a television and movie studio, but does not operate cable or broadcast networks.

¹¹⁵⁴ For example, News Corp.'s Twentieth Century Fox Television produces *Modern Family* for Disney's ABC, *Awake* for Comcast's NBC, *How I Met Your Mother* for CBS, and *Futurama* for Viacom's Comedy Central. News Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 9-10 ("News 2010 Form 10-K").

¹¹⁵⁵ The Weinstein Co., *About The Weinstein Company*, <http://weinsteinco.com/about-us/> (visited Mar. 7, 2012).

¹¹⁵⁶ For example, Warner Brothers Television Group ("WBTVG"), a subsidiary of Time Warner, develops and produces new television series (e.g., *Two and a Half Men*), reality-based entertainment shows and animation programs for Time Warner's cable networks and third parties. Time Warner Inc., *SEC Form 10-K for the Year Ended December 31, 2010*, at 7 ("Time Warner 2010 Form 10-K"). In 2010, Warner Brothers Studios, another subsidiary of Time Warner, wholly financed the production, marketing, advertising and distribution of eight films, while distributing 15 films financed in whole or in part by other parties. *Id.*

¹¹⁵⁷ For example, Viacom's Paramount Studios distributes animated feature films produced by DreamWorks Studios and CBS Films. Michael Cieply & Brooks Barnes, *A Studio's Real-Life Drama*, N.Y. TIMES, Jan. 29, 2012, <http://www.nytimes.com/2012/01/30/business/media/dreamworks-caught-in-a-real-life-drama.html?pagewanted=all> (visited Feb. 10, 2012); Viacom Inc., *SEC Form 10-K for the Year Ended December 31, 2010*, at 66 ("Viacom 2010 Form 10-K"). In addition, Lionsgate has home video distribution rights to prime time series and library titles from ABC Studios, while CBS Television Distribution syndicates Harpo Studio's *Dr. Phil* and *Rachael Ray* to television stations. See Lions Gate Entertainment Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 18 ("Lionsgate 2010 Form 10-K"); Harpo, Inc., *Oprah Winfrey's Official Biography*, <http://www.oprah.com/pressroom/Oprah-Winfreys-Official-Biography/7> (visited Mar. 26, 2012); CBS Studios Inc., *CBS Television Distribution — Featured Shows*, http://www.cbstv.com/shows_main.aspx (visited Mar. 26, 2012).

¹¹⁵⁸ Time Warner 2010 Form 10-K at 19.

¹¹⁵⁹ *Id.* According to Time Warner, the public acceptance of the studios' content depends on many factors, including the availability of competing content, the availability of alternative forms of leisure and entertainment time activities, the adequacy of efforts to limit piracy, studios' ability to develop strong brand awareness and target key audience demographics, studios' ability to anticipate and adapt to changes in consumer tastes and behavior on a timely basis, and general economic conditions.

¹¹⁶⁰ GAO, *Media Programming: Factors Influencing the Ability of Independent Programming in Television and Programming Decisions in Radio*, GAO-10-369, Mar. 2010, at 13. The CW network is jointly owned by CBS and Time Warner.

¹¹⁶¹ WGA 6/8/11 Comments at 6. See also Deana Myers, *Comedy Returns to Broadcast*, SNL Kagan, May 27, 2011. To promote a more competitive media marketplace, the Writers Guild of America, West proposes that the (continued....)

believe that in order to retain control over the distribution of their content, including OVD and VOD distribution, networks may rely more on in-house production.¹¹⁶² Time Warner asserts that despite the increasing number of networks distributed by MVPDs, access to prime time and syndicated television slots for its studio has tightened as networks and O&Os increasingly rely on programming from content producers aligned with or owned by their parent companies.¹¹⁶³ Time Warner, which owns studios that are not vertically integrated with a broadcast television network, states that this could lead it and similarly situated studios to launch fewer new television series and to receive lower licensing fees.¹¹⁶⁴

362. *Broadcast Programming.* Broadcast networks license programming from in-house production studios, third-party studios, and sports leagues.¹¹⁶⁵ Television production studios develop programs in collaboration with independent writers, producers, and creative teams.¹¹⁶⁶ Broadcast networks' primary expense is the cost to acquire or license television programming, including sports programming and feature films.¹¹⁶⁷ Premium sports programming is the most expensive, while reality and non-fiction programming are the least expensive.¹¹⁶⁸ Broadcast networks also incur the expense of producing certain programming, most notably non-entertainment programming, such as news and public affairs, that is unlikely to be acquired from a studio. SNL Kagan estimates that programming costs for 11

(Continued from previous page)

Commission require the broadcast networks devote at least 25 percent of their prime time schedule to programming that is owned and produced by independent sources. WGAW 6/8/11 Comments at 15-16. WGAW defines independent producers as studios or production companies that are not owned or affiliated with a major broadcast or cable network or an MVPD provider. *Id.* at 3.

¹¹⁶² Spencer Wang, Shub Mukherjee, and Michael Senno, *Entertainment Industry: Not All Cable Networks Are Created Equal*, Credit Suisse, Jan. 31, 2012, at 34 ("Wang") ("[W]e believe that cable networks that own more of their programming will have more control over their destiny. . . [E]ven if the total [number of MVPD subscribers] declines, networks that own the programming that they air will be able to [earn revenue from] their content by selling these rights to [OVDs]."). See also Time Warner 2010 Form 10-K at 25; Sony Kabushiki Kaisha (Sony Corporation), *SEC Form 20-F for the Fiscal Year Ended March 31, 2011*, at 31 ("[B]roadcast networks in the U.S. continue to produce their own shows internally.").

¹¹⁶³ Time Warner 2010 Form 10-K at 10-11. Studios differ on how they assess cable and broadcast networks' demand for television programming. Lionsgate expects to see an increase in demand for its programming. It expects key drivers to include the success of the cable industry's bundled services, increased average revenue per user and accelerated growth in advertising. Additionally, Lionsgate claims increased capacity for channels on upgraded digital cable systems and satellite systems has led to the launch of new networks seeking programming to compete with traditional broadcast networks as well as other existing networks. Lionsgate 2010 Form 10-K at 7.

¹¹⁶⁴ Time Warner 2010 Form 10-K at 25.

¹¹⁶⁵ The Walt Disney Co., *SEC Form 10-K for the Year Ended December 31, 2010*, at 1 ("Disney 2010 Form 10-K"); News 2010 Form 10-K at 13, 46, 55-56; Comcast Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at 10 ("Comcast 2010 Form 10-K"); CBS Corp., *SEC Form 10-K for the Year Ended December 31, 2010*, at I-2 ("CBS 2010 Form 10-K").

¹¹⁶⁶ Individual studios develop half-hour comedies, one-hour dramas, television movies, mini-series, and/or non-fiction programming for cable or broadcast networks. Disney 2010 Form 10-K at 1; Lionsgate 2010 Form 10-K at 48; Time Warner 2010 Form 10-K at 7-8.

¹¹⁶⁷ Broadcast networks, including CBS, FOX, and ABC, whose television studios operate as separate divisions of their conglomerates, include in-house programming as expenses. News 2010 Form 10-K at 9; Disney 2010 Form 10-K at 30; CBS 2010 Form 10-K at I-2. In contrast, NBC Universal's NBC and Telemundo broadcast networks and production studios operate as a single division, competing directly with other productions studios and content creators. Comcast 2010 Form 10-K at 9-10.

¹¹⁶⁸ Wang at 31.

nationally distributed English and Spanish-language broadcast networks stayed relatively steady from \$13.1 billion in 2006 to \$13.4 billion in 2010.¹¹⁶⁹

363. For a typical broadcast entertainment program, about one year ahead of the scheduled air date, each broadcast television network selects approximately two or three dozen shows to develop into a pilot or sample episode. Of the approximately 120 pilots that studios produce for the major broadcast networks, about half are selected for the start of the coming television season. The networks usually commit to funding 13 episodes of a weekly series provided that the show attracts a minimum number of viewers, with an option to order an additional nine to 11 episodes to complete the television season.¹¹⁷⁰ As of 2010, an hour-long, scripted pilot could cost a studio between \$2.7 million and \$3 million to produce, with some costing significantly more.¹¹⁷¹ Broadcast networks may pay a studio about \$1.5 million to license the program.¹¹⁷²

364. Broadcast networks derive about 99 percent of their net operating revenues¹¹⁷³ from the sales of advertising time for their network broadcasts.¹¹⁷⁴ The ability to sell commercial time and the rates received are primarily dependent on the size and nature of the audience that the network can deliver to the advertiser as well as overall advertiser demand for time on network broadcasts.¹¹⁷⁵ A decrease in audience ratings can lead to a reduction in pricing and advertising spending, adversely affecting a

¹¹⁶⁹ SNL Kagan, *TV Network Industry Benchmarks: Broadcast (2006 – 2010)* (“SNL Kagan Broadcast Benchmarks”). SNL Kagan defines programming expenses as the direct cost of creating, acquiring, and distributing content and services. For the years 2006-2010, SNL Kagan included financial data from CBS, NBC, ABC, FOX, Univision, The CW, Telemundo, TeleFutura, ION, Azteca America, and MyNetwork TV. For 2006, SNL Kagan includes figures from the networks The WB and UPN in the industry totals. For 2009 and 2010, SNL Kagan also includes figures from Estrella TV in broadcast network industry estimates. See also SNL Kagan, *Media Trends*, 2011 Edition, at 20-21 (“SNL Kagan 2011 Media Trends”). NBC has higher costs in even years due to the Olympics. *Id.*

¹¹⁷⁰ Each year, studios can lose hundreds of millions of dollars on flops. See, e.g., Meg James, *TV’s Evolution Brings New Profit Squabbles*, L.A. TIMES, Jan. 17, 2006, at C1. In contrast, Discovery Networks CEO David Zaslav stated that they have made a concerted effort to “trim the waste” of the development process by waiting to see how a pilot episode performs before ordering more than four episodes at time. Discovery Communications, Inc., *Presentation to Deutsche Bank Media & Telecom Conference*, Corrected Transcript, Feb. 28, 2012, at 5 (“Discovery Presentation Transcript”). Netflix, on the other hand, has ordered 26 episodes of an original series, *House of Cards*, for about \$4 million per episode, without a pilot episode. Ben Fritz & Joe Flint, *Netflix Less about Flicks, More about TV*, L.A. TIMES, Feb. 4, 2012, at B1.

¹¹⁷¹ See Marisa Guthrie, *Is Network TV’s Model Lost?*, BROADCASTING & CABLE, Apr. 26, 2010, at 10. A half-hour situation comedy costs slightly less, about \$2-\$3 million per episode in 2011. Paige Albinak, *Will Sheen Get Payne Treatment on New Show?*, BROADCASTING & CABLE, July 25, 2011, at 29. Network reality programs are less expensive to produce, with the average cost between \$1.5 million and \$2 million per episode. Bill Carter, *NBC to Pay Outsiders for Blocks of Programs*, N.Y. TIMES, Dec. 3, 2007, at C1.

¹¹⁷² See Bill Carter, *NBC to Pay Outsiders for Blocks of Programs*, N.Y. TIMES, Dec. 3, 2007, at C1.

¹¹⁷³ Net advertising revenue is the total amount networks charge advertisers to carry their commercials net of commissions charged to client companies by ad agencies to buy time on the networks, *i.e.*, the revenues that broadcast networks actually receive. Net operating revenue includes net advertising revenue plus all other sources of revenues. See Table 25.

¹¹⁷⁴ CBS 2010 Form 10-K at I-2; Disney 2010 Form 10-K at 1; News 2010 Form 10-K at 45.

¹¹⁷⁵ Disney 2010 Form 10-K at 1.

broadcast network's financial performance.¹¹⁷⁶ Between 2006 and 2008, net operating revenues for the broadcast television network industry increased from \$16.6 billion to \$16.8 billion. In 2009, it declined to \$15.5 billion, but increased to \$16.4 billion in 2010.¹¹⁷⁷

Table 25: Broadcast Television Network Industry Financial Performance¹¹⁷⁸

Revenue (in thousands)

	2006	2007	2008	2009	2010
Gross Advertising	\$19,422,445	\$19,504,124	\$19,680,532	\$18,134,566	\$19,173,013
Net Advertising	\$16,509,078	\$16,578,505	\$16,728,452	\$15,414,381	\$16,297,061
Other Operating Revenue	\$51,278	\$59,994	\$48,964	\$61,120	\$87,006

Net Operating Revenue	\$16,560,356	\$16,638,499	\$16,777,416	\$15,475,501	\$16,384,067
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Expenses (in thousands)

	2006	2007	2008	2009	2010
Operating SG &A	\$2,412,129	\$2,326,703	\$2,319,787	\$2,301,060	\$2,350,880
Programming	\$13,054,780	\$12,728,519	\$13,337,526	\$12,613,117	\$13,414,689
Network Compensation	\$246,632	\$170,650	\$133,563	\$81,467	\$48,109

Total Operating Expenses	\$15,713,541	\$15,225,872	\$15,790,876	\$14,995,644	\$15,813,678
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Cash Flow (in thousands)

	2006	2007	2008	2009	2010
Cash Flow	\$846,814	\$1,412,628	\$986,540	\$479,857	\$570,389
Cash Flow Margin (%)	5.11%	8.49%	5.88%	3.10%	3.48%

365. Studios often do not profit from a show for several years, if ever. They hope to earn large revenues during subsequent distribution windows of the programs¹¹⁷⁹ in ancillary markets, including syndication to broadcast television stations and/or cable networks; DVD and Blu-ray release; international distribution; and online distribution. The performance of a television series in subsequent distribution

¹¹⁷⁶ News 2010 Form 10-K at 30-31. ABC was nevertheless able to increase its advertising rates between 2009 and 2010 for prime time programming despite a decline in prime time ratings. Disney 2010 Form 10-K at 29-30.

¹¹⁷⁷ SNL Kagan Broadcast Benchmarks. Increased revenues for broadcast networks in even years are due in part to the airing of the Olympics. Because most political advertising is purchased on a regional basis (e.g., on a statewide basis for gubernatorial and senate elections as well as presidential campaigns that target swing states), it tends to impact broadcast stations more than broadcast networks. In some cases, however, presidential campaigns may purchase advertising on broadcast networks. See Jim Rutenberg, *Nearing Record, Obama's Ad Effort Swamps McCain*, N.Y. TIMES, Oct. 18, 2008, at A1.

¹¹⁷⁸ FCC staff estimates based on data from SNL Kagan. See SNL Kagan Broadcast Benchmarks.

¹¹⁷⁹ CBS 2010 Form 10-K at I-3; Lionsgate 2010 Form 10-K at 8.

windows is highly correlated with the ratings of its initial telecast.¹¹⁸⁰ Typically, a series must be broadcast for at least three to four television seasons to generate a sufficient number of episodes to make it desirable for syndication to broadcast television.¹¹⁸¹ Moreover, not all series lend themselves to subsequent distribution. For example, with respect to the syndication market, broadcast stations and cable networks prefer series with episodes that have self-contained storylines which give them the flexibility to schedule the episodes out of sequence.¹¹⁸² The most popular network television series are sold into both broadcast television station and cable network syndication.¹¹⁸³ In the past, studios primarily sold television situation comedies to broadcast television stations. As cable networks have earned more in fees from MVPDs, their programming budgets have increased, enabling them to bid for situation comedies as well as dramas.¹¹⁸⁴ Unscripted, or “reality” programming, generally has little value in the syndication after its initial airing.¹¹⁸⁵

Table 26: Television Studio Revenue Streams¹¹⁸⁶
(Revenue in millions)

	2006	2007	2008	2009	2010
Broadcast Network	\$12,434	\$12,197	\$12,786	\$12,048	\$12,693
Syndication (Cash)	\$3,162	\$3,303	\$3,379	\$3,316	\$3,227
Syndication (Gross Barter)	\$2,902	\$2,823	\$3,015	\$2,878	\$2,813
Basic Cable Networks/RSNs (Cash)	\$15,197	\$17,165	\$18,783	\$20,855	\$22,460
Premium Cable TV Domestic	\$2,584	\$2,594	\$2,611	\$2,696	\$2,989
Total Domestic	\$36,280	\$38,082	\$40,573	\$41,793	\$44,182
Total International	\$8,666	\$8,965	\$9,454	\$10,178	\$10,555
Total TV Programming	\$44,946	\$47,047	\$50,027	\$51,970	\$54,737

¹¹⁸⁰ A network’s decision to cancel a program due to poor ratings may prevent a studio from recouping its production expenses, requiring the studio to immediately write-off of any unamortized production costs. Viacom 2010 Form 10-K at 65.

¹¹⁸¹ More recently, syndication sales have occurred within the first two seasons of a show’s initial airing. One-hour dramatic series airing on broadcast networks between 2000 and 2010 only had a 17.1 percent probability of being renewed into a fourth season. Deana Myers, *1-Hours: Chance of Success*, SNL Kagan, Dec. 22, 2011.

¹¹⁸² *Second Life; Digital \$\$\$ Amp Syndie Biz*, DAILY VARIETY, July 21, 2011, at 1.

¹¹⁸³ Deann Myers, “Off-Network Deals Continue to Break Records,” *Economics of Networks*, SNL Kagan, JULY 9, 2012.

¹¹⁸⁴ SNL Kagan, *Syndication: Background*, Economics of TV Programming and Syndication (2007) at 70.

