Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers

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Comments of Grier C. Raclin[1] on Behalf of Charter Communications, Inc.

During my almost 30 years in the communications industry, I do not think there has been a more dynamic and robustly competitive environment. At Charter Communications, Inc. ("Charter"), we see both exciting new business opportunities and serious challenges to our traditional "core" business being presented by an array of formidable competitors, with others on the horizon. These are indeed interesting times in the communications industry.

Competition in the communications industry – especially in its video segment – is robust, rapidly growing and ultimately working for the benefit of consumers. Governmental intervention is not needed for this process to continue and, in fact, likely would impede, rather than enhance, the overall competitive landscape.

In these Comments, I will first give a brief overview of Charter in order to provide some background as to where Charter fits in the overall landscape of the communications industry. Then I will give Charter's perspective on the state of competition in the communications industry now, as well as the future competitive outlook. Next, I will give a summary of the recent actions taken by the Federal Communications Commission ("FCC") and many state legislatures that have paved a clear path for entry into the video programming business for new entities,

[1] Executive Vice President, General Counsel and Corporate Secretary of Charter Communications, Inc. Mr. Raclin would like to thank Burt Braverman and Jim Tomlinson of Davis Wright Tremaine LLP for assistance in preparing these Comments.

particularly incumbent local exchange carriers ("ILECs") such as Verizon, AT&T and Qwest, but unfortunately has created a regulatory playing field that is unfairly tipped in favor of these giants. Finally, I will conclude with Charter's perspective on the ramifications for analysis under the antitrust laws of (i) the recent surge of competitive entry into the video programming distribution business and (ii) the bundling of communications services.

I. OVERVIEW OF CHARTER

Charter is an incumbent, multiple system, cable television operator ("MSO") that currently serves approximately 5.7 million customers.[2] This makes Charter the **fifth largest** publicly-traded multichannel video programming distributor ("MVPD"), behind Comcast (24 million subscribers),[3] DirecTV (16 million subscribers),[4] EchoStar Communications (13.7 million subscribers)[5] and Time Warner Cable (13.4 million subscribers).[6] Approximately 2.9 million Charter customers, or about 54% of Charter total video customers, purchase digital video services.

Charter serves customers in 29 states. Charter's service areas are dispersed throughout the country and, while we have made great strides recently to divest isolated, smaller systems, we still are not "clustered" to the same degree as many other MSOs. Charter's key market areas are the following:

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2 *See News Release - Charter Communications Reports Third Quarter Financial and Operating Results*, Nov. 8, 2007, available at: http://phx.corporate-ir.net/phoenix.zhtml?c=112298&p=irol-newsArticle&ID=1074737&highlight=.

3 *See Top 25 MSOs – As of June 2007*, National Cable & Telecom Ass'n, available at: http://www.ncta.com/ContentView.aspx?contentId=73.

4 *See About DirecTV*, available at: http://www.directv.com/DTVAPP/global/secondaryIndex.jsp?-assetId=1400008.

5 *See EchoStar Reports Third Quarter 2007 Financial Results*, Nov. 9, 2007, available at: http://dish.client.shareholder.com/releasedetail.cfm?ReleaseID=275179.

6 *See Top 25 MSOs – As of June 2007*, National Cable & Telecom Ass'n, available at: http://www.ncta.com/ContentView.aspx?contentId=73. We believe Cox Communications has approximately the same subscriber base as Charter but, because it is no longer a publicly-traded company, we cannot confirm its subscriber count.

Region Served	# Subscribers	Market Rank No.
Central States	659,000	27
South Carolina	553,000	39
Tennessee	422,000	47
New England	361,000	59
Alabama	338,000	60
Minnesota/Nebraska	341,000	61
North Wisconsin	304,000	67
Georgia	299,000	68
Los Angeles Metro	305,000	70
Northwest	267,000	74[7]

As you can see from the list of our top regions, Charter serves very few major metropolitan areas.

Like most other major cable operators, Charter provides high-speed Internet service as well as interconnected Voice over Internet Protocol ("VoIP") telephone service in most of its service areas. Charter has about 2.6 million high-speed Internet customers, to which it offers 3 Mbps, 5 Mbps, 10 Mbps and, in some cases, even 16 Mbps service. As of the end of the third quarter of 2007, Charter had approximately 800,000 telephone customers, or provided telephone service to slightly less than 10% of the homes passed with Charter's telephone service. Charter has more than doubled its telephone subscriber base over the past twelve months and, generally speaking, has experienced relatively strong telephone service growth since the service was introduced.

Charter's high-speed Internet and VoIP services are offered on a stand-alone basis, and in bundles of either two or, with video, three services. Charter currently has about 2.5 million customers, or about 43% of our total customer base, purchasing "bundles" of service. We call our "triple play" offering of all three services **The Charter Bundle™**. We offer The Charter

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7 *Multichannel News Special Report - Top 100 Cable Systems*, Multichannel News at 28, Jan. 22, 2007.

Bundle™ in our upgraded cable systems across the country at the uniform price of $99.97 per month for twelve months.

Since 1998, Charter has secured **thousands** of local franchises. In fact, in the late 1990s, Charter grew by acquisition from approximately one million to more than six million customers (some of which have since been divested), securing over **2,000 franchises** in **only 18 months**, and we have little regard for ILEC claims that franchise requirements pose a significant barrier to entry, especially for companies with the huge infrastructure of local government affairs lobbyists and representatives possessed by the ILECs.

Charter has invested **billions** of dollars rebuilding and upgrading its cable systems to keep pace with our traditional competitors, DirecTV and EchoStar, by offering more high definition programming, VOD and similar advanced video services, and by deploying high-speed Internet and VoIP services. Charter made all these improvements from private investment while subject to significant competition, and was willing to bear the risk of doing so even though it knew full well that some day ILECs and presumably others would become MVPDs.

II. THE STATE OF COMPETITION IN THE COMMUNICATIONS INDUSTRY

The Department has asked Charter to comment on the state of competition in the communications industry now, and how extensive it is likely to become in the future.

A. The Present State of Competition

In a word, the present state of competition among MVPDs is **robust**. While Charter has faced competition from satellite and overbuilders for many years, we have never faced competition as fierce as we do today – and the level of competition is increasing. We see competition on several fronts – from our traditional rivals, the DBS providers, from alternative MVPDs (*e.g.*, "overbuilders," municipal and private electric companies, unfranchised, private cable operators ("PCOs") and satellite master antenna television ("SMATV") systems), from alternative video delivery platforms, and most notably, from ILECs such as Verizon and AT&T. Indeed, in the third quarter of 2007, Charter lost 40,000 analog service subscribers, and other MSOs reported similar or more extensive losses.[8]

1. DBS

Since 1984, cable franchises have been required by federal law to be non-exclusive grants of authority.[9] Virtually throughout its existence, Charter has faced direct and aggressive competition from two strong competitors with a national presence: DirecTV and EchoStar. We confront both DBS providers in **every market we serve**. The notion of a "cable monopoly" truly is a myth, and has been since at least the early-1990s, when DBS competition emerged.

Both DirecTV and EchoStar now far exceed Charter in terms of the number of subscribers served. Collectively, they have approximately 30 million subscribers compared to Charter's 5.7 million. DirecTV and EchoStar are, respectively, the second and third largest MVPDs, ranking behind only Comcast.

Because of their scale, both DirecTV and EchoStar have a significant cost advantage over Charter and most other cable operators in terms of purchasing power for programming and other product inputs. They also are able to offer exclusive programming packages that Charter is not permitted to offer. The prime example is DirecTV's "NFL Sunday Ticket" package, which is very popular with sports fans. This past spring, DirecTV tried to execute another exclusive distribution agreement, this time with Major League Baseball for out-of-market games. Only the overwhelming public and political outcry allowed this high-value programming to be made available to cable subscribers as well.

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8 Mike Farrell, *Sub Losses Whack Cable Firms*, Multichannel News at 3, Nov. 12, 2007, available at: http://www.multichannel.com/article/CA6499809.html.

9 47 U.S.C. § 541.

The DBS providers are particularly strong competitors in Charter's less urban service areas. Indeed, in some communities served by Charter, the satellite operators have a **larger** market share than Charter. Moreover, the DBS providers are in strategic marketing partnerships with telephone companies. For example, EchoStar has a long-running partnership with AT&T,[10] and Verizon has a long-standing relationship with DirecTV.[11] Through these relationships, they seek to offer "synthetic bundles" of services to customers, using the massive, aggregate marketing budgets and reach of the combined companies.

2. ILECs

Charter is quite accustomed to competing with ILECs. Our high-speed Internet product has been directly competing with the ILECs' digital subscriber line ("DSL") service in the high-speed Internet access product market for many years. In September 2005, one of Kevin Martin's first acts after becoming Chairman of the FCC was to change the regulatory status of broadband Internet access service provided by ILECs. As a result, Verizon's and AT&T's on-line DSL products are classified as "information services," not telecommunications services, eliminating any prior regulatory advantage cable operators may have held with respect to Internet access services.

In the Telecommunications Act of 1996, Congress invited the ILECs to enter the video distribution business by (a) eliminating the cable-telco cross-ownership ban,[12] and (b) giving telephone companies four different regulatory options to provide video, including a new regulatory category of service called Open Video Service ("OVS").[13] OVS is subject to limited

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[10] *See AT&T / Dish Network Digital Satellite TV - Residential*, available at: http://www.att.com/gen/general?pid=7901.

[11] *See Verizon Entertainment – Television*, available at: http://www22.verizon.com/Residential/-Entertainment/.

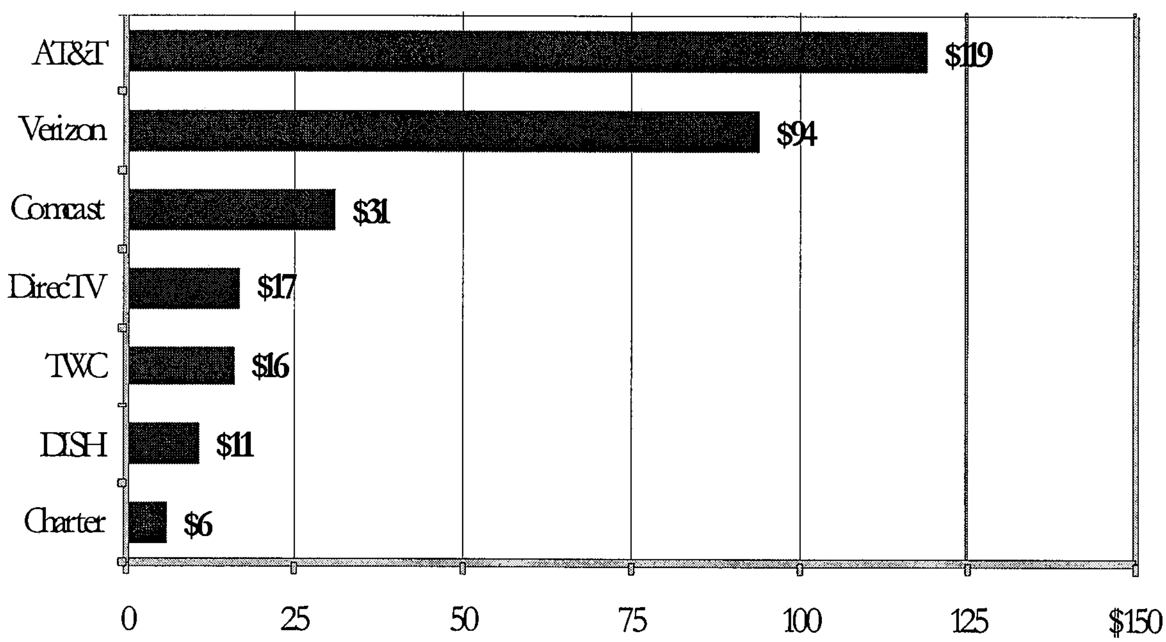
[12] 47 U.S.C. § 572.