¹¹⁸⁵ For this reason, rights holders for reality programming often allow entire seasons to be available online instead. Andrew Wallenstein, *ABC-WBTV Deal Rewrites Syndie, Digital Rules*, DAILY VARIETY, Nov. 14, 2011, <http://www.variety.com/article/VR1118046062> (visited Mar. 26, 2012).

¹¹⁸⁶ FCC staff estimates based on data from SNL Kagan. See SNL Kagan 2011 Media Trends at 196 (containing the data for 2009-2011); SNL Kagan, Data Library, *Worldwide TV Programming Market for U.S. Produces Programming (\$Mil.)*, Historical, Nov. 30, 2009 (containing the data for 2006-2008).

366. *Cable Programming.* Similar to broadcast networks, cable networks also license programming from in-house production studios, third-party studios, and sports leagues. As with broadcast networks, programming represents a major expense for cable networks.¹¹⁸⁷ SNL Kagan estimates that combined, the basic cable networks' programming expenses were \$14.4 billion in 2006, representing 44.1 percent of total \$32.6 billion in net industry revenues for cable networks, and rose to \$20 billion in 2010, representing 44.2 percent of \$45.3 billion in net industry revenues for cable networks.¹¹⁸⁸ A typical hour-long, scripted cable drama costs less to produce than a broadcast drama, approximately \$2 million per episode. And cable networks generally pay lower licensing fees than broadcast networks – about \$1 million per episode.¹¹⁸⁹ On the other hand, the returns for a studio on a popular cable network show may be less than a broadcast network show because the former tends to attract a fraction of audience in its original airing.¹¹⁹⁰ In addition, cable series have about 10 to 13 episodes per series per season compared with 22 to 24 episodes for a broadcast series.¹¹⁹¹

367. Cable networks are the primary source of profit for entertainment conglomerates.¹¹⁹² Cable networks earn revenues primarily from two sources, advertising and MVPD license fees paid on a per subscriber basis. Premium cable networks, described in more detail below, are generally available to subscribers for an additional fee, are commercial-free, and offer specialized programs including unedited movies, original series, and sporting events. Combined, basic cable networks earned about \$15.1 billion in net advertising revenues in 2006, and \$19 billion in net advertising revenues in 2010.¹¹⁹³ Subscriber fees rose at a much faster rate. Basic cable networks collectively earned about \$16.3 billion in subscriber fees in 2006, and \$24.9 billion in 2010.¹¹⁹⁴ A two-tier structure has emerged in which the established

¹¹⁸⁷ Wang at 29, 32.

¹¹⁸⁸ SNL Kagan, *TV Network Industry Benchmarks: Basic Cable Networks (2006 – 2010)* (“SNL Kagan Basic Cable Benchmarks”). For broadcast and cable networks, sales, general, and administrative expenses (“SGA”) represent the other major expense besides programming. We compare the profit margins of the two types of networks in our discussion of sports programming, *infra*, ¶¶ 371-76. See also Wang at 27-33 (indicating that programming expenses play a key role in a cable network group's cost structure).

¹¹⁸⁹ Because they know that they will earn less money from cable networks, studios adjust their budgets accordingly. They rely on tighter budgets, smaller deficits, and investment by international markets. Bill Carter, *Weighty Dramas Flourish on Cable*, N.Y. TIMES, Apr. 4, 2010, at B1; SNL Kagan TV Programming Report 109.

¹¹⁹⁰ In addition, the possibilities for syndication are more limited, since cable networks fear that they might dilute their brand by running programming that originally aired on a competitor. SNL Kagan TV Programming Report at 109.

¹¹⁹¹ Bill Carter, *Embracing Cable's Concept of Opening Night*, N.Y. TIMES, Jan. 15, 2012, at B3. Cable networks generally air episodes of a series consecutively, with no pre-emptions or repeats, while broadcast networks spread the episodes out over a period of nine months. *Id.*

¹¹⁹² For five of the entertainment conglomerates (Disney, Time Warner, Viacom, Discovery Networks, and News Corp.), cable networks contribute anywhere from 60 percent to more than 90 percent of companywide earnings before interest and taxes (“EBIT”). Wang at 2. See also Comcast Corp., *Comcast and GE Announce Content Joint Venture* (slide presentation), Dec. 3, 2009, at 4 (“Cable channels represent 82% of the new joint venture's OCF [Operating Cash Flow] and drive its profitability.”), <http://www.cmcsk.com/events.cfm?Year=2009> (visited Mar. 2, 2012); Meg James, *Cost of Cable TV Content Soars*, L.A. TIMES, Dec. 8, 2011, at B1.

¹¹⁹³ SNL Kagan, *Economics of Basic Cable Networks*, 2011 Edition, at 13 (“SNL Kagan Basic Cable Report”). See also Table 27; SNL Kagan Basic Cable Benchmarks.

¹¹⁹⁴ SNL Kagan Basic Cable Report at 13. See also SNL Kagan Basic Cable Benchmarks. Basic cable networks collectively earned about \$1.3 billion in additional operating revenue in 2006 and about \$1.4 billion in 2010. Depending on the structure of the cable networks' parent company, this revenue may include ancillary revenues (continued....)

major-brand cable networks charge MVPDs subscriber fees, while newer networks pay MVPDs for carriage in order to launch.¹¹⁹⁵ The top networks enjoy relatively high per subscriber license fees, while less viewed cable networks, even those that are well established, might receive only a few pennies per month per subscriber. For example, in 2010 ESPN charged on average \$4.39 per month per subscriber (up from \$3.48 in 2007). On the other hand, TNT, the most expensive non-sports network, charged \$1.06 in 2010 (up from \$0.91 in 2007) and MTV Hits charged \$0.01 in 2010 (the same price charged in 2007).¹¹⁹⁶ Collectively, Comcast, Discovery, News Corp., Disney, Viacom, and Time Warner earned more than 69 percent of total basic cable subscriber fees in 2010, and 84 percent of basic cable network advertising revenues.¹¹⁹⁷ For several MVPDs, subscriber fees paid for carriage of programming is a major expense, or their single largest expense item.¹¹⁹⁸

Table 27: Basic Cable Network Financial Performance¹¹⁹⁹

Revenue (in thousands)	2006	2007	2008	2009	2010
Gross Advertising	\$17,762,171	\$19,268,379	\$20,639,236	\$20,459,863	\$22,509,530
Net Advertising	\$15,097,845	\$16,370,881	\$17,538,855	\$17,388,205	\$19,113,100
Subscriber Fees	\$16,225,993	\$18,340,322	\$20,507,329	\$22,732,037	\$24,756,531
Other Operating Revenue	\$1,295,956	\$1,541,676	\$1,445,783	\$1,267,576	\$1,376,143

Net Operating Revenue	\$32,619,795	\$36,252,879	\$39,491,967	\$41,387,819	\$45,265,744
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Expenses (in thousands)

	2006	2007	2008	2009	2010
Operating SG&A	\$6,614,666	\$6,839,323	\$6,930,042	\$6,572,993	\$6,765,499
Programming	\$14,358,296	\$16,156,814	\$17,462,761	\$18,567,669	\$20,045,769

Total Expenses	\$20,972,961	\$22,996,137	\$24,392,803	\$25,140,823	\$26,814,919
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Cash Flow (in thousands)

	2006	2007	2008	2009	2010
Cash Flow	\$11,646,934	\$13,257,188	\$15,099,056	\$16,247,693	\$18,450,826
Cash Flow Margin (%)	35.7%	36.6%	38.2%	39.3%	41.0%

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from consumer product licensing, brand licensing, home entertainment sales of programming, and syndication or international distribution. See Viacom 2010 Form 10-K at 37-38; CBS 2010 Form 10-K at II-7; Time Warner 2010 Form 10-K at 2.

¹¹⁹⁵ See Vogel *supra*, n. 463, at 351, n. 17.

¹¹⁹⁶ SNL Kagan, *TV Network Summary: Basic Cable Network by Affiliate Revenue Per Avg Sub/Month (2006 – 2010)* (“SNL Kagan Basic Cable Network Affiliate Revenue”). Other networks (e.g., FamilyNet and ReelzChannel) do not charge any monthly subscriber fees. *Id.*

¹¹⁹⁷ Wang at 8.

¹¹⁹⁸ See, e.g., Comcast 2010 Form 10-K at 4; Time Warner Cable 2010 Form 10-K at 23; Cablevision 2010 Form 10-K at 32; Suddenlink 2010 *Annual Report* at 25-26; Mediacom 2010 Form 10-K at 11; DISH Network 2010 Form 10-K at 19. MVPDs expect these costs to rise. See, e.g., Comcast 2010 Form 10-K at 41; Time Warner Cable 2010 Form 10-K at 38; Cablevision 2010 Form 10-K at 32; Charter 2010 Form 10-K at 8; Insight 2010 Form 10-K at 36; Suddenlink 2010 *Annual Report* at 12-13; DIRECTV 2010 Form 10-K at 19; DISH Network 2010 Form 10-K at 19.

¹¹⁹⁹ FCC staff estimates based on data from SNL Kagan. See SNL Kagan Basic Cable Benchmarks.

368. *Movies.* Similar to television production, movie production, marketing and distribution can involve significant costs over an extended period of time.¹²⁰⁰ The production process involves decisions regarding financing a movie, development of a screenplay, assembling the artistic and technical staff, and the actual filming and post-filming editing/post-production process.¹²⁰¹ Studios may distribute their own movie productions or they may acquire movies for theatrical release and/or other distribution outlets from the content's creator.¹²⁰² Feature films typically are produced or acquired for initial exhibition in theaters, followed by ancillary distribution windows.

369. A studio typically incurs losses during a movie's theatrical exhibition, and may not realize profits until well after that time. Studios indicate that the costs of producing and marketing movies have steadily increased in recent years, outpacing domestic theater revenues.¹²⁰³ In particular, Viacom states that the costs of movie production have risen faster than revenues from ancillary markets.¹²⁰⁴ On average, six or seven out of ten major theatrical movies produced may be unprofitable, and one might break even.¹²⁰⁵ Premium cable networks provide a sizable source of production financing for the movie studios, representing nearly 12 percent of their revenues in 2010. These networks commit to spending hundreds of millions of dollars in advance to license a specified number of airings of a studio's movie catalog (sometimes exclusively) for up to nine years.¹²⁰⁶ In turn, the premium networks can retain the allegiance of MVPDs, their primary customers. License fees negotiated by the studios are based on the theatrical performance of the movies in the packages. SNL Kagan estimates that in 2010 premium networks spent about 62.5 percent (\$1.87 billion) of their programming budgets on movies, compared with 37.5 percent (\$1.1 billion) on original programming.¹²⁰⁷ In 2007, premium networks spent about 66 percent (\$1.71 billion) of their programming budgets on movies, compared with \$882 million on

¹²⁰⁰ Viacom 2010 Form 10-K at 12-13; Lionsgate 2010 Form 10-K at 24; Time Warner 2010 Form 10-K at 25. The increasing popularity of 3D movies and the trend toward producing event and franchise films (which often entail higher talent costs for movies later in the series) could result in even higher production costs. Time Warner 2010 Form 10-K at 25.

¹²⁰¹ Lionsgate 2010 Form 10-K at 9-10.

¹²⁰² *Id.* at 13-14. According to Lionsgate, the decision to acquire a movie is based on expected critical reaction, marketability, potential for commercial success, cost to acquire the picture, estimated distribution and marketing expenses, and ancillary market potential. *Id.*

¹²⁰³ Viacom estimates that it receives the ultimate revenues for a movie from all distribution windows within ten years of the movie's initial release. It estimates that for acquired film libraries it receives revenues over a period within 20 years from the date of acquisition. Viacom 2010 Form 10-K at 64-65.

¹²⁰⁴ Viacom states that revenues from subsequent markets have historically exhibited a high correlation to domestic theatrical performance. *Id.*

¹²⁰⁵ Vogel at 71.

¹²⁰⁶ *Id.* at 337. For example, the Disney Studio and Sony Studio license television and online viewing rights of their movie catalogs to Starz. Lionsgate, however, generally licenses its films to networks (including TV Guide Network, in which it has an ownership interest), on a film-by-film, rather than an output basis. Lionsgate notes that without multiple output agreements that typically contain guaranteed minimum payments, its revenues may be subject to greater volatility, which could have a material adverse effect on its business, financial condition, operating results, liquidity and prospects. Lionsgate 2010 Form 10-K at 28. In April 2008, Lionsgate, along with Viacom, and MGM studios, formed EPIX, a premium television channel and VOD service, for its theatrical releases after January 1, 2009. EPIX, which launched in October 2009, provides Lionsgate with an additional platform to distribute its library of motion picture titles and television episodes and programs. Lionsgate 2010 Form 10-K at 28; Studio 3 Partners, *What is EPIX?*, <http://corp.epixhd.com/> (visited Mar. 26, 2012).

¹²⁰⁷ SNL Kagan 2011 Media Trends at 155.

original programming.¹²⁰⁸ On average, about 25 percent of the retail price MVPDs charge consumers for premium networks goes to the movie studios.¹²⁰⁹

Table 28: Motion Picture Studio Revenue Streams¹²¹⁰
(Revenue in millions)

	2006	2007	2008	2009	2010
Domestic:					
Theatrical Rentals	\$4,798	\$5,118	\$5,119	\$5,672	\$5,678
Home Video	\$12,515	\$12,056	\$11,384	\$10,387	\$9,275
PPV/VOD	\$621	\$674	\$804	\$1,013	\$1,443
Premium Cable TV	\$1,731	\$1,713	\$1,689	\$1,820	\$1,868
Digital	\$16	\$70	\$242	\$503	\$752
Basic Cable	\$2,611	\$2,638	\$2,690	\$2,714	\$2,769
Broadcast Networks	\$478	\$444	\$418	\$394	\$372
TV Syndication	\$152	\$158	\$163	\$168	\$173
Other ¹²¹¹	\$1,285	\$1,393	\$1,324	\$1,205	\$1,226
Total Domestic:	\$24,209	\$24,263	\$23,833	\$23,875	\$23,557
Total International:	\$23,881	\$25,379	\$25,853	\$26,184	\$26,453
Total:	\$48,090	\$49,643	\$49,687	\$50,058	\$50,010

370. Home entertainment distribution involves the marketing, promotion and sale and/or lease of DVDs and Blu-ray discs to wholesalers and retailers who then sell or rent them to consumers.¹²¹² Studios also distribute television programs and movies for individual rental through such companies as

¹²⁰⁸ SNL Kagan, *Media Trends*, 2008 Edition, at 201.

¹²⁰⁹ Vogel at 337-38 & 351, n. 16.

¹²¹⁰ Wade Holden, *Distributor Revenue Should Continue Growth*, SNL Kagan, Dec. 28, 2010 (containing the data for 2006-2009); Wade Holden, *Home Video a Temporary Lag on Distributor Revenue*, SNL Kagan, Sept. 26, 2011 (containing the data for 2010).

¹²¹¹ “Other” includes hotel, airline and merchandise licensing.

¹²¹² Lionsgate 2010 Form 10-K at 6. Studios may rely on third parties to manufacture the discs, warehouse the discs, and deliver the discs to retailers. Time Warner 2010 Form 10-K at 8.

Redbox and Rentrak Corporation¹²¹³ or via subscription services such as Netflix¹²¹⁴ and Blockbuster.¹²¹⁵ While the domestic home video window has accounted for the largest proportion of domestic revenues for movie studios for several years, the proportion of movie studios' revenues attributable to this window has declined from 51.6 percent of the total \$24.2 billion in revenues (\$12.5 billion) in 2006 to 39.4 percent of \$23.6 billion in domestic revenues (\$9.3 billion) in 2010.¹²¹⁶

371. *Sports.* As noted above, rights for major sporting events are licensed to networks or stations by professional or collegiate leagues.¹²¹⁷ Some leagues or teams operate their own regional or national cable sports networks (e.g., the NFL Network and Mid-Atlantic Sports network, the latter operated by the Baltimore Orioles and Washington Nationals baseball teams). Many regional sports networks ("RSNs") are affiliated with entertainment conglomerates, such as Disney or Comcast.¹²¹⁸ We estimate that there are 93 RSNs in operation today.¹²¹⁹ The networks or stations may supply their own on-air talent, cameras, and production facilities to create sports programming,¹²²⁰ and sell advertising and sponsorships for the programs. Alternatively, networks can sell airtime to independent production companies for "time buys," in which an outside producer pays production costs and finds advertisers,

¹²¹³ Rentrak Corporation is a global digital media and research company. Its Video Retailer Revenue Sharing service is a wholesale operation that provides regional and independent retailers who rent home entertainment products to customers with an opportunity to acquire new inventory from studios in the same manner as major national chains. Rentrak Corp., *Home Entertainment Services: Video Retailer Revenue Sharing*, http://www.rentrak.com/section/homent/video_retailers/index.html (visited Mar. 6, 2012).

¹²¹⁴ In addition to playing a role in the home video market for movie studios through its disc rental and streaming services, Netflix is also commissioning original television programs and acquiring distribution rights for library content in the traditional syndication window. *See supra*, ¶ 303.

¹²¹⁵ Lionsgate 2010 Form 10-K at 18. *See also* Time Warner, Inc., *Presentation to Morgan Stanley Technology, Media & Telecom Conference*, Corrected Transcript, Feb. 29, 2012, at 3 ("Time Warner Presentation Transcript").