[13] *See* 47 U.S.C. § 571 ("Regulatory Treatment of Video Programming Services").

regulations and eliminates the requirement at the federal level that telephone companies obtain cable franchises.[14] A few start-ups like RCN Communications entered the video business by obtaining OVS franchises from the FCC, but the major ILECs essentially ignored the cable market for almost a decade after passage of the Telecommunications Act of 1996 – until cable operators began offering telephone service.

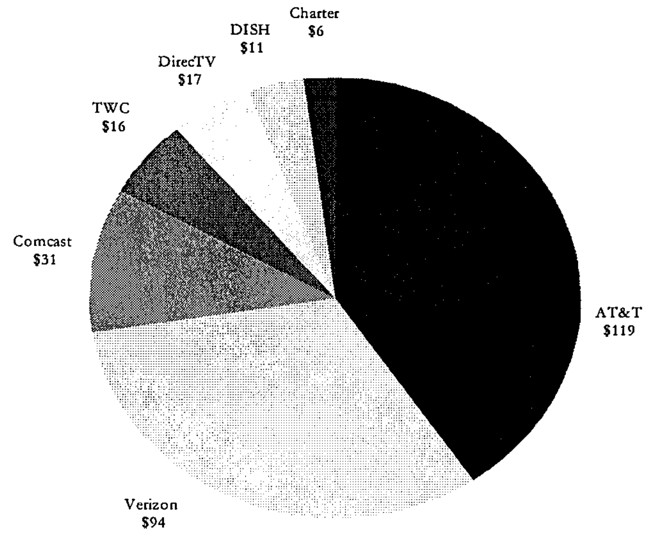
The ILECs pose a powerful competitive threat. The following graphs illustrate the relative revenues of the ILECs compared to their principal, publicly-held competitors, demonstrating that, due to their dominant, rate-based revenue streams, they are dramatically larger than their competing providers.

Graph 1
Annual Revenue Bar Chart (revenue in billions)



[14] 47 U.S.C. § 573.

Graph 2
Annual Revenue Pie Chart (revenue in billions)



Within the past few years, the ILECs have begun to aggressively upgrade their networks to make them capable of delivering video programming, and Charter now is facing staunch and growing competition from these companies. For example, while they are only at the initial stages of rolling out their networks, they are spending massive amounts to advertise even their not-yet-delivered video products.

The two dominant ILEC video services providers are Verizon, which offers a service known as "FiOS TV", and AT&T, which offers a video service called "U-verse" in addition to their satellite partnerships. At this point, the ILECs appear to be primarily "cherry picking" the wealthiest portions of their service territories and still ignoring most of the other, lower-income areas. Some examples Charter is aware of include: Massachusetts, where Verizon appears to be choosing communities based on upscale demographics and housing density, and negotiating build-out schedules that will allow them to avoid less dense neighborhoods for several years; Connecticut, where AT&T has, so far, identified only two communities -- both in upscale Fairfield County -- where it plans to deploy U-verse; and California, where Verizon appears to building out upscale areas in the High Desert region, specifically Apple Valley including the Solara and Jess Ranch areas. Indeed, Pluris, the marketing database firm, estimates that Verizon originally launched FiOS TV in Long Beach only in areas where at least 55% of the population has household incomes of $75,000 or more, as opposed to the larger area in which Charter was required to launch service, where only 14% of the population has household incomes of $75,000 or more.

Verizon FiOS TV. Verizon recently reported that it added 202,000 net new FiOS TV customers in the third quarter of 2007. Verizon now claim to have a total of **717,000** FiOS TV customers, and to be growing its subscriber base at the rate of approximately 17,000 per week.[15] In all, Verizon claims to have more than **1.5 million** total video customers, including DBS customers served with its partnership with DirecTV.[16] This makes Verizon the **10th largest MVPD** in the United States.

AT&T U-verse. At the end of the third quarter of 2007, AT&T reported that it had **126,000** U-verse subscribers,[17] and that install rates in the final weeks of the quarter approached 10,000 per week.[18] AT&T's total claimed video connections, which include U-verse and bundled satellite television service, increased to **2.1 million**.[19] That makes AT&T the **9th largest MVPD** in the United States.

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15 *See News Release – Verizon Reports Continued Success in 3Q 2007*, Oct. 29, 2007, available at: http://newscenter.verizon.com/press-releases/verizon/2007/verizon-reports-continued.html.

16 *Id.*

17 *See News Release - AT&T Delivers Strong Third-Quarter Results; Growth Highlighted by Robust Wireless Gains, Advances in Enterprise Services, Accelerated TV Ramp*, Oct. 23, 2007, available at: http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=24568.

18 *Id.*

19 *Id.*

3. Overbuilders, Munis, PCOs and SMATVs

Charter faces competition from traditional cable overbuilders as well, such as RCN Communications, in various markets: OneSource in Keller, Texas; Grande Communications in Denton, Texas; DCA Cablelink in Redding, California; CableAmerica in Maryland Heights, Missouri; Knology in Montgomery, Alabama; PrairieWave in Tracy, Minnesota, and Lakefield Communications in Two Rivers, Wisconsin. We also see municipalities – particularly those that are municipal electric providers – increasingly entering the cable television business. For example, Charter has faced municipal competition in Scottsboro, Alabama; Wilkes County, North Carolina; Newnan, Georgia; Dalton, Georgia; several Tennessee municipalities, including Columbia, Pulaskia, Fayetteville, Bristol and Morristown; and several Oregon municipalities, including Monmouth, Independence and Ashland.

Another area of intense competition is in planned housing developments, where Charter faces competition from PCOs. These entities team up with builders and, sometimes, ILECS, and can effectively lock cable providers out of the development.

Finally, SMATVs have long been competitors in the multi-dwelling unit ("MDU") market, and that increasingly will be the case as a result of the FCC's recent order concerning exclusive contracts in MDUs (discussed below).

4. Alternative Delivery Platforms

Charter is starting to see competition emerge from Internet-based video delivery services, such as iTunes and Netflix, which give producers a direct channel to consumers, and even free services such as YouTube. Cable and broadcast networks are starting to deliver programming directly to consumers over the Internet through services such as ABC's Full Episode Player and Disney's XD Theater. Without question, there is a steady trend toward delivery of video and television programming over the Internet. For example, earlier this month, Level 3 Communications, a CLEC, announced an initiative to deliver high-definition video streaming over the Internet.[20]

B. Responses to Increased Competition

The Department has requested that I describe Charter's response to market entries by ILECs and other competitors. The simple raising of this issue seems to reflect a fundamental misunderstanding that ILECs' market entry constitutes some sort of seminal change in the industry – it does not. As indicated above, the video market has been the subject of robust competition long before the ILECs decided to join; ILECs are, in most cases, the fourth entrant into an already competitive market.

Nevertheless, in deference to the Department's request, I would note that there is no standardized response to ILEC or other entry into the video market. While being responsive to competitive offers, whether from newcomers or long-standing competitors, we attempt to balance price and choice to provide the best value to the customer. In Keller, Texas, the much-ballyhooed first entry point for ILEC video competition, for example, we actually **raised** our video product price after Verizon's entry because the rate change was long scheduled and there was no reason to defer or eliminate it. We have since effectively lowered our per-product prices in Keller as two- and three-product bundles were introduced, thus providing discounts to customers from the bundling of services. Indeed, we believe the principal and most effective response to competition, whether from satellite, ILECs or others, is The Charter Bundle™, because it provides greater value to consumers than they receive from purchasing services or products individually. Other steps we have taken in light of increased competition have been:

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20 *See* Carol Wilson, *Level 3 Advances Video Strategy*, Telephony Online, Nov. 6, 2007, http://telephonyonline.com/home/news/level_3_video_110607/.

- enhancing our product offering by, *e.g.*, rolling out more HD and VOD video programming, introducing 16 Mbps Internet services and providing very competitively-priced international calling plans;
- investing in network upgrades, such as implementing digital/analog simulcasting in a majority of our footprint by 2009 and rolling out switched digital technology widely in our network by 2008;
- increasing distribution channels by, *e.g.*, increasing Internet and Charter Sales and Service Center locations, and signing distribution agreements with major retailers, such as Wal-Mart;
- refining our offers by, *e.g.*, trialing various two-product bundles and launching low-end introductory "Digital Home" packages;
- increasing our marketing expenditures; and
- improving customer services by, *e.g.*, introducing two-hour service windows, same-day service appointments and other leading enhancements.

C. The Expected State Of Future Competition

Competition in the delivery of communications services is increasing every day, and undoubtedly will become even more extensive in the future. Charter expects to see even more aggressive competition from its existing competitors and the entry of new competitors in the near-term future.

1. DBS

The DBS providers are strong competitors and are investing heavily in HD programming. Both EchoStar and DirecTV have steadily increased market share and are doing whatever they can to cause that trend to continue. The Achilles heel of DBS, if any, has been its limited ability to deliver VOD, high-speed Internet access and similar advanced products. But the DBS providers have struck partnerships and bundle their services with those provided by ILECs (*e.g.*, DSL and telephone) that mitigate this disadvantage. Now there are rumors that AT&T may acquire EchoStar or DirecTV, which would create a Goliath in the marketplace.

2. ILECs

The most significant recent development in the video market is the entry of ILECs into the business of delivering video programming and the bundling of that service with their DSL Internet access and dominant voice business. Charter sees the ILECs as particularly formidable competitors for several reasons:

- The ILECs have huge networks and infrastructure largely in place: employees, suppliers, poles, conduit, rights-of-way, central offices, thousands of miles of fiber optic cable, billing systems, etc. All the ILECs have to do to deliver video is upgrade their networks and add headend equipment in their central offices. While involving a significant expense and appearing to be a bit more difficult than the ILECs originally estimated,[21] it is being accomplished successfully and rapidly.
- The ILECs are established brand names and have existing business relationships with many suppliers and customers.

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21 *See, e.g.*, Gary Audlin, *Verizon FiOS, Good for Business?*, VoIP Loop – Views on Enterprise IP Telephony, Mar. 28, 2007 ("At this time [Verizon's] FiOS costs about $2,200, primarily installation costs for each customer added - not a profitable venture, according to Richard Klugman, a Prudential Equities analyst. He says that 'Verizon is losing more than $4,500, including capital costs, per new subscriber.'") available at: http://www.voiploop.com/index.php?option=com_content&task=view&id=1896&Itemid-=28; Eric Bangeman, *AT&T Scales Back U-verse Expectations*, Arts Technica, Mar. 2, 2007 ("AT&T has run into some roadblocks with its U-Verse broadband initiative. As a result, it has slashed its forecast for the number of homes passed by the service by the end of 2007 from 18 million to 8 million. It now hopes to hit the 19 million mark by the end of 2008.") available at: http://arstechnica.com/news.ars/post/-20070302-8969.html.

- The ILECs have enormous scale and service areas, built significantly upon their captive ratepayers' revenue streams, with volume purchasing power that far outstrips Charter or even cable as a whole. This competitive advantage is rapidly increasing as they add subscribers.
- All of the major ILECs possess a potential advantage over cable in that they own or are affiliated with nationwide wireless carriers, giving them the ability to create a "quad play" bundle of services – video, wireline telephone, Internet access **and wireless service**.