¹²¹⁶ Wade Holden, *Home Video a Temporary Lag on Distributor Revenue*, SNL Kagan, Sept. 26, 2011, at 3. *See also* Time Warner 2010 Form 10-K at 41 (noting that while DVD distribution has been one of the largest drivers of its film studio's revenues and profits over the last several years, the industry and the company have experienced a decline in DVD sales in recent years). Home video consumption falls into three major categories: purchase, rental, and subscription, including subscription video on demand.

¹²¹⁷ Some networks and distributors of content own sports teams (e.g., Comcast owns the Philadelphia Flyers, a National Hockey League team and Liberty Media owns the the Atlanta Braves, a National Baseball League team). *See* Comcast 2010 Form 10-K at 1; Liberty Media Corp., *Atlanta National League Baseball Club*, <http://www.libertymedia.com/assets-braves.aspx> (visited Mar. 8, 2012). The National Football League, however, bars corporate ownership. *See* John Clayton, *NFL Ownership Growing Increasingly Complicated*, ESPN, July 15, 2008, http://sports.espn.go.com/nfl/columns/story?columnist=clayton_john&id=3485962 (visited Mar. 8, 2012).

¹²¹⁸ *See The Regional Sports Network Marketplace*, MB Docket No. 11-128, Report, 27 FCC Rcd 154, 160-61, ¶¶ 16-17 (MB 2012). Comcast Corporation also owns Comcast SportsNet Philadelphia, Comcast SportsNet Mid-Atlantic, and Comcast SportsNet New England, as well as the NBC Broadcasting Network. *See infra*, Appendix C, Table C-1. News Corp. also owns a number of RSNs and the Fox Broadcasting Network. *See infra*, Appendix C, Table C-2.

¹²¹⁹ *See infra*, Appendix D (this figure includes the HD feeds of the RSN networks). NCTA estimates that there were about 51 RSNs in standard, high-definition, or premium format as of 2010. NCTA, *Organizations: Cable Networks*, <http://www.ncta.com/Organizations.aspx?type=orgtyp2&contentId=2907#&&CurrentPage=1> (visited May 11, 2010).

¹²²⁰ *See* Chris Gratton & Harry Arne Solberg, *THE ECONOMICS OF SPORTS BROADCASTING* 83-86 (Routledge, Taylor & Francis Group) (2007) ("Gratton & Solberg").

while the network supplies on-air talent and coordination.¹²²¹ The amount of financial risk incurred by a team or league, as well as its dependence on revenues from broadcasting and cable companies, depends on the sport, the market, and the team's performance.

372. Sports programming differs from other television programs and movies in two major respects. First, audience and advertiser interest is more predictable, especially for marquis events. Major sporting events, including professional football, baseball, and basketball, the Olympics, and certain NCAA playoff series consistently generate among the highest ratings of any programming among viewers who are demographically desirable to advertisers.¹²²² Audiences,¹²²³ advertisers, and MVPDs therefore regard such sporting events as "premium" programming.¹²²⁴ Second, live sports programs have little value beyond their initial telecast since viewer interest drops substantially once the contest is over and the results known. With the exception of websites that provide opportunities for additional engagement of fans, ancillary markets for sports programming are limited.¹²²⁵

373. The licensing of sports programming for video distribution varies by sport. For example, the National Football League ("NFL") negotiates media rights exclusively on a national basis. In the NFL, each team receives an equal share of broadcast and licensing revenues and 40 percent of gate receipts from away games.¹²²⁶ Revenues earned from licensing network television rights have been especially important to the NFL. CBS, FOX, NBC, and ESPN jointly paid nearly \$25 billion for the right to air NFL games for eight years, 2006-2013, representing an increase of 42 percent from the previous eight-year agreement.¹²²⁷ The combination of the financial cushion from broadcast and cable networks contracts, the NFL's revenue sharing arrangement, and the lack of local television contracts, has means

¹²²¹ Vogel at 463, n. 6. Examples of this include the Ladies Professional Golf Association, Grand Prix auto racing, and Tour de France cycling. *Id.*

¹²²² See Wang at 15. See also Gratton & Solberg at 10 ("Sports programm[ing] almost uniquely had this ability to attract the size and characteristics of audiences most attractive to distributors, sponsors, and advertisers.").

¹²²³ According to Nielsen, major sporting events are appealing to advertisers because they are more likely than other programs to attract viewers in households earning \$100,000 or more. See Nielsen, *State of the Media: Year in Sports 2010*, at 1, <http://www.nielsen.com/us/en/insights/reports-downloads/2011/year-in-sports-2010.html?status=success> (visited Mar. 27, 2012).

¹²²⁴ Wang at 15. When NBC announced that it would stream the Super Bowl in 2012, the American Television Alliance, a group representing MVPDs, argued that free streaming undercut the stations' rationale for justifying retransmission consent fees. See American Television Alliance, *Blog*, <http://www.americantelevisionalliance.org/uncategorized/new-ad-why-is-sunday%E2%80%99s-big-game-being-streamed-for-free-online-when-broadcast-networks-and-their-affiliates-demand-sky-high-fees-to-show-their-programming/> (visited Feb. 17, 2012).

¹²²⁵ According to Nielsen, the mobile web audience among sports sites increased by 22 percent from November 2010 to November 2011. Nielsen, *State of the Media: 2011 Year in Sports* at 2, <http://www.nielsen.com/us/en/insights/reports-downloads/2012/state-of-the-media--2011-year-in-sports.html> (visited Mar. 27, 2012). In November 2011, the first full month of the NHL season, nearly 1.3 million people visited NHL.com and watched close to 10 million minutes of video content, which is 37 percent more video than was consumed in November 2010. *Id.* at 8.

¹²²⁶ Vogel at 453-54, Fig. 12.2.

¹²²⁷ SNL Kagan 2011 Media Trends at 19. ABC, which had aired NFL games for the previous 36 years, gave up the rights to its sister network, ESPN. ESPN's high subscriber fees enable it to earn higher cash flow margin than the broadcast network. For example, in 2010, ABC had \$2.9 billion in programming costs (primarily entertainment) and a cash flow margin of 1.7 percent, while ESPN had total programming costs (sports programming) of \$4.9 billion and a 25 percent cash flow margin. *Id.* at 18.

that the most profitable NFL team usually generates only 20 percent more gross revenues than the least.¹²²⁸

374. For Major League Baseball (“MLB”) and the National Basketball Association (“NBA”), revenues from licensing fees are highly correlated with the size of the market and individual team performance. The NBA and MLB allow teams to negotiate local broadcast rights contracts. For this reason, RSNs may carry professional basketball and baseball games. Traditionally, the NBA and MLB have been less dependent on television revenues than the NFL, in part because they play many more games in their home markets.¹²²⁹ In August 2010, however, the Texas Rangers signed a 20-year licensing agreement with FOX Sports Net valued at \$3 billion that includes an equity stake in the network, escalator clauses, and profit participation. This transaction has set in motion a series of negotiations between baseball teams and RSNs for major television contracts, at least for many teams in larger markets.¹²³⁰ Similarly, in February 2011, Time Warner Cable signed a 20-year, \$3 billion licensing agreement with the Los Angeles Lakers to launch English-language and Spanish-language RSNs built around the team, and other teams have subsequently signed major contracts with RSNs as well.¹²³¹

375. While the broadcast networks generally lose money on sports, the programming attracts viewers, especially with pre- and post-game programming, enabling broadcast networks to develop their brands and promote their non-sports programming schedules.¹²³² Nevertheless, since sporting events are less vulnerable than other types of programming to competition, broadcast and cable networks are paying increasingly large amounts for sports rights, supported in part by subscriber fees charged to MVPDs, and/or contributions from broadcast affiliates to cover rights and production costs. One recent trend has been the migration of some major sports, including the NBA and MLB, to cable networks.¹²³³ Cable and broadcast networks sometimes share in the bidding for sports rights. For example, in 2010 CBS and TNT jointly won a bid for the National Collegiate Athletic Association (“NCAA”) men’s basketball tournament rights, providing additional outlets for sports programming.¹²³⁴ For MVPDs, sports-themed cable networks are considered “must have” programming because their programming is unique and

¹²²⁸ Vogel at 453.

¹²²⁹ *Id.* at 454-55.

¹²³⁰ Bob Nightengale, *Cash Flows Through MLB Cable Outlets*, USA TODAY, Feb. 10, 2012, at 1C. According to Arizona Diamondbacks’ President Derrick Hall, “[i]t’s the biggest game changer a lot of us have ever seen. The landscape changed in Texas . . . You’re seeing clubs double or triple their TV value.” *Id.*

¹²³¹ Mike Reynolds, *TWC’s Lakers Deal Changes Game*, MULTICHANNEL NEWS, Feb. 21, 2011, at 8. The agreement made the Los Angeles Lakers the most valuable team within the league. Kurt Badenhausen, *L.A. Lakers Top 2012 List of the NBA’s Most Valuable Teams*, FORBES, Jan. 25, 2012, <http://www.forbes.com/sites/kurtbadenhausen/2012/01/25/the-nbas-most-valuable-teams/> (visited Mar. 13, 2012).

¹²³² SNL Kagan 2011 Media Trends at 21.

¹²³³ Deana Myers, *Sports Rights: Paying Off for Broadcast?*, SNL KAGAN, Feb. 7, 2012. See also Pete Toms, *What Does a Drop in Cable TV Subscribers Mean for MLB?*, BIZ OF BASEBALL, Nov. 29, 2010 (“Fewer and fewer games are available on local ‘over-the-air’ channels as sports continue to migrate to the more lucrative ‘dual revenue’ (sub fees and ads) model of cable TV.”), http://bizofbaseball.com/index.php?option=com_content&view=article&id=4899:lwiib-what-does-a-drop-in-cable-tv-subscribers-mean-for-mlb&catid=67:pete-toms&Itemid=155 (visited Mar. 26, 2012).

¹²³⁴ *A Modified Madness*, DAILY VARIETY, Mar. 9, 2011, at 3. According to CBS Sports Chairman Sean McManus, “[w]e realized we couldn’t bid for this just as an over-the-air broadcaster We needed a partner from a (number of) standpoints.” Beginning in 2011, for the first time, every game was available for viewing in its entirety. *Id.*

cannot be easily replicated.¹²³⁵ ESPN charges the highest per subscriber license fee, \$4.39 per month as of 2010, of all cable networks.¹²³⁶

376. Sports cable networks earned about \$2.2 billion in net advertising revenue in 2007, representing 25.9 percent of net operating revenues and \$2.6 billion in 2010, representing 22.8 percent in net advertising revenues, lower percentages of net operating revenue than non-sports networks as reported above. Similar to the EBITDA and operating cash flow metrics we used to measure profitability in the previous sections,¹²³⁷ broadcast and cable network cash flow margins serve as indicators of their profitability.¹²³⁸ As we noted earlier, cable networks, such as ESPN, have higher cash flow margins than broadcast television networks, such as ABC.¹²³⁹ Among cable networks, however, sports networks, both national and regional, have lower cash flow margins than general entertainment and other genres.¹²⁴⁰ For instance, ESPN, which earns 15 percent of cable network industry revenues, had a cash flow margin of 25.3 percent as of 2010, while Nickelodeon had a cash flow margin of 64.6 percent.¹²⁴¹ Sports fees have continued to rise during the recession. Between 2000 and 2010, RSN subscriber fees quadrupled from \$1 billion to \$4.2 billion. As of 2010, several MVPDs attributed expected additional increases in programming costs in part to rising fees for sports programming.¹²⁴² Some analysts question whether RSNs, ESPN, and other networks will be able to pass on the increasing costs of sports programming onto MVPDs.¹²⁴³ Given the potential for subscribers to substitute or cut back on their MPVD subscriptions, some MVPDs have decided to price sports programming on a separate tier, and others may follow suit.¹²⁴⁴

¹²³⁵ See, e.g., *News Corp-DirectTV Order*, 23 FCC Rcd at 3305, ¶ 87, *supra*, n. 101. For example, when Disney first considered purchasing full season NFL rights for \$8.8 billion for ESPN in 1998, CEO Michael Eisner justified the acquisition after getting a guaranteed 20 percent compounded growth rate in subscriber fees from all MVPDs. James Andrew Miller & Tim Shales, *ESPN: THOSE GUYS HAVE ALL THE FUN* 406-412 (Back Bay Books/Little, Brown & Co.) (2011). According to Comcast CEO Brian Roberts, “Michael Eisner knew that the NFL was unlike any other programming, and he used it to impose the most dramatic rate increases ever on cable customers. ESPN raised their rates more than 20 percent for seven straight years.” *Id.* at 409-10.

¹²³⁶ SNL Kagan Basic Cable Network Affiliate Revenue. In 2010, Comcast SportsNet Washington charged the next highest rate, an average of \$3.18 per subscriber per month.

¹²³⁷ See *supra*, Secs. III.A.4., III.B.4, and III.C.4.

¹²³⁸ For networks, cash flow equals total revenues (*i.e.*, net advertising revenue, MVPD license fee revenues, and other revenue sources) minus SG&A and programming expenses. It excludes depreciation of plant property and equipment as well as amortization of goodwill. Cash flow margin equals the percentage of revenues attributable to cash flow. See SNL Kagan, *TV Network Industry Benchmarks: View Definitions*.

¹²³⁹ See *supra*, Tables 25 & 27.

¹²⁴⁰ FCC staff analysis of SNL Kagan data. See SNL Kagan, *TV Network Summary: Basic Cable Network by Net Advertising Revenue (2006 – 2010)*.

¹²⁴¹ SNL Kagan Basic Cable Report at 4, 7.

¹²⁴² Charter 2010 Form 10-K at 8; Comcast 2010 Form 10-K at 25; Insight 2010 Form 10-K at 36; Suddenlink 2010 *Annual Report* at 12; Mediacom 2010 Form 10-K at 11, 25.

¹²⁴³ Sarah Barry James, *The Danger of Specialized Sports Networks*, SNL Kagan, Oct. 24, 2011.

¹²⁴⁴ One recent example is Cox Communications’ offer of an economy package for \$35 a month that includes several basic cable networks, but excludes ESPN and RSNs. Comcast and Time Warner Cable have also tested and offered similar tiers. Deborah Yao, *Cox Rolling Out Economy Cable TV Tier*, SNL Kagan, Jan. 24, 2012, at 1-2. DISH Network, which positions itself as a low-cost MVPD (in contrast to sports-centric DIRECTV, which offers exclusive NFL Sunday Ticket programming), has reportedly considered dropping ESPN if it does not agree to be distributed on a separate sports tier, to keep prices in check for subscribers who are non-sports fans. In New York, (continued....)

2. Distribution Strategies

377. As discussed elsewhere in this Report, technology continues to evolve and provide alternative methods for the distribution, storage, and consumption of video content, such as DVR and VOD.¹²⁴⁵ Alternative distribution of video content entails an evolution of rights between the networks, affiliates, and studios as well as strategic business decisions of the parties. We now describe key examples of these evolving relationships below.

378. *Broadcast Television Programming and Network Affiliates.* The increasing availability of network programming through a variety of video distributors has impacted the relationship between networks and their affiliates. As described above, broadcast network programming is available both via MVPD VOD service and from OVD services such as iTunes and Hulu. For example, iTunes began selling broadcast network programming in 2005. Specifically, in October 2005, ABC struck an agreement with iTunes for EST for \$1.99 per episode.¹²⁴⁶ NBC followed with an iTunes agreement in December 2005 to distribute programs from NBC Universal broadcast and cable networks.¹²⁴⁷ When these networks began selling programs to iTunes, they did not have formal compensation agreements concerning these types of arrangements with their broadcast television affiliates in place.¹²⁴⁸ Many affiliates were displeased that the networks had neither apprised them nor sought their permission prior to striking the deal with iTunes.¹²⁴⁹ NBC offered iTunes more programs than ABC, in part because its affiliation agreements allowed redistribution of more in-season programs, while ABC's affiliation agreements limited it to redistribute only 25 percent of its prime time schedule.¹²⁵⁰

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DISH Network has dropped three RSNs – SportsNet New York, YES, and MSG Plus. DISH Network CEO Charlie Ergen has stated that if only 15 percent of subscribers in a market actually watch sports programming, it may be a good idea for one of the MVPDs not to carry RSNs. Derek Baine, *Dish to Dump ESPN?*, SNL Kagan, Sept. 13, 2011, at 11.

¹²⁴⁵ See, e.g., News Corp. 2010 Form 10-K at 33; Time Warner 2010 Form 10-K at 18.

¹²⁴⁶ The agreement also covered series from the Disney Channel. The Walt Disney Co., *Disney, ABC & Apple Announce Deal to Sell TV Shows Online; Hits to Include "Desperate Housewives," "Lost," and "That's So Raven"* (press release), Oct. 12, 2005.

¹²⁴⁷ Apple Inc., *NBC Universal & Apple Offer New Primetime, Cable, Late-Night & Classic TV Shows on the iTunes Music Store* (press release), Dec. 6, 2005. Sales from iTunes sales breathed new life into NBC's *The Office*. While the show was not a primetime hit as of January 2006, it often took up half the slots of Apple's lists of top 20 television episodes for sale on iTunes. Josef Adalian, *Peacock Preening with iTunes Presence*, DAILY VARIETY, Jan. 3, 2006 at 1.