In short, ILEC competition is here today in the most affluent portions of major markets and will continue to expand in smaller markets as the ILECs upgrade more of their existing networks.

3. Power Companies

Charter anticipates that power companies soon will provide a new source of competition when they roll out Broadband Over Powerline ("BPL") technology. Although BPL has been commercially deployed in only a few markets to date (*e.g.*, Manassas, Virginia), power companies are now overcoming the technological issues that slowed deployment of the service and can be expected to aggressively leverage, directly or indirectly, their wired presence in each home. Today, BPL only offers high-speed Internet access service, but undoubtedly this will evolve over time and it will become capable of delivering MVPD-type services, including VoIP telephone, IPTV and other Internet-based, advanced services.

4. Alternative Delivery Platforms

Alternative delivery platforms are approaching fast. Video content is being delivered over multiple platforms, from IPTV to cell phones to PDAs. Of course, some Internet-based video delivery platforms are here now, such as Netflix and Apple's popular iTunes service. But other companies such as Google, whose capitalization dwarfs that of Charter and every other cable company, are breaking down the established cable linear content delivery model, providing still more competition. And wireless and portable devices, such as TiVoToGo, also are providing competition to the traditional cable platform. These trends undoubtedly will continue as technology advances and new business models are developed.

III. LACK OF REGULATORY AND OTHER OBSTACLES FACING NEW ENTRANTS

The Department has asked Charter to comment on the federal, state and local regulatory and other obstacles that new communications entrants purportedly face. Before I touch on these issues, some additional perspective about Charter is needed.

Charter entered the cable market in earnest in the late 1990s, and has spent the last eight years obtaining over 4,000 franchises and investing billions of dollars to build its cable systems and deploy advanced broadband services in over 4,000 communities, many of them small or rural. Charter undertook these enormous business risks in the face of fierce competition and in spite of the fact local franchises have not been exclusive grants of authority for many years. At the same time that Charter was deploying its network under the local franchising regime of Title VI of the Federal Communications Act, DBS companies were gaining double digit market penetration and becoming the second and third largest MVPDs in the country, all while being free from any obligation to obtain local franchises.

In spite of Charter's experience, including obtaining over 2,000 franchises in just 18 months, ILECs have claimed that they cannot secure local franchises and upgrade their networks in a competitive environment. That is inherently incorrect as Charter did precisely this – and did so with dramatically fewer resources than the ILECs possess.

The FCC and many states have accepted without serious inquiry the ILECs' arguments that they should not go through the same franchising process that Charter endured. Indeed, the FCC and many states have essentially **rolled out the red carpet** for the ILECs by enacting laws and regulations that greatly facilitate the entry of new MVPDs. As a result, today, Charter believes there are **no significant regulatory obstacles** facing new entrants.

A. Regulatory Obstacles Removed

1. Video Franchising

FCC "Section 621" Proceeding. In March 2007, the FCC issued its First Report and Order streamlining the local franchising process for the ILECs and other new video entrants.[22] The new rules do not apply where statewide franchising is available (*e.g.*, Connecticut) or in states that have adopted new franchising reform statutes (discussed below).[23] The order did not grant similar relief to incumbent cable providers, and even preempted "level playing field" state laws and/or franchise provisions, that otherwise would have provided similar relief to incumbents.[24] Further, the order creates a "shot clock" to prohibit negotiation delay by LFAs, requiring LFAs to grant or deny a franchise within 90 days for applicants with facilities already in the existing rights-of-way (*i.e.*, ILECs).[25] In addition, the order prohibits LFAs from establishing "unreasonable" build out requirements, such as those requiring:

- a telephone company to build out beyond its telephone service area;
- construction of an entire market before any cable service can be offered anywhere in the market;

[22] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 (rel. March 5, 2007).

[23] The states that have adopted new franchising reform statutes are Arizona, California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Michigan, Missouri, Nevada, New Jersey, North Carolina, Ohio, South Carolina, South Dakota, Texas and Virginia.

[24] *Id.* at ¶ 138.

[25] *Id.* at ¶¶ 66-81.

- a new entrant to build out a market more quickly than the incumbent was required to build out;
- a new entrant to serve lower density areas than required of the incumbent;
- service of buildings or developments to which the new entrant cannot obtain access on reasonable terms; or
- build-out to areas or customers that cannot be reached using "standard technical solutions."[26]

Unlike the new entrants, incumbent cable operators traditionally have been required to comply with strict build-out requirements set forth in franchise agreements, which required operators to provide ubiquitous service throughout their franchise areas. By contrast, these newly adopted rules give the ILECs broad discretion to build out their networks in narrow regions and at the pace they desire, and to pick and choose – *i.e.*, "cherry pick" – the more desirable areas. As discussed earlier, they are doing precisely that – focusing on high-density, high-income areas – whereas incumbent operators are required to serve less profitable areas. *See* pages 8-9, above.

The FCC order also places limits on LFAs' ability to impose on ILECs requirements regarding franchise fees,[27] public, educational and governmental ("PEG") access channels, PEG support and institutional networks ("I-Nets")[28] – all of which requirements Charter had to satisfy in getting its thousands of franchises around the country. These are often some of the thorniest issues that arise during franchise negotiations, and the FCC order has taken them off the table. It is ironic that the FCC chose to ride to the rescue of entities like Verizon and AT&T while much smaller entities like Charter were given very little or no protection from exorbitant LFA demands over the years.

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26 *Id.* at ¶¶ 82-91.
27 *Id.* at ¶¶ 94-109.
28 *Id.* at ¶¶ 110-124.

On October 31, 2007, the FCC voted to extend the rules and policies regarding PEG channels, I-Nets and franchise fees to incumbents.[29] But the FCC did **not** apply the streamlined franchising provisions or the build-out limitations in its March 2007 order to incumbent providers such as Charter.[30]

State Video Franchise Laws. As a result of intense lobbying efforts by the ILECs, national video franchising was a very hot issue in Congress in 2006. Indeed, it is likely that a national video franchising law would have passed last year were it not for the inclusion of controversial "net neutrality" provisions.

In any event, national video franchise legislation has effectively become a non-issue because, to date, 18 states, including almost all of the most populous, have enacted laws that dramatically streamline the process of obtaining a franchise to provide video programming. The largest states to enact franchise laws include: California (population rank #1), Texas (#2), Florida (#4), Illinois (#5), Ohio (#7), Michigan (#8), Georgia (#9), North Carolina (#10), New Jersey (#11) and Virginia (#12).[31] Of the top twelve states ranked by population, only New York (#3) and Pennsylvania (#6) have not yet enacted video franchise legislation.

The laws vary to some degree, but generally they allow for either state-wide registration or a standardized process for local franchises in order to streamline the franchising process. The laws also attempt to limit or standardize the ability of LFAs to impose strict requirements such as PEG capacity and support, customer service obligations and free services, such as I-Nets.

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29 *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, Second Report and Order, FCC LEXIS 8156 at ¶¶ 10-17 (rel. Nov. 6, 2007).

30 *Id.* at ¶ 9.

31 The other states that have enacted video franchise laws are Arizona, Indiana, Iowa, Kansas, Missouri, Nevada, South Carolina and South Dakota. *See In the States - Statewide Video Franchising Legislation States to Watch*, available at: http://saveaccess.org/inthestates. For population tables, *see* U.S. Census Bureau, http://www.census.gov/popest/states/tables/NST-EST2006-01.xls.

The FCC's new Section 621 rules apply in the remaining states, and it is expected that there will be legislative activity in a number of other states in the near term future including: Colorado, Louisiana, Maine, Massachusetts, Minnesota, New York, Pennsylvania, Tennessee, Washington, Wisconsin, and Utah.[32] On November 1, 2007, the Connecticut Department of Public Utility Control ("DPUC") awarded a state-wide franchise to AT&T after the Connecticut Superior Court overturned an earlier DPUC order that held that AT&T could not operate in the state without a franchise.[33]

Beyond the FCC and state-level activity, we have seen many instances in which Verizon, AT&T and other alternative MVPDs have been warmly welcomed by LFAs. As a result, in many instances, Charter has seen its well-heeled competitors granted franchises with terms that are much more favorable than the obligations imposed on Charter.

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As a result of these actions by the FCC and many states, franchising requirements cannot be credibly deemed to be a material barrier to entry to ILECs and other new competitors, and of course DBS competitors are not subject to franchising requirements at all. As a start-up, Charter was able to secure 2,000 franchises in as little as 18 months less than a decade ago. Franchising was a manageable necessity for cable operators then; today, it is little more than an administrative detail for new entrants.

2. Access to Programming

As a general matter, program providers provide their content to all buyers on a per-subscriber cost that decreases with scale (*i.e.*, subject to volume discounts). In other words, even

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32 *See In the States - Statewide Video Franchising Legislation States to Watch*, available at: http://saveaccess.org/inthestates.

33 Steve Dohonue, *AT&T Wins Connecticut Franchise*, Multichannel News, Nov. 5, 2007, available at: http://www.multichannel.com/article/CA6497213.html.

the newest entrant, and very small operators, have access to programming. While the per-subscriber rate may be relatively higher for customers with smaller subscriber bases than those with larger subscriber bases, it cannot reasonably be suggested that the extremely well financed ILECs or satellite operators consider program acquisition to constitute a barrier to entry or presence in the video marketplace.

Since 1992, all satellite-delivered program networks affiliated with cable operators have been required by federal law, 47 U.S.C. § 548, to be made available to alternative MVPDs. FCC rules also prohibit vertically-integrated program networks from discriminating against alternative MVPDs in terms of price and terms and conditions of carriage, and also restrict unfair negotiation tactics.[34] Alternative MVPDs have a simple, expeditious form of recourse to the FCC if any of these obligations are violated.

The federal program access rules are blatantly discriminatory because they apply only to program networks affiliated with cable operators. The exclusivity ban and other rules do not affect DBS providers' exclusive programming agreements, such as DirecTV's "NFL Sunday Ticket" programming package. As a result, federal law grants these entities a significant competitive advantage – the ability to create and offer exclusive program content – while cable operators are forced to share content they create with their competitors.

In September 2007, the FCC voted to extend the ban on exclusive program contracts between networks affiliated with cable operators for another five years. The ban was originally intended to sunset in 2002, but now is likely to remain in place at least until October 2012.[35] The FCC further enacted new program access complaint rules that require respondents to program-access complaints (*i.e.*, program networks) to produce documents that they expressly rely on in

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34 47 C.F.R. §§ 76.1000 – 76.1004.

35 *Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29, FCC 07-169, Report and Order and Notice of Proposed Rulemaking at ¶ 79 (rel. Oct. 1, 2007).

their defense at the time of filing an answer, and thereafter to produce all relevant documents in their control that are requested by the complainant or ordered by the FCC.[36]

The FCC also has an on-going proceeding to consider whether competitive MVPDs require access to terrestrially- (as well as satellite-) delivered cable-affiliated programming in order to offer a viable video service, and whether it would be appropriate to extend the Commission's program-access rules (including the exclusivity ban) to such programming.[37] Finally, the FCC also recently opened a rulemaking to address program tying arrangements. For example, the FCC has asked whether Section 628(b) of the Communications Act, 47 U.S.C. § 548(b), requires satellite cable programmers to offer each of their programming services on a stand-alone basis to all MVPDs at reasonable rates, term and conditions.[38]

As a result of these and other regulatory actions by Congress and the FCC, and the continuing safeguards to new competitors that they provide, it cannot be reasonably contended that access to programming constitutes a barrier to entry. Of course, AT&T and Verizon certainly have the resources to produce content of their own, but we've seen very little of that so far. Although Charter is not vertically integrated with program networks, the program access rules have eliminated any of the perceived advantages held by vertically-integrated MSOs over their ILEC and DBS rivals. And indeed, Charter is at a competitive **disadvantage** *vis á vis* the DBS providers and other unfranchised MVPDs, which are permitted to block access by Charter and other cable operators to their exclusive programming.