¹²⁴⁸ Glen Dickson, *Broadcasters Cut Out of Convergence*, BROADCASTING & CABLE, Jan. 16, 2006, at 38. CBS, however, agreed to provide a share of revenues to affiliates when it reached a distribution agreement with Google. *Id.*

¹²⁴⁹ Michele Greppi, *ABC Affils Remain Uneasy; Network Does Little to Erase Concerns Raised by iPod Pact*, TELEVISION WEEK, Oct. 24, 2005, at 5. ABC claimed that Disney's non-disclosure agreement with Apple prevented it from doing so. Andrew Wallenstein & T.K. Arnold, *Disney-Apple Pact Upsets Affiliates*, THE HOLLYWOOD REPORTER, Oct. 13, 2005. Likewise, ABC did not believe a prior agreement it reached with affiliates to limit the amount of programming it redistributed applied to iTunes. Michele Greppi, *Affils Slighted by Big 3's VOD Deals; Stations Want Info on How Revenues Will be Split*, TELEVISION WEEK, Nov. 14, 2005, at 5.

¹²⁵⁰ Josef Adalian, *Peacock Preening with iTunes Presence*, DAILY VARIETY, Jan. 3, 2006 at 1. Years earlier, ABC, CBS, and FOX had reached agreements with affiliates that gave affiliates additional advertising spots in network programming and/or other revenue-sharing opportunities in exchange for allowing the networks to redistribute a limited amount of network programming in-season and on a nationwide basis. In return, the affiliates helped defray the networks' costs for sports rights. Michele Greppi, *Affils: Exclusivity is Dead*, TELEVISION WEEK, Apr. 17, (continued....)

379. Broadcast networks subsequently reached comprehensive agreements with their affiliates that specifically addressed alternative forms of distribution, such as iTunes and MVPD VOD services.¹²⁵¹ In 2006, FOX and its affiliates reached a six-year agreement, allowing the network to repurpose more programming per week on alternative media, including iTunes, websites, and VOD, making it available for viewing the morning after the show originally aired on broadcast television stations.¹²⁵² Stations had the right to share in revenues.¹²⁵³ This marked the first agreement between a broadcast network and its affiliates to extensively address distribution of broadcast network programming via VOD, OVDs, and FOX's website, FOX.com.

380. Other networks followed suit. In June 2006, CBS reached an agreement with affiliates allowing it to repurpose network programming on VOD, on its CBS.com website (formerly called "Innertube"), as well as other digital outlets.¹²⁵⁴ The agreement also provided affiliates with a share of the revenues generated by these ventures for three years. In exchange, affiliates agreed to continue to defray CBS' costs of acquiring the rights to NFL broadcasts.¹²⁵⁵ In September 2006, CBS and Comcast modified their VOD agreement to include eight CBS prime time programs distributed nationwide, with advertisements, at no additional cost to Comcast subscribers.¹²⁵⁶

381. In the summer of 2006, ABC became the first broadcast network to stream full episodes of its programs, with limited commercials, on its website, ABC.com, and initially limited online distribution of its programs to its own site.¹²⁵⁷ It allowed affiliates to incorporate ABC's video player in their own sites, and sell advertising within the episodes.¹²⁵⁸ In February 2008, ABC reached an

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2006, at 1. As of 2006, NBC was the only one of the four major networks that did not have a written agreement with affiliates setting forth terms of redistribution of its network programming. *Id.* When these agreements first became prevalent in the 1990s, NBC was decreasing its reliance on professional sports programming. Michele Greppi, *Affils Slighted by Big 3's VOD Deals; Stations Want Info on How Revenues Will Be Split*, TELEVISION WEEK, Nov. 14, 2005, at 5.

¹²⁵¹ While broadcast stations negotiate for retransmission consent for MVPD carriage of their signals, including broadcast network programming, the networks, subject to contractual rights with content creators, negotiate with MVPDs for VOD rights. Comcast 2010 Form 10-K at 5.

¹²⁵² Michael Schneider, *Fox Expands Playing Field for Content*, DAILY VARIETY, Apr. 13, 2006. The amount grew from 60 percent of FOX's prime time lineup the first year, to 80 percent the second year, to 100 percent the third year. *Id.* See also Michele Greppi, *Sly Fox's Win-Win Web Pact; New Media Deal Gives Net On-Demand Freedom, Affils a Cut; CBS Eyes Similar Scenario*, TELEVISION WEEK, Apr. 17, 2006, at 1.

¹²⁵³ The agreement was limited and only allowed affiliates to share revenues with FOX from programming made available via MVPD VOD service or on OVD sites. Michele Greppi, *Sly Fox's Win-Win Web Pact; New Media Deal Gives Net On-Demand Freedom, Affils a Cut; CBS Eyes Similar Scenario*, TELEVISION WEEK, Apr. 17, 2006, at 1. See also Allison Romano, *Affiliates Fight for Slice of Platform Pie*, BROADCASTING & CABLE, May 15, 2006, at 17.

¹²⁵⁴ *Mass Media Notes*, COMM. DAILY, June 30, 2006.

¹²⁵⁵ *Id.*

¹²⁵⁶ Comcast Corp., *Comcast and CBS Introduce Free On Demand Episodes of Primetime CBS Shows for Comcast Digital Cable Customers* (press release), Sept. 14, 2006. The VOD offerings excluded local commercials, which are often more time-sensitive than network commercials. Michele Greppi, *Affils Slighted by Big 3's VOD Deals; Stations Want Info on How Revenues Will Be Split*, TELEVISION WEEK, Nov. 14, 2005, at 5.

¹²⁵⁷ Chuck Salter, *Brave New Mouse*, FAST COMPANY, June 1, 2007, at 79. See also Abbey Klaassen, *Revved-Up Video*, ADVERTISING AGE, Sept. 11, 2006, at S-1.

¹²⁵⁸ Chuck Salter, *Brave New Mouse*, FAST COMPANY, June 1, 2007, at 79.

agreement with its affiliates enabling it to distribute ABC network content anytime via VOD as well as electronic sell-through services, such as iTunes and Microsoft's Zune service on its Xbox game consoles.¹²⁵⁹ The agreement allowed affiliates to participate through local advertising sales opportunities.¹²⁶⁰ In October 2008, ABC and Verizon made select ABC prime time programs available to Verizon FiOS customers nationwide.¹²⁶¹

382. In April 2006, NBC and its affiliates formed a joint venture, called National Broadband Company. National Broadband Company, which began operating in September 2006, was a wholesale service that distributed clips of videos produced by the affiliates, NBC Universal, and some third parties to the websites of the participating media companies.¹²⁶² In July 2007, however, NBCU announced that it would shut down the service in order to focus on Hulu.¹²⁶³ In 2010, NBC reached an agreement with its affiliates to offer them branding and advertising availabilities on post-network distribution of NBC entertainment and sports programs on Hulu as well as other platforms.¹²⁶⁴

383. *Creators.* The availability of network television programming also involved negotiations between networks, studios, and talent unions. Disagreement over compensation arrangements from alternative systems of distribution led to the strike of the Writers Guild of America ("WGA") during the 2007-2008 television season.¹²⁶⁵ For instance, with respect to the programming agreements with iTunes, the networks and studios claimed that iTunes fell into the category of "home video" rather than subscription television, and therefore entitled the unions to a lower residual rate, while the guilds felt that

¹²⁵⁹ The Walt Disney Co., *ABC and Affiliates Reach Unprecedented Arrangement to Expand* (press release), Feb. 25, 2008.

¹²⁶⁰ Each affiliate had the opportunity to insert one locally sold, 30-second commercial spot within each half-hour of programming in DMAs where ABC programming was available via VOD. *Id.*

¹²⁶¹ Verizon Communications Inc., *Disney-ABC Television Group and Verizon FiOS TV Expand ABC's Video-on-Demand Offering* (press release), Oct. 28, 2008.

¹²⁶² The affiliates owned about 30 percent of the joint venture. Seth Sutel, *NBC Launches Online Video Venture, Hoping to Reclaim Viewers*, ASSOCIATED PRESS, Sept. 12, 2006. Third party participants included CBS's College Sports Television and the Sundance Channel. At the time of the launch, NBC Universal Television Group executives stated that while the venture would initially distribute clips, it would be open to showing full-length episodes if demand existed. Michael Learmonth, *NBC U Bows Online Service*, DAILY VARIETY, Sept. 13, 2006, at 6.

¹²⁶³ At the time, Hulu, still in the planning stages, had the working name "New Site." Katy Bachman, *NBCU to Affils.: NBBC to Shut Down, Fold Into New Site*, MEDIA WEEK, July 5, 2007. See also Katy Bachman, *Affils Wary of "New Site": NBCU Says Alternative is Better Than Shuttered NBBC*, MEDIA WEEK, July 9, 2007, at 6.

¹²⁶⁴ The NBC affiliates reached an agreement with Comcast and NBC Universal on June 3, 2010 (the "NBC Affiliates Agreement"). A copy of the NBC Affiliates Agreement was submitted to the Commission on August 6, 2010, in the Comcast-NBC Universal transaction. See Letter from Michael H. Hammer, Counsel for Comcast and David H. Solomon, Counsel for NBC Universal, Inc., MB Docket No. 10-56, to Marlene H. Dortch, Secretary, FCC (Aug. 6, 2010). See NBC Affiliates Agreement at Section 9.

¹²⁶⁵ Julia M. Scott, *WGA Strike: Act I Both Sides Settle in for Long Battle Over Revenue*, DAILY NEWS (Los Angeles), Nov. 6, 2007, at A1. See also Sarah McBride & Rebecca Dana, *Scenes from Next Week...?*, WALL ST. J., Nov. 1, 2007.

this decision violated their collective bargaining agreements.¹²⁶⁶ Ultimately the WGA obtained higher residuals for online distribution.¹²⁶⁷

384. *Studios.* Studios attribute the decline in DVD sales to several factors, including the general economic downturn, the availability of subscription services and discount kiosks, the maturation of the standard definition DVD format, piracy, and the declining popularity of catalog titles.¹²⁶⁸ This loss in revenues is partially offset by the growing sales of Blu-ray discs and EST of movies via OVDs.¹²⁶⁹ Moreover, revenues from MVPDs' VOD services have grown since 2007, from \$674 million, representing 2.8 percent of motion picture studios' total domestic revenue, to \$1.2 billion in 2010, representing 4.9 percent of motion picture studios' total domestic revenues.¹²⁷⁰ For a studio, a pay-per-view VOD transaction is about seven times more profitable than a DVD rental transaction at a discount kiosk such as Redbox or from a subscription service such as Netflix, while an electronic sell-through transaction is 20 to 30 times more profitable.¹²⁷¹ The decline in DVD sales has diminished the leverage of large retailers¹²⁷² over the distribution of content; they can no longer insist on a prolonged period of exclusivity for home video releases.¹²⁷³ The number of movies released simultaneously on VOD and DVD tripled from 10 films in 2007 to more than 30 movies in 2008.¹²⁷⁴ According to an SNL Kagan study, movies in 2010 were released on pay-per-view VOD an average of just four days after they were available on DVD, down from 19 days in 2009, 31 days in 2008, 34 days in 2007, and 38 days in 2006.¹²⁷⁵

385. *Recent Developments.* In 2010, the Media Bureau waived the prohibition, under limited circumstances and conditions, on the use of selectable output controls for early-release films for Motion Picture Association of America ("MPAA") member companies and their MVPD partners.¹²⁷⁶ Since then,

¹²⁶⁶ At the time the networks and studios began distributing content online, the guilds did not have a formal agreement in place that specifically covered these methods of distribution. Dave McNary & Ben Fritz, *Download Drama: iPod Residual Battle Bubbles Up*, DAILY VARIETY, Feb. 27, 2006, at 1. Rather than wait to see how the distribution of content online developed, as they did for DVD home video sales in the 1980s, the unions wanted to work out advantageous terms early. Dave McNary & Ben Fritz, *The Pod Thickens: Guilds Mull Dramatic Move on Residuals*, DAILY VARIETY, Feb. 27, 2006, at 5.

¹²⁶⁷ David Carr, *Who Won the Writers Strike?*, N.Y. TIMES, Feb. 12, 2008, at 1. The WGA agreement was modeled after an agreement between studios and the Directors Guild of America ("DGA"). Claudia Eller & Richard Verrier, *Hollywood Writers Strike Ends*, L.A. TIMES, Feb. 13, 2008.

¹²⁶⁸ Time Warner 2010 Form 10-K at 24, 41; Lionsgate 2010 Form 10-K at 7; Viacom 2010 Form 10-K at 39.

¹²⁶⁹ Time Warner 2010 Form 10-K at 41.

¹²⁷⁰ Wade Holden, *Home Video a Temporary Lag on Distributor Revenue*, SNL Kagan, Sept 26, 2011. 2010 VOD figures differ from the chart due to the inclusion of international figures by a major distributor in SNL Kagan's initial tally. Table 26 contains corrected figures provided by SNL Kagan to Media Bureau staff.

¹²⁷¹ Time Warner Presentation Transcript at 4.

¹²⁷² Such DVD retailers include Wal-Mart (owner of Vudu), Best Buy (owner of CinemaNow), and Target.

¹²⁷³ Julia Boorstin, *Warner Brothers Starts to Collapse Movie Distribution Windows*, CNBC.COM, Sept. 30, 2009, http://www.cnbc.com/id/33091887/Warner_Brothers_Starts_to_Collapse_Movie_Distribution_Windows (visited Mar. 27, 2012).

¹²⁷⁴ Tuna N. Amobi, *Industry Surveys: Movies & Entertainment*, STANDARD & POOR'S, Mar. 18, 2010, at 16.

¹²⁷⁵ Wade Holden, *Video-to-PPV/VOD Window Disappears in 2011*, SNL Kagan, Dec. 21, 2011.

¹²⁷⁶ See *Motion Picture Association of America, Petition for Expedited Special Relief; Petition for Waiver of the Commission's Prohibition on the Use of Selectable Output Control*, CSR-7947-Z, MB Docket No. 08-82, (continued....)

movie studios have experimented with releasing movies in theaters and on VOD simultaneously, in a “premium VOD” window, but their strategies vary.¹²⁷⁷ While independent studios IFC Films and Magnolia make simultaneous VOD and theater part of their standard distribution plans, studios releasing major movies are hesitating, in part because of the concern about cannibalizing revenues from the theatrical release window, as well as resistance from theater owners.¹²⁷⁸ Theater owners have threatened to pull movies if studios choose to release a movie in VOD too close to the theatrical release,¹²⁷⁹ and several major theater chains have refused to book movies that are released simultaneously on VOD.¹²⁸⁰

386. CBS and Disney have struck multi-year, comprehensive distribution agreements with Comcast that include their cable networks, broadcast networks, stations, and studios in Comcast’s TV Everywhere and VOD initiatives. CBS’s 10-year agreement with Comcast, reached in August 2010, provides for expanded VOD and online access, via Comcast’s site, to programming from the CBS broadcast network and sister cable networks.¹²⁸¹ Disney’s agreement with Comcast, reached in January 2012, also enables Comcast’s Xfinity customers to watch ABC shows live, on demand, and across multiple screens.¹²⁸² The agreement covers Disney’s cable networks, ABC, and ABC’s O&Os.¹²⁸³ Premium networks, including HBO and Showtime, in conjunction with MVPDs offer subscribers unlimited access to television programs, movies, and sporting events on PCs and mobile devices through

(Continued from previous page)

Memorandum Opinion and Order, 25 FCC Rcd 4799, ¶ 1 (MB 2010). This waiver of Section 76.1903 of the Commission’s rules allows MVPDs to disable certain audiovisual outputs on set-top boxes to ensure that copy protection is available for early-release movies. The waiver terminates for a particular movie 90 days after the first activation of the selected output control, or immediately upon the retail release of the film on any prerecorded media (including Blu-ray), whichever is sooner. In addition to MPAA member companies and their MVPD partners, any other similarly situated provider of first-run theatrical content may take advantage of this waiver by filing an Election to Participate with the Commission. *Id.* at 4805-06, 4808, ¶¶ 13, 18.

¹²⁷⁷ Typically, VOD revenues are 10 percent of box office revenues. Deana Myers, *Premium VOD Draws Healthy Results for ‘Margin Call’*, SNL Kagan, Nov. 18, 2011. In the fall of 2011, Lionsgate distributed the movie *Margin Call* in theaters and VOD for the price of \$6.99, theorizing that audiences in smaller markets might be less inclined or able to watch it in theaters, earning \$5.1 million in theatrical revenues and more than \$4 million in VOD revenues. Sarah Barry James, *Lionsgate Exec Opens Up About New Windows, Summit Deal*, SNL Kagan, Jan. 30, 2012. See also Pat Saperstein, *‘Margin Call’ Changes VOD Picture*, DAILY VARIETY, Dec. 18, 2011, <http://www.variety.com/article/VR1118047677> (visited Mar. 6, 2012). Some industry executives consider the results of Lionsgate’s experiment with *Margin Call* to be a “game changer.” *Id.*

¹²⁷⁸ Pat Saperstein, *‘Margin Call’ Changes VOD Picture*, DAILY VARIETY, Dec. 18, 2011, <http://www.variety.com/article/VR1118047677> (visited Mar. 6, 2012).

¹²⁷⁹ Deana Myers, *Premium VOD Draws Healthy Results for Margin Call*, SNL Kagan, Nov. 30, 2011. For example, Universal Studios halted its plan to make the movie *Tower Heist* available via VOD three weeks after its theater debut after resistance from theater owners. David Lieberman, *Universal Halts ‘Tower Heist’ VOD Plan as Exhibitors Agree to Further Talks*, DEADLINE, Oct. 12, 2011, <http://www.deadline.com/2011/10/universal-halts-tower-heist-vod-plan/> (visited Mar. 6, 2012).