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36 *Id.* at ¶¶ 91-103.

37 *Id.* at ¶¶ 115-117.

38 *Id.* at ¶¶ 119-132.

3. FCC Voiding of Exclusive Cable Deals in MDUs

On November 13, 2007, the FCC released an order declaring that exclusive access and service clauses in video contracts between cable operators and MDUs are unenforceable.[39] The Order is blatantly discriminatory as it applies only to incumbent cable operators, such as Charter, but not DBS providers, PCOs and unfranchised alternative MVPDs.[40] The order applies and thus abrogates these provisions in cable operators' **existing** as well as future contracts; the FCC did not provide any transition or grandfathering period for existing agreements.[41] The order will apply even in states where state MDU access laws have been enacted regardless of whether those laws grandfathered existing exclusive contracts.[42] Charter believes the order is **anticompetitive** because, when coupled with the FCC's cable inside wiring rules[43] (which allow the MDU owner to take possession of the cable operator's inside wiring when the operator no longer has a contractual or statutory right to remain on the premises), Charter and other cable operators could be left with no ability to offer and compete for telephone or Internet-access service. The FCC simultaneously launched a further proceeding for additional review of exclusive marketing or bulk service agreements.[44]

Charter believes this order is patently unlawful on a number of grounds and that it will be overturned on judicial review. Nonetheless, as a result of the FCC's latest salvo against incumbent cable operators, Charter expects that its unfranchised competitors will approach MDU

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39 *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, FCC 07-189, MB Docket 07-51, Report and Order and Notice of Proposed Rulemaking at ¶ 31 (rel. Nov. 13, 2007).

40 The order applies only to "entities that are subject to Section 628 of the [Communications] Act," 47 U.S.C. § 548, which includes only franchised cable operators. *Id.*

41 *Id.* at ¶ 35.

42 *Id.* at ¶ 33.

43 47 C.F.R. § 76.800 *et seq.*

44 *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, FCC 07-189 at ¶¶ 63-65.

landlords and seek to negotiate access rights in derogation of Charter's pre-existing exclusive access or service agreements.

4. Set-Top Box Security Integration Ban

In June 2007, the FCC granted a one-year waiver of the security integration ban for HD/DVR set-top boxes to Verizon and Qwest,[45] and granted Verizon a **permanent** waiver from the integration ban for its more limited function boxes. AT&T appears to be ignoring the ban, claiming that it does not apply to its equipment; and the FCC appears to not be taking any action to enforce the law against AT&T.[46] The FCC also has said that the ban does not apply to the DBS providers, based on very dubious legal analysis. Charter and other incumbent cable operators requested similar waivers for their HD/DVR boxes, but these were denied.[47] As a result, cable operators are at a competitive cost disadvantage with respect to HD/DVR set-top boxes. Charter sees this as yet another example of unjustified and blatant preferential treatment for ILECs, who have far greater resources than Charter – to the detriment of Charter's subscribers and the overall competitive landscape – and it certainly supports the conclusion that ILECs do not have any material regulatory barrier to their entry into the video marketplace.

B. Other Obstacles

The following table and graph illustrate the market capitalization of Charter and its direct competitors:

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[45] *See* John Eggerton, *Comcast Files Set-Top Suit vs. FCC*, Broadcasting and Cable, Nov. 1, 2007, available at: http://www.broadcastingcable.com/article/CA6496376.html.

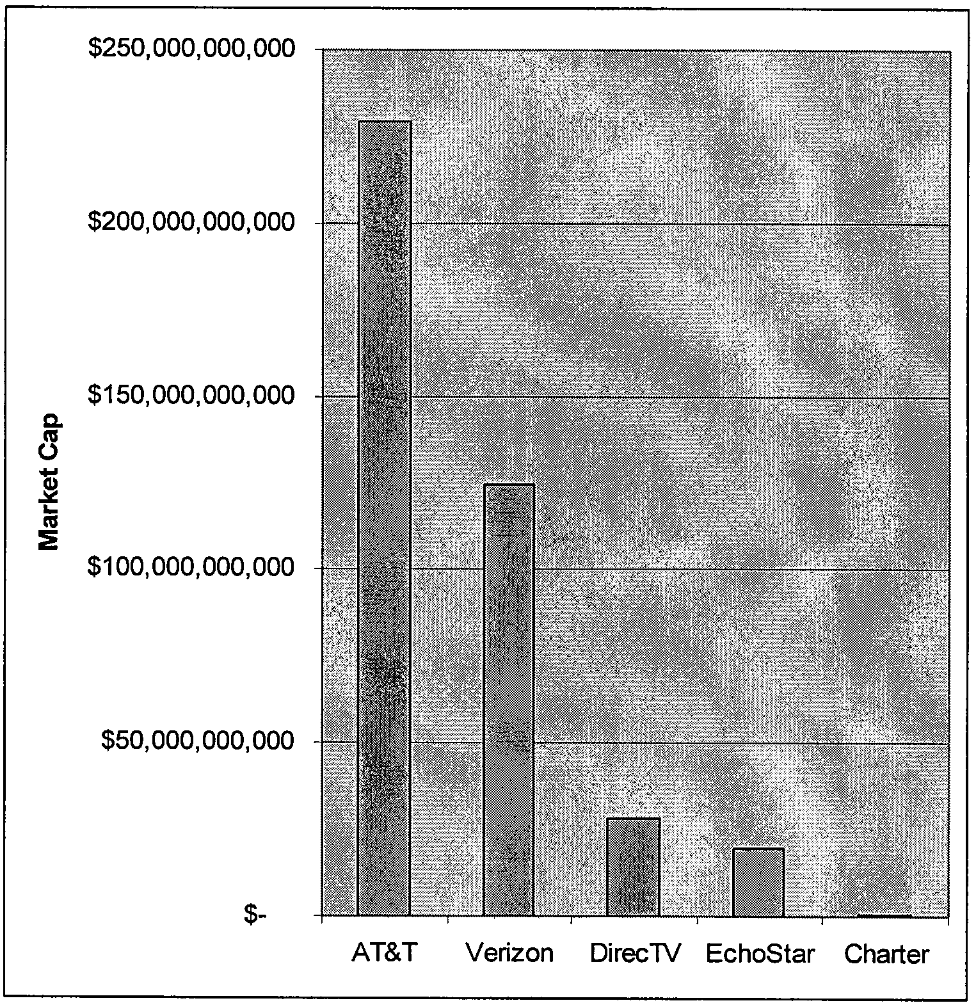
[46] *See* Ted Hearn, *AT&T: No Need for Set-Top Waiver*, Multichannel News, July 5, 2007, available at: http://www.multichannel.com/article/CA6457755.html.