¹²⁸⁰ Pat Saperstein, *“Margin Call” Changes VOD Picture*, DAILY VARIETY, Dec. 18, 2011, <http://www.variety.com/article/VR1118047677> (visited Mar. 6, 2012).

¹²⁸¹ CBS Corp., *CBS and Comcast Sign Ten-Year Content Carriage Agreement* (press release), Aug. 2, 2010.

¹²⁸² Comcast Corp., *The Walt Disney Company and Comcast Corporation Announce a Long-Term, Comprehensive Distribution Agreement that Advances the Successful Multichannel Business Model* (press release), Jan. 4, 2012.

¹²⁸³ *Id.*

their own branded web sites and mobile applications.¹²⁸⁴ At the same time, some cable programming networks are taking a more cautious approach. For example, as of February 2012, the Discovery Networks has chosen not to give TV Everywhere rights to any MVPD.¹²⁸⁵ TV Everywhere initiatives have sometimes caused tensions between networks and MVPDs. For example, Time Warner Cable withdrew live streams of content from Viacom, Discovery, and News Corp. from its live television iPad app after the companies objected.¹²⁸⁶

387. Industry observers expect that a November 2011 agreement between WBTVG and ABC may become a template for other studios and networks regarding the distribution of television programs.¹²⁸⁷ Under this agreement, WBTVG will be able to syndicate its shows three years after they have had their first-run on the ABC network, rather than the traditional four years.¹²⁸⁸ WBTVG also can sell distribution rights to ABC-aired shows to subscription services, such as Netflix and Hulu, after the completion of each season. In exchange, ABC has the right to simulcast the network feeds of this WBTVG programming to any device, including tablets. ABC can distribute a maximum of five of the most recently aired episodes via an MVPD's VOD service or an OVD for a 30-day period at any time. Under this agreement, ABC retains all the revenue from advertising-supported streaming OVDs, such as Hulu. At the same time, the studio keeps revenues from in-season electronic sell-through platforms, such as iTunes, that enable consumers to own rather than rent episodes, as well as out-of-season DVD and Blu-ray disc sales.¹²⁸⁹ In addition, ABC retains revenues from any OVD subscription service in which it has an ownership interest, such as Hulu Plus.

B. Consumer Premises Equipment

388. Changes in consumer premises equipment ("CPE") technology have an important impact on competition in the video programming market. CPE is the necessary means by which consumers access the services that broadcasters, MVPDs, and OVDs provide. Because CPE is an integral part of viewing video programming, CPE features such as recording, home networking, and user interface are factors to consumers when choosing their programming provider and which services to purchase. Further, interoperability of CPE can impact the ability to consumers to seamlessly switch providers. In this section, we report on a number of developments in this area that affect the manner and state of competition in the video marketplace. We specifically note, where possible, developments since the last report, and examine the technological, regulatory and market developments that have had an effect on or are likely in coming years to affect competition in the video market. We begin by summarizing

¹²⁸⁴ See CBS Corp., *Showtime — Apps*, <http://www.sho.com/sho/apps> (visited Mar. 27, 2012); Time Warner Inc., *What is HBO Go*, <http://www.hbogo.com/#whatis/> (visited Mar. 27, 2012). See also, e.g., Comcast 6/8/11 Comments at 12-14; Bright House Networks, *HBO and Cinemax Now Available "On the Go" to Bright House Networks Customers* (press release), Jan. 10, 2012.

¹²⁸⁵ Discovery Presentation Transcript at 7. Discovery has indicated it may reconsider this decision at a later date.

¹²⁸⁶ Brian McNeill, *Time Warner Cable Removes Programming from iPad App Following Cable Network Complaints*, SNL Kagan, Mar. 31, 2011.

¹²⁸⁷ Andrew Wallenstein, *ABC-WBTV Deal Rewrites Syndie, Digital Rules*, DAILY VARIETY, Nov. 14, 2011, <http://www.variety.com/article/VR1118046062> (visited Mar. 26, 2012). While trade publications may refer to Warner Brothers Television Group as "WBTV," Time Warner, Inc. uses the acronym "WBTVG."

¹²⁸⁸ WBTVG Executive Vice President Craig Hunegs said that cable networks and broadcast stations have requested access to off-net syndicated programming earlier. *Id.*

¹²⁸⁹ Time Warner Inc., *ABC Entertainment and Warner Bros. Television Group Reach New Digital Distribution Agreement* (press release), Nov. 14, 2011.

navigation device developments by MVPDs and by non-affiliated vendors. We then review developments in devices used to access online video and mobile video services.

1. CPE Used to Access MVPD Services.

a. Leased CPE

389. MVPDs have been deploying set-top boxes that allow consumers to move content among other MVPD-provided set-top boxes in the home and incorporating cable modems into set-top gateways. MVPDs are also providing video to portable screens, such as Internet-connected smart phones and tablet computers. Cable companies continue to support CableCARD and, as described in more detail below, are working to implement an IP based recordable output.¹²⁹⁰

390. MVPDs have widely begun deploying multi-room DVR and home networking solutions. Comcast's "AnyRoom DVR," AT&T's "Total Home DVR," and DIRECTV's "Whole Home DVR" are current examples of MVPD-provided services that move recorded video content among MVPD-provided set-top boxes in the home. DIRECTV's multi-room DVR provides full DVR capabilities on other DIRECTV set-top boxes connected to a central HD DVR in a consumer's home.¹²⁹¹ Similarly, DISH Network's DuoDVR receivers allow two independently controlled televisions to be connected to the same set-top box.¹²⁹² In addition, DISH Network's TV Everywhere service streams video from a consumer's set-top box via IP to a remote computer, mobile device, or "WiFi Monitor."¹²⁹³ The DISH Network WiFi Monitor is a portable HD monitor with built-in wi-fi and a streaming receiver. This remote viewing service works both inside and away from the consumer's home.

391. Some MVPDs are deploying cloud-based user interfaces that take advantage of IP connectivity in leased set-top boxes. For example, Comcast's Xfinity TV uses a cloud-based interface that allows subscribers to search content from live television, on demand, or on their DVRs, in addition to providing access to weather and traffic applications, and social networking features.¹²⁹⁴ Comcast has also begun a trial of a more robust IP based program guide and video delivery platform that targets delivery to IP enabled devices.¹²⁹⁵ Time Warner has started to implement a cloud-based user guide providing

¹²⁹⁰ See *infra*, ¶¶ 393, 395. In 2004, the Commission adopted a requirement that cable operators provide an IEEE 1394 interface on all high definition set-top boxes as a means of enabling a market for devices which interact with the operator supplied set-top box. In 2010, the Commission relaxed this requirement to permit operators to provide the same functionality over IP. IP has overwhelming marketplace support and serves the same purpose that our IEEE 1394 connection requirement was intended to serve. See *Navigation Devices Third Report and Order*, 25 FCC Rcd 14677-79, ¶¶ 39-44.

¹²⁹¹ See DIRECTV, *DIRECTV: Whole Home DVR*, <http://www.DIRECTV.com/DTVAPP/content/technology/wholehome?footernavtype=-1&lpos=header> (visited Nov. 10, 2011).

¹²⁹² DISH Network, *DISH Network Introduces TV Everywhere* (press release), Jan. 6, 2010.

¹²⁹³ DISH Network 7/29/09 Comments at 5.

¹²⁹⁴ Letter from Michael Powell, NCTA President and CEO, to Julius Genachowski, Chairman, FCC, MB Docket 07-269 (July 7, 2011) at 4 ("Letter from Michael Powell").

¹²⁹⁵ See Jessica E. Vascellaro, *Comcast Test Tech Overhaul*, May 26, 2011, <http://online.wsj.com/article/SB10001424052702304066504576345330554958642.html> (visited Mar. 6, 2012).

improved search and navigation features through its set-top boxes equipped with a DOCSIS IP connection.¹²⁹⁶

392. Additionally, MVPDs have been working on ways to expand access to their services by retail products.¹²⁹⁷ For example, DIRECTV is a founding member of the “RVU Alliance,” which has developed open-standard technology that permits the distribution of video programming directly to televisions and other devices throughout the home from IP-enabled gateway devices. Portable media players, gaming consoles, and Internet-connected smart phones and tablet computers have become popular ways to interact with video as well. While an increasing number of these devices can access many MVPD services, the AllVid Tech Alliance asserts that few devices from non-affiliated vendors can access MVPD services.¹²⁹⁸

b. CableCARDS and Section 629 of the Communications Act

393. Pursuant to Section 629 of the Act,¹²⁹⁹ the Commission adopted regulations to assure the commercial availability of consumer electronics equipment that can access MVPD services.¹³⁰⁰ In enacting the section, Congress pointed to the vigorous retail market for CPE used with the telephone network and sought to create a similarly vigorous market for devices used with MVPD services.¹³⁰¹ The Commission has made regulatory efforts to develop this market and continues to analyze marketplace developments.

394. In 2003, the Commission adopted CableCARD standards that make cable service compatible with consumer electronics devices.¹³⁰² These standards direct cable operators to separate the

¹²⁹⁶ Mike Robuck, *Time Warner Cable Sheds Light on Cloud-Based Guide*, CED, Oct. 27, 2011, <http://www.cedmagazine.com/blogs/2011/10/time-warner-cable-sheds-light-on-cloud-based-guide> (visited Oct. 31, 2011).

¹²⁹⁷ Some MVPDs have announced or demonstrated products that integrate their video content with televisions from Samsung, LG, and Sony, gaming consoles from Sony and Microsoft, and smartphones and tablets running Apple’s iOS or Google’s Android platform. See Letter from Michael Powell at 2-7. See also AT&T 7/8/11 Reply at 4-5 (regarding compatibility with Microsoft’s X-Box 360).

¹²⁹⁸ See Letter from Robert S. Schwartz and Jeffrey L. Turner, Counsel, AllVid Tech Company Alliance *et al.*, to Julius Genachowski, Chairman, FCC, MB Docket No. 10-91 (July 27, 2011) at 8. NCTA disputes the AllVid Tech Alliance’s assertion that contracts between MVPDs and device manufacturers “affiliate” the two parties. Letter from Neal M. Goldberg, Vice President and General Counsel, NCTA, to Sherrese Smith, Senior Counsel and Legal Advisor to the Chairman, FCC, MB Docket No. 10-91 (Aug. 10, 2011) at 3, n.8.

¹²⁹⁹ See 47 U.S.C. § 549 (“The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.”).

¹³⁰⁰ 47 U.S.C. § 549(a).

¹³⁰¹ H.R. REP. NO. 104-204, at 112-3 (1995).

¹³⁰² *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80, PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885 (2003).

conditional access¹³⁰³ functions of a set-top box from the box's other functions, like tuning and guide rendering (*i.e.*, drawing the image you see when you push the "guide" button on your remote).¹³⁰⁴ This separation requirement is commonly referred to as the "integration ban." CableCARDs permit the reception of digital cable programming via commercially available devices without using a cable operator supplied set-top box. Consumers, however, must obtain a CableCARD from their local cable operator to insert into digital television sets, competitive set-top boxes (*e.g.*, TiVo) or other devices they have purchased at a retail outlet. While the CableCARD-compatible devices available at retail today are only capable of receiving one-way cable service, operator-supplied set-top boxes using CableCARDs are capable of two-way communication with the headend.¹³⁰⁵

395. Despite the CableCARD standards, consumer adoption of retail CableCARD-compatible devices has not matched the Commission's expectations.¹³⁰⁶ The following table shows the reported number of CableCARD deployments for use in retail CableCARD-enabled devices since 2006¹³⁰⁷ and the deployment of operator-supplied set-top boxes with CableCARDs since the integration ban went into effect on July 1, 2007.¹³⁰⁸

¹³⁰³ "Conditional access" is the method that cable operators use to make sure that cable subscribers only receive the programming to which they subscribe.

¹³⁰⁴ See generally 47 C.F.R. §§ 76.640, 76.1204.

¹³⁰⁵ The Commission's CableCARD rules standardized what was necessary to make retail devices compatible with cable system conditional access systems nationwide and to tune digital linear programming channels. The Commission deferred standardization of technology necessary for navigation devices to communicate upstream to the headend to request two-way services like video-on-demand, pay-per-view, or switched digital video, but some cable operators have negotiated with TiVo privately to provide on-demand services to retail TiVo set-top boxes. Harry McCracken, *TiVo Gets Comcast's Xfinity on Demand*, TIME, Apr. 9, 2012, <http://techland.time.com/2012/04/09/tivo-gets-comcasts-xfinity-on-demand/> (visited May 3, 2012); Letter from Natalie G. Roisman, Counsel to Cox Enterprises, Inc., to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80 (filed Oct. 8, 2010).

¹³⁰⁶ *Navigation Devices Third Report and Order*, 25 FCC Rcd at 14660, ¶ 4.

¹³⁰⁷ The Commission directed certain cable operators to file reports with the Commission detailing CableCARD deployments. See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Second Report and Order, 20 FCC Rcd 6794, 6814-15, ¶ 39 (2005) ("2005 Deferral Order").

¹³⁰⁸ Effective July 1, 2007, cable operators were required to separate security in their leased devices and rely on the same conditional access mechanism that consumer electronics manufacturers use in their commercially available devices. 47 C.F.R. § 76.1204(a)(1). See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 7924, 7926 ¶ 4 (2003); *2005 Deferral Order*, 20 FCC Rcd at 6802-03 ¶ 13.

Table 29: Deployment of CableCARDS (Cumulative)¹³⁰⁹

Year (as of June)	CableCARD Deployment for Use in Retail Devices – Top 10 Cable Operators	Operator-supplied Set-top Boxes With CableCARDS
2006	170, 000	
2007	271,000	
2008	372,000	6,232,800
2009	437,800	14,085,000
2010	520,000	21,000,000
2011	582,000	29,300,000

396. While our CableCARD rules have allowed vendors like TiVo and Hauppauge to build retail devices that connect to cable systems, the cable industry criticizes the CableCARD regime as expensive and ineffective.¹³¹⁰ Non-cable MVPDs insist that CableCARDS are too cable-centric, and that future standards should consider that their systems differ from cable systems.¹³¹¹ According to certain public interest and local government entities, disagreement in the industry about the best mechanism to achieve a competitive retail market for CPE devices has limited the choices available to consumers.¹³¹²

397. In October 2010, the Commission adopted rules to eliminate four impediments to consumer adoption of CableCARDS, including rules that: (1) ensure that retail devices can access all video programming that is prescheduled by the programming provider; (2) increase transparency in CableCARD pricing and billing; (3) streamline CableCARD installation; and (4) streamline requirements for manufacturers who build CableCARD devices.¹³¹³ In the same order the Commission replaced the IEEE 1394 connector that was meant to be a recordable digital output from MVPD leased set-top boxes with an IP based open-standard connection with certain requirements in service discovery, video transport, and remote command pass-through for home networking. Beginning December 1, 2012, cable operators must deploy set-top boxes that meet the IP-based output requirement. Once that requirement takes effect, retail-purchased CPE will be able more effectively to network with and view content from MVPD-provided devices.

¹³⁰⁹ See Letters from Neal M. Goldberg, Vice President and General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 97-80 (filed June 29, 2006, June 25, 2007, June 23, 2008, June 26, 2009, June 23, 2011, June 30, 2011).

¹³¹⁰ See, e.g., NCTA 5/20/09 Comments at 40.

¹³¹¹ Verizon 5/20/09 Comments at 29-31; DISH Network 6/20/09 Reply at 10-11.

¹³¹² Free Press 8/28/09 Reply at 6-9; Montgomery County, MD 5/20/09 Comments at 21-23.

¹³¹³ *Navigation Devices Third Report and Order*, 25 FCC Rcd at 14662-14676, ¶¶ 8-38.

c. CableCARD Successors

398. The Commission and industry have undertaken several efforts to update, extend, or replace the CableCARD regime.¹³¹⁴ Most recently, the Commission has begun exploring a replacement concept referred to as “AllVid.” The *AllVid NOI* introduced the concept of an adapter that could act either as a small “set-back” device for connection to a single smart video device or as a gateway allowing all consumer electronics devices in the home to access multichannel video programming services in addition to any other services the devices might have access to.¹³¹⁵ Unlike CableCARD technology, this adapter could support the development and marketing of retail smart video devices that attach to any MVPD service anywhere in the United States. Such an approach could greatly enhance the incentives for manufacturers to enter the retail market. As conceived, an MVPD would supply an adapter that would communicate with the MVPD service, perform the tuning and security decryption functions that may be specific to that particular MVPD, and deliver video to retail devices using a common home networking protocol. In this manner, a retail smart video device would be able to integrate MVPD and non-MVPD services, perform navigation functions, including the presentation of programming guides and search functionality. The Commission is continuing to monitor and evaluate the market for devices that can access MVPD services.

2. CPE Used to Access OVD Services

399. Increased broadband speeds will allow consumers to receive IP-delivered video content within the home across multiple broadband-capable devices, game consoles, and standalone devices like those provided by Apple, Roku, Boxee, and Google.¹³¹⁶ These devices allow users to navigate and receive video delivered via broadband Internet and display it on a television monitor. In the OVD section of this Report, we note that many of the leading OVDs make their services available via a wide variety of consumer electronics products. The converse is also true – many consumer electronics products give consumers access to a variety of OVD services.

400. Vendors have also begun to integrate and blend linear television service from MVPDs and broadcasters with OVD services. For example, Boxee’s LiveTV is a digital television tuner peripheral that connects to Boxee’s media player, where the over-the-air broadcast television signals are presented to consumers alongside OVD services.

3. Handheld and Mobile Video Devices

a. Mobile IP Devices

401. The proliferation of portable media devices with broadband IP capability has opened up new video distribution opportunities for MVPDs and OVDs alike. Devices such as laptops, netbooks, smartphones and media tablets all have IP connections and high resolution screens for consumers to watch video. Gartner, Inc. projects that over 100 million media tablets will be sold worldwide by the end

¹³¹⁴ One such effort undertaken by industry is called Tru2way, previously called the Open Cable Applications Platform. While consumer electronics manufacturers have been reluctant to implement tru2way in retail devices, cable operators may continue to support Tru2way for their own internal purposes. See Todd Spangler, *Comcast New Way on Tru2way*, MULTICHANNEL NEWS, June 14, 2010, <http://www.multichannel.com/article/453729-Comcast-New-Way-on-Tru2way.php> (visited Mar. 6, 2012).

¹³¹⁵ *Video Device Competition; Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility between Cable Systems and Consumer Electronics Equipment*, MB Docket No. 10-91, Notice of Inquiry, 25 FCC Rcd 4275, 4281-3, ¶¶ 17-23 (2010).

¹³¹⁶ Comcast 7/8/11 Reply at 4-5.

of 2012.¹³¹⁷ The number of smartphones with 4G connectivity is on the rise as well, which enables video providers to potentially deliver high quality video to viewers.¹³¹⁸ To access the mobile IP market, MVPDs have begun making their video content accessible over a host of portable devices. For example, Comcast's XFINITY TV service provides on-demand video to laptops, smartphones, and tablets.¹³¹⁹ DIRECTV's "nomad" service allows consumers to copy recordings from their HD DVR to their phones, laptops, or tablets for viewing without an active network connection. To facilitate these services, MVPDs and programmers are looking to cloud-delivery mechanisms for IP connected devices including, tablets, smartphones, televisions, laptops, and other mobile devices.¹³²⁰

b. Specialty Mobile Devices

402. For the purposes of this Report, specialty mobile devices are those that include specialized hardware to receive mobile video services from the mobile provider's network, as opposed to those that receive mobile video via the Internet. Such devices often have the advantage that they are served by a broadcast or point-to-multipoint system, so they do not consume data from a data plan, and many devices can receive content simultaneously in a crowded location such as a stadium or arena. However, the specialized hardware needed to access the mobile video services requires vendors to design devices for a specific service, potentially restricting the number of services than can be accessed by a device, and diminishing the willingness of vendors to build devices that support the service.

403. Since the last report, mobile providers have continued to experiment in ways to send broadcast video programming to mobile devices. For example, MediaFLO was an attempt by Qualcomm to broadcast video to mobile devices. MediaFLO receivers were built into a range of Verizon Wireless handsets, which Verizon utilized for its VCAST service.¹³²¹ However, with the growth of IP connected smartphones, Verizon Video is now delivered over IP, and the specialized MediaFLO reception hardware is no longer necessary or included in handsets. The MediaFLO network was shut down in late 2010, and Qualcomm sold the spectrum to AT&T. ATSC Mobile/Handheld ("ATSC M/H") receivers have appeared in the market, mostly in the form of USB tuner peripherals that connect to personal computers.¹³²² These USB receivers allow consumers to view ATSC M/H broadcasts on their laptops.¹³²³ Driven by industry groups like the Open Mobile Video Coalition ("OMVC"),¹³²⁴ some smartphone manufacturers have announced plans to include the hardware needed to receive ATSC M/H broadcasts in

¹³¹⁷ See Gartner, Inc., *Gartner Says Apple Will Have a Free Run in Tablet Market Holiday Season as Competitors Continue to Lag* (press release), Sept. 22, 2011.

¹³¹⁸ See Zach Epstein, *NPD: One in Five Smartphones Sold in Q2 Was 4G Capable, HTC Leads Market*, BGR Media, LLC, Oct. 14, 2011, <http://www.bgr.com/2011/10/14/npd-one-in-five-smartphones-sold-in-q2-was-4g-capable-htc-leads-market/> (visited Mar. 8, 2012).

¹³¹⁹ Letter from Michael Powell at 4.

¹³²⁰ *Id.* at 2.

¹³²¹ See Verizon Wireless, *Verizon Wireless Lifts Curtain on V CAST Mobile TV True Broadband Quality, the Best of TV* (press release), Jan. 7, 2007.

¹³²² See WinTV Aero-m product description, Hauppauge Computer Works, Inc., http://www.hauppauge.com/site/products/data_aero-m.html (visited Mar. 2, 2012).

¹³²³ Universal Serial Bus ("USB") is a set of connectivity specifications that allows easy, high-speed connections of peripherals to PCs that, once plugged in, configure automatically. USB is found in over ten billion PCs, consumer electronics, and mobile devices. See USB (Universal Serial Bus), <http://www.intel.com/content/www/us/en/io/universal-serial-bus/universal-serial-bus.html> (visited Mar. 8, 2012).

¹³²⁴ See Open Mobile Video Coalition, <http://www.openmobilevideo.com/> (visited Mar. 6, 2012).

their products beginning in late 2012.¹³²⁵ MetroPCS will offer handsets made by Samsung that include ATSC M/H reception hardware.¹³²⁶ The resulting increase in specialty receiver penetration could allow mobile broadcast video services that rely on ATSC M/H specialty receivers to succeed where the previous attempts have been unsuccessful.

404. In order to compete in the mobile video marketplace by delivering video over their own networks, satellite-based providers face technical challenges such as antenna size, weight, and ability to track satellites while in motion. Because they must be larger than would typically be found in a handheld device, mobile satellite-based devices are more often integrated into passenger vehicles. Several companies have attempted to introduce mobile video services targeted toward family-sized passenger vehicles. CruiseCast, a joint service of AT&T Inc. and RaySat Broadcasting Corp., began service in June 2009, but in November 2009 ceased activating new customers and refunded existing customers for equipment purchased.¹³²⁷ ICO mim (mobile interactive media) launched its North American geosynchronous satellite in 2007. ICO had planned to provide interactive mobile video, navigation, and emergency assistance, but does not appear to have expanded beyond trials begun in 2009.¹³²⁸ SiriusXM's Backseat TV continues to operate, offering three family-oriented channels – Nickelodeon, Disney Channel, and Cartoon Network. Backseat TV can be purchased pre-installed in several vehicle models, with controls integrated into the vehicle's audio head unit.¹³²⁹

VI. PROCEDURAL MATTERS

405. This *14th Report* is issued pursuant to authority contained in sections 4(i), 4(j), 403, and 628(g) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 403, and 548(g).

406. It is ORDERED that the Office of Legislative Affairs shall send copies of the *14th Report* to the appropriate committees and subcommittees of the United States House of Representatives and the United States Senate.

¹³²⁵ See Joseph Palenchar, *Dyle's Mobile DTV Service to Launch on Smartphone*, TWICE, Jan. 4, 2012, http://www.twice.com/article/478473-Dyle_s_Mobile_DTV_Service_To_Launch_On_Smartphone.php (visited Mar. 2, 2012).

¹³²⁶ See Electronica, *MetroPCS to Offer Phones with ATSC Mobile TV Tuners, MetroPCS will Launch Samsung Mobile TV Phone*, Jan. 4, 2012, <http://www.electronista.com/articles/12/01/04/metropcs.will.launch.samsung.mobile.tv.phone/> (visited Mar. 9, 2012).

¹³²⁷ Amy Gilroy, *AT&T CruiseCast Ceases Activations*, TWICE, Nov 2, 2009, http://www.twice.com/article/367231-AT_T_CruiseCast_Ceases_Activations.php?nid=2402&source=title&rid=6258981 (visited Nov. 10, 2011).

¹³²⁸ See ICO mim website, <http://www.ico.com/mim/> (visited Mar. 8, 2012).

¹³²⁹ See SiriusXM Backseat TV, <http://www.siriusxm.com/backseattv> (visited Mar. 8, 2012).

407. It is FURTHER ORDERED that the proceeding in MB Docket No. 07-269 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Commenters¹2007/2008 Comments (5/20/09 Comments)

American Cable Association (“ACA”)
 AT&T Inc. (“AT&T”)
 Cable and Telecommunications Committee of the New Orleans City Council (“New Orleans”)
 Comcast Corporation (“Comcast”)
 Community Broadcasters Association (“CBA”)
 Community Programming Board of Forest Park, Greenhills and Springfield Township, Ohio (“Ohio Community Board”)
 Consumer Union (“Consumers Union”)
 DIRECTV, Inc. (“DIRECTV”)
 Heritage Media Services (“Heritage”)
 Mathew Murphy (“Murphy”)
 Microcom (“Microm”)
 Montgomery County, Maryland (“Montgomery County”)
 National Association of Broadcasters (“NAB”)
 National Cable & Telecommunications Association (“NCTA”)
 National Telecommunications Cooperative Association (“NTCA”)
 Reynolds Media Incorporated (“RMI”)
 Verimatrix, Inc. (“Verimatrix”)
 Verizon (“Verizon”)
 W.A.T.C.H. TV Company (“W.A.T.C.H. TV”)

2007/2008 Reply Comments (6/20/09 Reply)

AT&T Inc. (“AT&T”)
 Consumers Union (“Consumers Union”)
 Cox Communications (“Cox”)
 DISH Network L.L.C. (“DISH Network”)
 HDNet LLC (“HDNet”)
 National Association of Broadcasters (“NAB”)
 National Cable & Telecommunications Association (“NCTA”)
 Verizon (“Verizon”)

¹ The Commission issued three notices of inquiry in this proceeding. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Notice of Inquiry, 24 FCC Rcd 750 (2009) (“*Notice of Inquiry*”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Supplemental Notice of Inquiry, 24 FCC Rcd 4402 (2009) (“*Supplemental Notice of Inquiry*”); and *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 07-269, Further Notice of Inquiry, 26 FCC Rcd 14091 (2011) (“*Further Notice*”). In response to these notices, we received three sets of comments and reply comments. Comments for 2007 and 2008 were due on May 20, 2009 and reply comments were due on June 20, 2009. For 2009, comments were due on July 29, 2009; reply comments were due on August 28, 2009. Additional 2009 and new 2010 comments were due on June 8, 2011 and reply comments for those years were due on July 8, 2011. We refer to each submission by its due date and the acronym as listed in this Appendix.

2009 Comments (7/29/09 Comments)

American Cable Association (“ACA”)
AT&T Inc. (“AT&T”)
Consumers Union (“Consumers Union”)
DIRECTV, Inc. (“DIRECTV”)
DISH Network L.L.C. (“DISH Network”)
Independent Film & Television Alliance (“IFTA”)
Marin Telecommunications Agency, Marin County, California (“Marin”)
Montgomery County, Maryland (“Montgomery County”)
National Association of Broadcasters (“NAB”)
National Cable & Telecommunications Association (“NCTA”)
Organization for the Promotion and Advancement of Small Telecommunications Companies
 (“OPASTCO”)
TiVo Inc. (“TiVo”)
Verizon (“Verizon”)
W.A.T.C.H. TV Company (“W.A.T.C.H. TV”)
WealthTV (“WealthTV”)

2009 Reply Comments (8/28/09 Reply)

American Cable Association (“ACA”)
Association of Public Television Stations and Public Broadcasting Service (“APTS”)
Cablevision Systems Corporation (“Cablevision”)
CBS Corporation (“CBS”)
Comcast Corporation (“Comcast”)
Community Broadcasters Association (“CBA”)
Cox Communications (“Cox”)
DIRECTV, Inc. (“DIRECTV”)
Free Press (“Free Press”)
Motion Picture Association of America, Inc (“MPAA”)
National Association of Broadcasters, ABC Television Affiliates Association, CBS Television Network
 Affiliates Association, FBC Television Affiliates Association, and the NBC Television Affiliates
 (“Broadcasters Associations”)
National Cable & Telecommunications Association (“NCTA”)
NBC Universal, Inc. (“NBCU”)
RCN Telecom Services, Inc. (“RCN”)
Verizon (“Verizon”)
The Walt Disney Company (“Disney”)

2009/2010 Comments (6/8/11 Comments)

Alliance for Community Media (“ACM”)
The Allvid Tech Company Alliance (“AllVid Alliance”)
American Cable Association (“ACA”)
Anne Arundel and Montgomery Counties, Maryland, and the Cities of Boston, Massachusetts, and
 Laredo, Texas (“Anne Arundel”)
AT&T Inc. (“AT&T”)
California Public Utilities Commission and the People of the State of California (“California PUC”)
City & County of Denver, Colorado (“Denver”)

City of South Portland, Maine (“South Portland”)
Comcast Corporation (“Comcast”)
Community Programming Board of Forest Park, Greenhills and Springfield Township, Ohio (“Ohio Community Board”)
Consumer Electronics Association and Consumer Electronics Retailers Coalition (“CEA”)
Digital Broadcasting OVS (“Digital Broadcasting”)
DIRECTV, Inc. (“DIRECTV”)
DISH Network L.L.C. (“DISH Network”)
Google Inc. (“Google”)
Hiawatha Broadband Corporation Inc., National Rural Telecommunications Cooperative, Rural Broadband Alliance, and Rural Independent Competitive Alliance (“Rural Telcos”)
Marin Telecommunications Agency, Marin County, California (“Marin”)
National Association of Broadcasters (“NAB”)
National Cable & Telecommunications Association (“NCTA”)
National Telecommunications Cooperative Association; the Independent Telephone and Telecommunications Alliance; the Organization for the Promotion and Advancement of Small Telecommunications Companies; the Rural Independent Competitive Alliance; and the Western Telecommunications Alliance (“Rural Associations”)
Netflix, Inc. (“Netflix”)
New Jersey Division of Rate Counsel (“New Jersey”)
Oxnard College Television (“Oxnard College”)
Oxnard Elementary School District, Oxnard California (“Oxnard Elementary”)
Public Knowledge (“Public Knowledge”)
Rovi Corporation (“Rovi”)
Susan Udovic (“Udovic”)
Verizon (“Verizon”)
Writers Guild of America, West, Inc. (“WGAW”)

2009/2010 Reply Comments (7/8/11 Reply)

The Allvid Tech Company Alliance (“AllVid Alliance”)
AT&T Inc. (“AT&T”)
Cable and Telecommunications Committee of the New Orleans City Council (“New Orleans”)
Cisco Systems, Inc. (“Cisco”)
City of New York (“NYC”)
Comcast Corporation (“Comcast”)
DIRECTV, Inc. (“DIRECTV”)
Montgomery County, Maryland (“Montgomery County”)
Motorola Mobility, Inc. (“Motorola”)
National Association of Broadcasters (“NAB”)
National Cable & Telecommunications Association (“NCTA”)
New Jersey Division of Rate Counsel (“New Jersey”)
SureWest Communications (“SureWest”)

APPENDIX B

National Video Programming Services

Table B-1

National Video Programming Services Affiliated with One or More MVPDs

Network Owner	Networks Wholly Owned or Owned in Part
Bright House Networks	Animal Planet, Animal Planet HD, Discovery Channel, Discovery Channel HD, Discovery Espanol, Discovery Familia, Discovery Fit & Health, Discovery Fit & Health HD, HD Theater, Investigation Discovery, Investigation Discovery HD, Military Channel, OWN, OWN HD, Planet Green, Planet Green HD, Science Channel, Science Channel HD, The HUB, The HUB HD, TLC, TLC HD Turbo, Velocity HD, 3net
Cablevision ⁽¹⁾ (AMC Networks Inc.)	AMC, AMC HD, FUSE, FUSE HD, IFC, IFC HD, Sundance Channel, WE, WE HD
Comcast/NBCU	A&E, A&E HD, Bio, Bio HD, Bravo, Bravo HD, Chiller, Chiller HD, Cloo, CNBC, CNBC HD, CNBC World, CNBC World HD, Crime & Investigation, Crime & Investigation HD, E! Entertainment TV, E! Entertainment TV HD, EPIX, EPIX HD, FEARnet, FEARnet HD, G4, G4 HD, Golf Channel, Golf Channel HD, History Channel, History Channel HD, History Channel en Espanol, H2, H2 HD, iN Demand, iN Demand HD, ION Life, ION TV, ION TV HD, LMN, LMN HD, Lifetime Real Women, Lifetime TV, Lifetime TV HD, Military History Channel, MLB Network, MLB Network HD, The Mtn, The Mtn HD, MSNBC, MSNBC HD, mun2, Music Choice, NBC Sports Network, NBC Sports Network HD, NHL Network, NHL Network HD, Oxygen Network, Oxygen Network HD, PBS Kids Sprout, qubo, Retirement Living TV, ShopNBC, Sleuth, SYFY, SYFY HD, Telemundo, TV One, TV One HD, Style Network, Style Network HD, The Weather Channel, The Weather Channel HD, Weatherscan, Universal HD, USA Network, USA Network HD
Cox Enterprises	iN Demand, iN Demand HD, MLB Network, MLB Network HD Travel Channel, Travel Channel HD
DIRECTV	Game Show Network, GSN HD, MLB Network, MLB Network HD
Liberty Media Corporation ⁽²⁾	Animal Planet, Animal Planet HD, Discovery, Discovery HD, Discovery Espanol, Discovery Familia, Discovery Fit & Health, Discovery Fit & Health HD, Encore, Encore HD, Encore Action, Encore Action HD, Encore Drama, Encore Drama HD, Encore Love, Encore Mystery, Encore WAM, Encore Westerns, Game Show Network, GSN HD, GAC, HDTheater, HSN, HSN HD, HSN2, Investigation Discovery, Military Channel, MoviePlex, OWN, OWN HD, Planet Green, Planet Green HD, Movie Plex, QVC, QVC HD, Starz, Starz HD, Starz Cinema, Starz Cinema HD, Starz Comedy, Starz Comedy HD, Starz Edge, Starz Edge, HD, Starz in Black, Starz in Black HD, Starz Kids and Family, Starz Kids and Family HD Science Channel, Science Channel HD, TLC, TLC HD, The Hub, The HUB HD, 3net

Network Owner	Networks Wholly Owned or Owned in Part
Time Warner Cable	Exercise TV, GameHD, Game2HD, HDPPV, iN Demand, iN Demand HD, MLB Network, MLB Network HD, MLS Direct Kick, NBA League Pass, NHL Center Ice, Team HD

Notes:

⁽¹⁾ On December 31, 2010, Cablevision System Corporation (“Cablevision”) wholly owned programming subsidiary Rainbow Media Holding LLC (“Rainbow”) transferred control of the News 12 regional programming services to Cablevision. On June 30, 2011, Cablevision spun-off Rainbow, which became an independent public company, now called AMC Networks Inc. We list these networks as affiliated with this media company since AMC and Cablevision share common ownership, officers, and directors.

⁽²⁾ On February 21, 2008, the Commission approved the transfer of license and authorization that resulted in Liberty Media Corporation (“Liberty”) acquiring a *de facto* controlling interest in DIRECTV. On November 19, 2009, Liberty through a series of transactions transferred its interest in DIRECTV, three RSNs and GSN to a wholly owned subsidiary called DIRECTV Group, Inc. We list these networks as affiliated with this media company since Liberty and DIRECTV share common ownership, officers, and directors.

Sources:

Application of News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority To Transfer Control, Consolidated application For Authority to Transfer Control, Jan. 29, 2007, at 10-11.

AMC Networks Inc., *SEC Form-Q*, for the Quarterly Period Ending September 30, 2010 (“AMC 10-Q”), at 7.

Bright House Networks, *About Us*, at <http://brighthouse.com/corporate/default> (visited Feb. 8, 2012).

Cablevision, *About Cablevision*, at <http://www.cablevision.com/about/index.jsp> (visited Feb. 8, 2012).

Comcast-NBCU Order, 26 FCC Rcd at 4410-18, Appendix D; *GE/Comcast/NBCU Application* at 19-20, 30-31.

Columbia Journalism Review, *Who Owns What*, at <http://www.cjr.org/resources/> (visited Feb. 8, 2012).

Cox Enterprises, *Corporate Overview*, at <http://www.coxenterprises.com/about-cox/corporate-overview.aspx> (visited Feb. 8, 2012).

DIRECTV, *About Us*, at http://www.directv.com/DTVAPP/content/about_us/our_company (visited Feb. 8, 2012).

Liberty Media Corporation, *SEC Form 10-K*, for the Fiscal Year Ending December 31, 2010 (“Liberty 2010 Form 10-K”) at I-26.

Liberty Media Corporation, *Company Overview*, at <http://www.libertymedia.com/company-overview.aspx> (visited Feb. 8, 2012).

NCTA, *Cable Networks*, at <http://www.ncta.com> (visited Feb. 8, 2012).

SNL Kagan, *Economics of Basic Cable Networks* (2011 Edition).

SNL Kagan, *Cable Network Ownership* (July 2011).

Time Warner Cable Inc, *TWC/Insight Application* at Exhibit F.

Time Warner Cable Inc, *SEC Form 10-K*, for the Period Ending December 31, 2009 (“TWC 2010 Form 10-K”) at 5.

Time Warner Cable Inc. *About Us*, at <http://www.timewarnercable.com/nynj/about/> (visited Feb. 8, 2012).

Table B-2

National Networks Affiliated with a Television Network, Broadcast Television Licensee, or Other Media Company

Network Owners:	Networks Wholly Owned or Owned in Part
CBS Corporation	CBS Sports Network, CBS Sports Network HD, College Sports Television, College Sports Television HD, FLIX, FLIX HD, MountainWest Sports Network, MountainWest Sports Network HD, Showtime, Showtime HD, Showtime Beyond, Showtime Beyond HD, Showtime Extreme, Showtime Extreme HD, Showtime Family Zone, Showtime Family Zone HD, Showtime Next, Showtime Next HD, Showtime Showcase, Showtime Showcase HD, Showtime 2, Showtime 2 HD, Showtime Women, Showtime Women HD, Smithsonian Channel HD, TMC, TMC HD, TMC Xtra, TMC Xtra HD
Crown Media Holdings	Hallmark Channel, Hallmark Channel HD, Hallmark Movie Channel, Hallmark Movie Channel HD
Daystar Television Network	Daystar TV
Discovery Communications ⁽¹⁾	3net A&E, A&E HD, Animal Planet, Animal Planet HD, Discovery, Discovery HD, Discovery Espanol, Discovery Familia, Discovery Fit & Health, Discovery Fit & Health HD, HD Theater, Investigation Discovery, Military Channel, OWN, Planet Green, Planet Green HD, Science Channel, Science Channel HD, TLC, TLC HD, The Hub, Velocity HD
Hearst Corporation	A&E, A&E HD, Bio, Bio HD, Crime & Investigation, Crime & Investigation HD, ESPN 3D, ESPN Classic, ESPN Deportes, ESPN, ESPN HD, ESPN2, ESPN2 HD, ESPNEWS, ESPNEWS HD, ESPN, ESPN HD, H2, History, History HD, History en Espanol, History International, Lifetime, Lifetime HD, Lifetime Real Women, Lifetime Real Women HD, LMN, LMN HD, Military History Channel
Hubbard Broadcasting Corporation	Reelz Channel, Reelz Channel HD, Ovation TV, Ovation TV HD
InterMedia Partners	Gospel Music Channel, Gospel Music Channel HD, The Sportsman Channel, The Sportsman Channel HD, WAPA-America
News Corporation	Big Ten Network, BTN HD, FOX Business Network, FOX Business Network HD, FOX College Sports, FOX College Sports HD, FOX Deportes, FOX Movie Channel, FOX News Channel, FOX News Channel HD, FOX Soccer Channel, FOX Soccer Channel HD, FOX Soccer Plus, FOX Sports Net, FOX Sports Net HD, FUEL TV, FUEL TV HD, FX Network, FX Network HD, Nat Geo WILD, Nat Geo WILD HD, National Geographic Channel, National Geographic Channel HD, SPEED Channel, SPEED HD, TV Guide Network
Scripps Networks Interactive ⁽²⁾	Cooking Channel, Cooking Channel HD, DIY Network, DIY Network HD, Food Network, Food Network HD, Great American Country, HGTV, HGTV HD, Travel Channel, Travel Channel HD

Network Owners:	Networks Wholly Owned or Owned in Part
The Walt Disney Company	A&E, A&E HD, ABC Family, ABC Family HD, Bio, Bio HD, Crime & Investigation Network, Crime & Investigation HD, Disney Channel, Disney Channel HD, Disney XD, Disney XD HD, ESPN 3D HD, ESPN Classic, ESPN Classic HD, ESPN Deportes, ESPN, ESPN HD, ESPN2, ESPN2 HD, ESPNNews, ESPNNews HD, ESPNU, ESPNU HD, H2, History Channel, History Channel HD, History International, History International HD, LMN, LMN HD, Lifetime Real Women, Lifetime TV, Lifetime TV HD, Military History Channel, SOAPnet
Time Warner Inc. ⁽³⁾	@Max, @Max HD, 5 Star Max, 5 Star Max HD, Action Max, Action Max HD, Boomerang, Cartoon Network/Adult Swim, Adult Swim HD, Cinemax, Cinemax HD, CNN, CNN HD, CNN Airport, CNN Headline News, CNN International, HBO, HBO HD, HBO2, HBO2HD, HBO Comedy, HBO Comedy HD, HBO Family, HBO Family HD, HBO Signature, HBO Signature HD, HBO Zone, HBO Zone HD, More Max, More Max HD, NBA, NBA HD, Outer Max, Outer Max HD, TBS, TBS HD, TMC, TMC HD, Thriller Max, Thriller Max HD, TNT, TNT HD, Tru TV, Tru TV HD, WMAX WMAX HD
Tribune Company	WGN America, WGN America HD, Food Network, Food Network HD
Viacom Inc.	BET, BET HD, BET Gospel, BET Hip Hop, CENTIC, CMT, CMT HD, CMT Pure Country, CMT Pure Country HD, Comedy Central, Comedy Central HD, EPIX, EPIX HD, LOGO, MTV, MTV HD, MTV Hits, MTV Jams, MTV2, Nick 2, Nickelodeon/Nick at Nite, Nickelodeon/Nick at Nite HD, HD Nicktoons Network, Palladia HD, Spike TV, Spike TV HD, TeenNick, EPIX HD, Tr3s, TV Land, VH1, VH1 HD, VH1 Classic, VH1 Soul
Trinity Broadcasting Network	JCTV, Smile of a Child, TBN, TBN HD, TBN Enclave, The Church Channel
Univision Communications	Bandamax, De Pelicula, De Pelicula Classico Ritmoson Latino, Galavision, Telehit, TeleFutura, TeleFutura HD

Notes:

⁽¹⁾ On September 17, 2008, Discovery Holding Company (“DHC”) an independent publicly traded company was formed. We list these networks as affiliated because Liberty Media and Advance/Newhouse, owner of cable system Bright House Networks, share common ownership, officers, and directors with DHC.

⁽²⁾ On July 1, 2008, E.W. Scripps spun-off its programming into an independent publicly traded company, Scripps Interactive Networks (“SNI”). We list these networks as affiliated since SNI and E.W. Scripps share common ownership, officers, and directors.

⁽³⁾ On February 11, 2008, the Commission approved the applications for the assignment and transfer of control of certain Commission licenses and authorizations that resulted in Time Warner Cable, Inc. (“TWC”) separating from Time Warner Inc. In March 2009, TWC completed its separation from Time Warner Inc.

Sources:

CBS Corporation, *About CBS*, at <http://www.cbscorporation.com/index.php> (visited Feb. 8, 2012).

Columbia Journalism Review, *Who Owns What*, at <http://www.cjr.org/resources/> (visited Feb. 8, 2012).

Crown Media Holdings, *Company Overview*, at <http://ir.crownmedia.net/index.cfm> (visited Feb. 8, 2012).

Discovery Communications, Inc., *SEC Form 10-K*, for the Fiscal Year Ending December 31, 2010 (“Discovery 10-K”), at 3.

Discovery Communications, *Our Company*, at <http://corporate.discovery.com/our-company/overview/> (visited Feb. 8, 2012).

E.W. Scripps Networks Interactive, *SEC Form 10-K* for the Fiscal Year Ending December 31, 2010 (“E.W. Scripps 10-K”) at 4.

Hearst Corporation, *About Hearst*, at <http://www.hearst.com/broadcasting/index.php> (visited Feb. 8, 2012).
NCTA, *Cable Networks*, at <http://www.ncta.com> (visited Feb. 8, 2012).

News Corporation, *Cable Network Programming*, at <http://www.newscorp.com/operations/cable.html> (visited Feb. 8, 2012).

Scripps Networks Interactive, *About Us*, at <http://www.scrippsnetworks.com/about.aspx?code=about> (visited Feb. 8, 2012).

SNL Kagan, *Economics of Basic Cable Networks* (2011 Edition).

SNL Kagan, *Cable Network Ownership* (July 2011).

Time Warner Inc., *About Us*, at <http://www.timewarner.com/our-company/about-us/> (visited Feb. 8, 2012).

Trinity Broadcasting Network, *About Us*, at http://www.tbn.org/about/images/TBN_Networks_info.pdf (visited Feb. 22, 2012).

Univision, *Company Overview*, at <http://univision.com/> (visited Feb. 8, 2012).

Viacom Inc., *About Viacom*, at <http://www.viacom.com/aboutviacom/Pages/default.aspx>. (visited Feb. 8, 2012).

Walt Disney Corporation, *Company Overview*, at <http://corporate.disney.go.com/corporate/overview.html> (visited Feb. 8, 2012).

APPENDIX C

Regional Video Programming Services

Table C-1

Regional Video Programming Services Affiliated with One or More MVPDs

Network Owners	Networks Wholly or Owned in Part
Bright House Networks	Regional News Networks: Bay News 9, Bay News 9 HD, Bay News 9 en Espanol, CFN 13 (Central FL News) Regional Sports Networks: Bright House Sports Network, Bright House Sports Network HD
Cablevision Systems Corporation ⁽¹⁾ (Madison Square Garden) ⁽²⁾	Regional News Networks: News 12 CT, News 12 Bronx, News 12 Brooklyn, News 12 Hudson Valley, News 12 Long Island, News 12 NJ, News 12 Traffic & Weather – CT, News 12 Traffic & Weather – Long Island, News 12 Traffic & Weather – Hudson Valley, News 12 Traffic & Weather – NJ, News 12 Traffic & Weather – NY, News 12 Westchester Regional Sports Networks: MSG, MSG HD, MSG Plus, MSG Plus HD
Charter Communications	Regional Sports Networks: Comcast/Charter SportsNet Southeast
Comcast/NBCU	Regional News Networks: CN8, New England Cable News New England Cable News HD Regional Sports Networks: Comcast Entertainment TV (CET), Comcast SportsNet Bay Area, Comcast SportsNet California, Comcast SportsNet Chicago, Comcast SportsNet Chicago HD, Comcast SportsNet Mid-Atlantic, Comcast SportsNet Mid-Atlantic HD, Comcast SportsNet New England Comcast SportsNet New England HD, Comcast SportsNet Philadelphia Comcast SportsNet Philadelphia HD, Comcast SportsNet Northwest, Comcast SportsNet Northwest HD, Comcast SportsNet Washington, Comcast SportsNet Washington HD, Comcast SportsNet West, Comcast SportsNet West HD, Comcast SportsNet Southwest, SportsNet New York, SportsNet New York HD
Cox Enterprises	Regional News Networks: 24/7 News Channel, Arizona News Channel, Kansas 22 Now, Las Vegas One News Local News on Cable (Hampton), News Now 53 (Oklahoma City), News Now 53 (Tulsa), NewsWatch 15 (Louisiana), Pittsburgh Cable News Channel, Rhode Island News Channel, San Diego's News Channel 15 Regional Sports Networks: Channel 4 San Diego, Cox Sports Television
DIRECTV	Regional Sports Networks: Roots Sports Northwest Roots Sports Northwest HD, Roots Sports Pittsburgh, Roots Sports Pittsburgh HD, Roots Sports Rocky Mountain, Roots Sports Rocky Mountain HD

Network Owners	Networks Wholly or Owned in Part
Time Warner Cable	<p>Regional News Networks: Antelope Valley Channel 3 (Southern CA), Bay News 9, Bay News 9 HD ,BEVOD (TX), Capital News 9 (Albany, NY), Channel 858 (Southern CA), Desert Cities TV (Southern CA), The Green Channel (HI), K-Life(HI), Metro Weather (Kansas City), NEON (OH), News 8 Austin (TX), News 8 Radar Now (TX), News 8 Traffic Now (TX), News 8 Non-Stop Weather (TX), News 10 Now (TX), News 14 Carolina (Charlotte, NC), News 14 Carolina (Raleigh, NC), News 14 Carolina (Greensboro, NC), News 14 Carolina (Wilmington, Jacksonville, Morehead city, NC), Nippon Golden Network (HI), NY1 News (NY), NY1 Road and Rail Report (NY), OC 16 (HI), Oivi (HI), Rhode Island News Channel, SoCal1 (Southern CA), Texas Channel (Austin, Waco, San Antonio, Corpus Christi, TX), Texas Chanel (Dallas), Texas Channel (El Paso), TWC-TV (New England), YNN (Austin, TX), YNN Austin, YNN Austin Radar Now, YNN Austin Traffic Now, YNN Austin Weather, YNN Buffalo (NY), YNN Capital Region (Albany, NY), YNN Central NY, YNN Hudson Valley (NY), YNN Rochester (NY), Wichita Falls TV (TX)</p> <p>Regional Sports Networks: Bright House Sports Network, Bright House Sports Network HD, Comcast/Charter SportsNet Southwest Metro Sports (Kansas City), Metro Sports HD, Metro Sports (NE), Metro sports (NE) HD, Metro Sports 2 (Kansas City, MO), News 8 Non-Stop Sports (TX), SportsNet New York, SportsNet New York HD, SunSports, SunSports HD, TWC Connection/Sports (Mid-Ohio), TWC Connections/Sports (Southwest Ohio), TWC Sports (Albany, NY), TWC sports (Albany) HD, TWC Sports Central New York, TWC Sports (WI), TWC SportsNet (Buffalo), TWC Sports (Rochester), YNN Non-Stop Sports</p>

Notes:

⁽¹⁾ On December 31, 2010, Cablevision System Corporation (“Cablevision”) wholly owned programming subsidiary Rainbow Media Holding LLC (“Rainbow”) transferred control of the News 12 regional programming services to Cablevision. On June 30, 2011, Cablevision spun-off Rainbow, which became an independent public company, now called AMC Networks Inc. We list these networks as affiliated with this media company since AMC and Cablevision share common ownership, officers, and directors.

⁽²⁾ On July 29, 2009, Madison Square Garden, Inc. (“MSG”) was incorporated as an indirect, wholly-owned subsidiary of Cablevision Systems Corporation. On February 9, 2010, MSG was spun off from Cablevision, becoming a separate public company. We list these networks as affiliated since MSG and Cablevision share common ownership, officers, and directors.

Sources:

AMC Networks Inc., *SEC Form 10-Q*, Quarterly Period Ending September 30, 2011 (“AMC 10-Q”) at 7.

Application of News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, For Authority To Transfer Control, Consolidated application For Authority to Transfer Control, Jan. 29, 2007, at 10-11.

Cablevision, *About Cablevision*, at <http://www.cablevision.com/about/index.jsp> (visited Feb. 8, 2012).

Charter Communications, *About Charter*, at <http://www.charter.com/footer/footerPage.jsp?tag=about> (visited Feb. 8, 2012).

Columbia Journalism Review, *Who Owns What*, at <http://www.cjr.org/resources/> (visited Feb. 8, 2012).

Comcast-NBCU Order, 26 FCC Rcd at 4410-18, Appendix D; *GE/Comcast /NBCU Application* at 19-20, 30-31.

Cox Enterprises, *Corporate Overview*, at <http://www.coxenterprises.com/about-cox/corporate-overview.aspx> (visited Feb. 8, 2012).

Madison Square Garden, Inc. *SEC Form 10-K*, for the Fiscal Year ending December 31, 2010 (“MSG” 10-K) at 3.

NCTA, *Cable Networks*, at <http://www.ncta.com> (visited Feb. 8, 2012).

SNL Kagan, *Economics of Basic Cable Networks* (2011 Edition).

SNL Kagan, *Cable Network Ownership* (July 2011).

Time Warner Cable *About Us*, at <http://www.timewarnercable.com/nynj/about/> (visited Feb. 8, 2012).

Table C-2

Regional Networks Affiliated with a National Broadcast Television Network, Broadcast Television Licensee, or Other Media Company

Network Owners	Networks Wholly or Owned in Part
Allbritton Communications	Regional News Networks: NewsChannel 8, NewsChannel 8 HD
Belo Corporation	Regional News Networks: 24/7 News Channel (Boise, ID), Arizona News Channel, Local News on Cable (Hampton), NewsWatch 15 (Louisiana), Northwest Cable News (Washington, Oregon, Idaho), TXCN (Texas)
CBS Corporation	Regional Sports Networks: MountainWest Sports Network, The Mtn. HD
News Corporation	Regional Sports Networks: FOX Sports Arizona, FOX Sports Arizona HD, FOX Sports Carolinas, FOX Sports Carolinas HD, FOX Sports Detroit, , FOX Sports Detroit HD, FOX Sports Florida, FOX Sports Florida HD, FOX Sports Houston, FOX Sports Houston HD, FOX Sports Indiana, FOX Sports Indiana HD, FOX Sports Kansas City, FOX Sports Kansas City HD, FOX Sports Midwest, FOX Sports Midwest HD, FOX Sports North, FOX Sports North HD, FOX Sports Ohio, FOX Sports Ohio, HD, FOX Sports Oklahoma, FOX Sports Oklahoma HD, FOX Sports South, FOX Sports South HD, FOX Sports Southwest, FOX Sports Southwest HD, FOX Sports Tennessee, FOX Sports Tennessee HD, FOX Sports West, FOX Sports West HD, FOX Sports Wisconsin, FOX Sports Wisconsin HD, Sun Sports, Sun Sports HD
Scripps Networks Interactive	Regional Sports Networks: FOX Sports South , FOX Sports South HD

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APPENDIX D

Regional Sports Networks

Regional Network Name ⁽¹⁾	MVPD Owner	Other Owners
Altitude Sports Network		Stan Kroenke (owner of the Denver Nuggets and the Colorado Avalanche)
Altitude Sports Network HD		Stan Kroenke (owner of the Denver Nuggets and the Colorado Avalanche)
Bright House Sports Network	Time Warner Cable	
Bright House Sports Network HD	Time Warner Cable	
Big Ten Network		Big Ten Conference, News Corporation
Big Ten Network HD		Big Ten Conference, News Corporation
Channel 4 San Diego ⁽²⁾	Cox Enterprises	
Channel 4 San Diego HD	Cox Enterprises	
Comcast/Charter Sports Southeast	Comcast, Charter	
Comcast/Charter Sports Southeast HD	Comcast, Charter	
Comcast SportsNet Bay Area	Comcast/NBCU	San Francisco Giants
Comcast SportsNet Bay Area HD	Comcast/NBCU	San Francisco Giants
Comcast Sports Net California	Comcast/NBCU	
Comcast SportsNet California HD	Comcast/NBCU	
Comcast SportsNet Chicago	Comcast/NBCU	J. Joseph Ricketts (owner of the Cubs), Jerry Reinsdorf (owner of the Bulls and the White Sox), Rocky Wirtz (owner of the Blackhawks)
Comcast SportsNet Chicago HD	Comcast/NBCU	J. Joseph Ricketts (owner of the Cubs), Jerry Reinsdorf (owner of the Bulls and the White Sox), Rocky Wirtz (owner of the Blackhawks)
Comcast SportsNet Houston ⁽³⁾	Comcast/NBCU	Houston Astros, Houston Rockets
Comcast SportsNet Houston HD	Comcast/NBCU	Houston Astros, Houston Rockets

Regional Network Name⁽¹⁾	MVPD Owner	Other Owners
Comcast SportsNet New England	Comcast/NBCU	
Comcast SportsNet New England HD	Comcast/NBCU	
Comcast SportsNet Northwest	Comcast/NBCU	
Comcast SportsNet Northwest HD	Comcast/NBCU	
Comcast SportsNet Philadelphia	Comcast/NBCU	Philadelphia Phillies
Comcast SportsNet Philadelphia HD	Comcast/NBCU	Philadelphia Phillies
Comcast SportsNet Washington	Comcast/NBCU	
Comcast SportsNet Washington HD	Comcast/NBCU	
Comcast Sports Southwest	Comcast/NBCU	
Comcast Sports Southwest HD	Comcast/NBCU	
Cox Sports Television (New Orleans)	Cox Enterprises	
Cox Sports Television HD (New Orleans)	Cox Enterprises	
Fox Sports Arizona		News Corporation
Fox Sports Arizona HD		News Corporation
Fox Sports Carolinas		News Corporation
Fox Sports Carolinas HD		News Corporation
Fox Sports Detroit		News Corporation
Fox Sports Detroit HD		News Corporation
Fox Sports Florida		News Corporation
Fox Sports Florida HD		News Corporation
Fox Sports Midwest		News Corporation
Fox Sports Midwest HD		News Corporation
Fox Sports North		News Corporation
Fox Sports North HD		News Corporation
Fox Sports Ohio		News Corporation
Fox Sports Ohio HD		News Corporation
Fox Sports Prime Ticket		News Corporation
Fox Sports Prime Ticket HD		News Corporation
Fox Sports South		News Corporation
Fox Sports South HD		News Corporation
Fox Sports Southwest		News Corporation

Regional Network Name⁽¹⁾	MVPD Owner	Other Owners
Fox Sports Southwest HD		News Corporation
Fox Sports Tennessee		News Corporation
Fox Sports Tennessee HD		News Corporation
Fox Sports West		News Corporation
Fox Sports West HD		News Corporation
Fox Sports Wisconsin		News Corporation
Fox Sports Wisconsin HD		News Corporation
Lakers RSN ⁽⁴⁾	Time Warner Cable	
Lakers RSN HD	Time Warner Cable	
Lakers RSN (Spanish language)	Time Warner Cable	
Lakers RSN HD (Spanish language)	Time Warner Cable	
Longhorn Network		University of Texas at Austin, Walt Disney
Longhorn Network HD		University of Texas at Austin, Walt Disney
MASN		Baltimore Orioles and the Washington Nationals
MASN HD		Baltimore Orioles and the Washington Nationals
Metro Sports (Kansas City)	Time Warner Cable	
Metro Sports HD (Kansas City)	Time Warner Cable	
Metro Sports (Nebraska)	Time Warner Cable	
MSG	Cablevision	
MSG HD	Cablevision	
MSG Plus	Cablevision	
MSG Plus HD	Cablevision	
NESN		Boston Red Sox and Boston Bruins
NESN HD		Boston Red Sox and Boston Bruins
OC Sports (Hawaii)	Time Warner Cable	
OC Sports HD (Hawaii)	Time Warner Cable	
PAC-12 Network		PAC-12 Conference
PAC-12 Network HD		PAC-12 Conference
SportsNet New York	Comcast, TWC	
SportsNet New York HD	Comcast, TWC	

Regional Network Name ⁽¹⁾	MVPD Owner	Other Owners
The Mtn. – Mountain West Sports Network ⁽⁵⁾	Comcast	CBS
The Mtn. – Mountain West Sports Network HD	Comcast	CBS
TWC Sports (Central NY)	Time Warner Cable	
TWC Sports HD (Central NY)	Time Warner Cable	
TWC SportsNet (Buffalo)	Time Warner Cable	
TWC SportsNet HD (Buffalo)	Time Warner Cable	
TWC SportsNet (Rochester)	Time Warner Cable	
TWC SportsNet HD (Rochester)	Time Warner Cable	
TWC Connection/Sports (Mid-Ohio)	Time Warner Cable	
TWC Connection/Sports (SW Ohio)	Time Warner Cable	
TWC Sports 32 (Wisconsin)	Time Warner Cable	
TWC Sports 32 HD (Wisconsin)	Time Warner Cable	
Texas Channel (Texas)	Time Warner Cable	
YNN Non-Stop Sports (Texas)	Time Warner Cable	

Notes:

⁽¹⁾ See SNL Kagan, Media Trends (2011 Edition), at 70-74. This list is provided for illustrative purposes only. Inclusion or exclusion of a network should not be read to state or imply any position as to whether the network qualifies as an “RSN” as defined by the Commission.

⁽²⁾ While press reports indicate that Channel 4 San Diego will no longer hold the rights for the Major League Baseball games of the San Diego Padres in 2012, these reports also indicate that Channel 4 San Diego carries NCAA Division I basketball games. See *Cox to Layoff Baseball Programming Employees*, Aug. 30, 2011, available at <http://www.10news.com/news/29032885/detail.html>; *SDSU Men’s Hoops at Arizona to be Simulcast on 4SD*, Nov. 22, 2011, available at <http://goaztecs.cstv.com/sports/m-baskbl/spec-rel/112211aab.html>.

⁽³⁾ Comcast SportsNet Houston is scheduled to launch in 2012, featuring the games of the Houston Astros (of MLB) and the Houston Rockets (of the NBA). See *Go Back to the Future When the Astros and Rockets Launch Their Channel, It Likely Will Remind Viewers of HSE* (Nov. 8, 2010), available at <http://www.chron.com/sports/rockets/article/Astros-Rockets-network-likely-to-resemble-old-1705389.php>

⁽⁴⁾ TWC recently announced that it will launch two RSNs in 2012 featuring the games of the Los Angeles Lakers (of the NBA), including the first Spanish-language RSN. See *Time Warner Cable and the Los Angeles Lakers Sign Long-Term Agreement for Lakers Games, Beginning With 2012-2013 Season* (Feb. 14, 2011), available at <http://ir.timewarnercable.com/phoenix.zhtml?c=207717&p=irol-newsArticle&ID=1528805&highlight>.

⁽⁵⁾ The Mtn. plans to cease operation on May 31, 2012. See Frank Schwab, *Mountain West TV Network Will Be Discontinued*, THE GAZETTE, Colorado Springs, <http://www.gazette.com/common/printer/view.php?db=colgazette&id=136348> (visited Apr. 27, 2012).

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SNL Kagan, *Media Trends (2011 Edition)*, at 70-74.

**STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL**

Re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 07-269

First, I thank the incredibly hardworking and talented professionals in the Media Bureau for laboring for what must have been an uncountable number of hours to produce this comprehensive report. The report contains a wealth of information about the video market revealing just how dynamic and constructively chaotic it is. Accordingly, I would have preferred for this report to affirmatively conclude that the video programming market is competitive. It provides ample evidence for such a conclusion.

For example, since our last report, which analyzed data available as of June 2006, “telephone” MVPDs have emerged as a major competitive force, the digital television transition has yielded more channels for free over-the-air, and the Internet and mobile platforms have enabled consumers to access video content from an immeasurable universe of sources. In fact, given these non-traditional players, the competition is even more robust than this report reflects.

More consumers are accessing more online video content, more often. From May 2011 to May 2012, unique viewers of online video content increased by more than four million.¹ The consumption per viewer during the same period increased from 15.9 to 21.9 hours per month, a staggering thirty-eight percent increase.² The amount of content viewed has witnessed growth as well with the number of videos watched increasing by almost three billion, more than seven percent, from May 2010 to May 2012.³

Furthermore, the growth of the Internet video marketplace is underscored by the popularity of over-the-top devices,⁴ which allow consumers to use their televisions and mobile devices to watch online

¹ Press Release, COMSCORE, comScore Releases May 2012 U.S. Online Video Rankings (June 18, 2012), http://www.comscore.com/Press_Events/Press_Releases/2012/6/comScore_Releases_May_2012_U.S._Online_Video_Rankings; Press Release, COMSCORE, comScore Releases May 2011 U.S. Online Video Rankings (June 17, 2011), http://www.comscore.com/Press_Events/Press_Releases/2011/6/comScore_Releases_May_2011_U.S._Online_Video_Rankings.

² Press Release, COMSCORE, comScore Releases May 2012 U.S. Online Video Rankings (June 18, 2012), http://www.comscore.com/Press_Events/Press_Releases/2012/6/comScore_Releases_May_2012_U.S._Online_Video_Rankings; Press Release, COMSCORE, comScore Releases May 2011 U.S. Online Video Rankings (June 17, 2011), http://www.comscore.com/Press_Events/Press_Releases/2011/6/comScore_Releases_May_2011_U.S._Online_Video_Rankings.

³ Press Release, COMSCORE, comScore Releases May 2012 U.S. Online Video Rankings (June 18, 2012), http://www.comscore.com/Press_Events/Press_Releases/2012/6/comScore_Releases_May_2012_U.S._Online_Video_Rankings; Press Release, COMSCORE, comScore Releases May 2010 U.S. Online Video Rankings (June 24, 2010), http://www.comscore.com/Press_Events/Press_Releases/2010/6/comScore_Releases_May_2010_U.S._Online_Video_Rankings.

⁴ Over-the-top devices allow content to be sent to a device using a broadband connection. Over-the-top technologies include such products as Internet-enabled televisions, media tablets, gaming consoles, digital media adapters, and Blu-ray players and recorders. See Jordan Selburn, *Over-the-Top Market Emerges from the Shadows*, ISUPPLI, (continued....)

video content. Industry analysts project shipments of over-the-top devices to increase by nearly fifty percent in 2012, from 258 million to 384.8 million worldwide.⁵ This increase comes on the heels of a sixty-eight percent increase in 2011.⁶ One over-the-top video provider alone exemplifies the growth of this market, recently crossing the threshold of one billion hours viewed in one month.⁷ The company estimates that its twenty-four million U.S. subscribers watched an average of eighty minutes of its content everyday in June.⁸

Unfortunately, the report's analysis of the Internet's effect on the video market is generally limited to online video distributors offering professional content previously exhibited on television or theatrically. Although such content is clearly a driving force in the video market, the Internet, coupled with mobile devices, provides alternate outlets for content outside of the traditional media and entertainment structure. I hope that future reports will also explore the market effects of alternative and emerging online video distributors that are creating new and original content.

I am pleased to vote in support of this report, along with the accompanying notice of inquiry to obtain data regarding the video services industry for 2011 and 2012. We have a terrific opportunity to get the Commission back on track so that we can release these reports *annually* as intended by Congress.

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(Mar. 27, 2012), <http://www.isuppli.com/Home-and-Consumer-Electronics/MarketWatch/Pages/Over-the-Top-Market-Emerges-from-the-Shadows.aspx>.

⁵ *Id.*

⁶ *Id.*

⁷ Janko Roettgers, *Netflix Just Became Cable's Biggest TV Network*, NEWTEEVEE, (JUL. 3, 2012, 10:43 AM), <http://gigaom.com/video/netflix-june-one-billion-hours/>.

⁸ *Id.*

**STATEMENT OF
COMMISSIONER AJIT PAI**

Re: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 07-269

I would like to thank the Media Bureau staff for all of their work producing this comprehensive report, which demonstrates in detail that the video marketplace is more competitive than it ever has been. Over the four years covered by the report, the range of MVPD options expanded, broadcasters increased their number of multicast streams, distribution of video content over the Internet exploded, and the variety of devices capable of displaying video programming grew dramatically. This is all good news, because competition within and among market segments (broadcasters, MVPDs, and online video distributors) benefits consumers.

Given the fast pace of change within the industry, it is vital that the Commission comply with its statutory mandate to “annually report to Congress on the status of competition in the market for the delivery of video programming.” 47 U.S.C. § 548(g). Our record on this score is a matter of public record and need not be repeated here. I am hopeful, however, that we are back on track and that we will release our next report in 2013.