[47] Charter was granted a one-year waiver for its limited function set-top boxes based on its serving smaller, rural areas and its financial situation. By contrast, the FCC granted Verizon a permanent wavier for its limited function set-top boxes.

Market Capitalization Table (as of November 20, 2007)

Company	# of Video Subscribers	Market Capitalization
AT&T	2.1 million	$229.5 Billion
Verizon	1.5 million	$124.7 Billion
DirecTV	16 million	$28.5 Billion
EchoStar	13.7 million	$19.3 Billion
Charter	5.7 million	$520 million

Graph 3
Market Capitalization Chart



The market capitalization figures reveal that AT&T is **441 times larger** than Charter and Verizon is **230 times larger** than Charter. In other words, Charter's market capitalization would constitute little more than a rounding error on these companies' books. In addition to their enormous assets and vast resources, Verizon and AT&T both have strong brand recognition and national platforms upon which to operate. On the regulatory front, they have a vast infrastructure of local government affairs lobbyists and representatives who have established relationships with local and state regulators. The recent spate of newly-enacted video franchise laws shows just how effective this lobbying infrastructure is. In short, the ILECs are fully capable of entering the cable television business **today** – without subsidies or regulatory preferences.

As mentioned earlier, the ILECs have a relatively straight-forward technical path to upgrade their networks and make them capable of delivering video. Most of the infrastructure is already in place, so the capital investment needed to make these upgrades is not a barrier to entry, particularly given their vast resources. Under these circumstances, if the ILECs choose to proceed slowly or ignore certain markets altogether, it is because they are unwilling to assume the business risks or they have decided to invest their resources elsewhere – not because there are "obstacles" impeding their entry into this line of business.

C. Summary

Over the past several years, Verizon, AT&T and other ILECs have received everything from the FCC they have requested: deregulation of DSL, set-top box waivers, streamlined franchising, favorable program access rules and, most recently, a ban on exclusive MDU agreements with cable. Frankly, I am hard pressed to imagine what else the FCC could do to encourage and facilitate the ILEC entry into the video business – unless the Commission begins to install fiber-optic cable for them!

By contrast, Charter and cable in general has not received preferential treatment from the FCC or any other government entity. Charter and cable have simply sought a **level** regulatory playing field on which to compete with other MVPDs. Yet, even such a modest request has been denied.

IV. RAMIFICATIONS FOR ANTITRUST ANALYSIS

The Department has asked for comment on the ramifications of competitive entry and the bundling of communications services for antitrust analysis. The most important point is that companies like Verizon, AT&T, DirecTV and EchoStar do not need, and should not receive, regulatory preferences that disadvantage smaller rivals like Charter. More specifically, Charter sees the retail bundling of communications services – particularly the "triple play" of video, voice and data services – as a healthy development for competition in general.

Indeed, over the past decade, it has been **cable's** entry into other product markets that has been the driving force behind intermodal competition. In the late 1990s, cable operators embarked on spending billions to upgrade their systems in part to deploy high-speed Internet access service. Cable modem service made dial-up Internet access obsolete virtually overnight and forced the ILECs to deploy DSL as a competitive response. Cable was the driving force behind broadband deployment.

More recently, cable's deployment of VoIP telephony and the offering of the triple play forced a competitive response by the ILECs – their entry into the video market. After ignoring the video market for decades, the ILECs realized that they couldn't sit on the sidelines any more. Of course, they've gone hat in hand to Washington and every state capitol seeking preferential treatment, but they clearly are in the game now. But it is important to remember that cable's uninvited and unsubsidized entry into the telephone market was the driving force behind this – not Congress, the FCC or OVS.

Video. The number of video providers is increasing from a minimum of three (the incumbent cable operator, EchoStar and DirecTV) to four or more competitors in each geographic area. BPL will increase this number to a base of five in the not too distant future, and alternative platforms, particularly those powered by the Internet, will continue to expand consumer choice.

Internet. There have been at least two formidable providers of high-speed Internet access service (ILECs and cable operators) in each geographic region from the start. This competition is increasing as Internet services have become bundled with VoIP services from the cable providers and with video services from the ILECs. In addition, wireless data service providers have entered Charter markets with high-speed, wireless Internet services. For example, Clearwire is selling wireless, high-speed Internet access service in Charter's service areas in Reno, Nevada and central California. AT&T, Earthlink and others have contracted with municipalities across the United States to build and operate WiFi networks, proposing to provide free and/or subscription-based wireless Internet access to local government entities, commercial businesses and consumers. As BPL continues to emerge, there will be another viable high-speed Internet access alternative for consumers.

Telephone. Starting in 1996 and during the late 1990s, Congress and the FCC tried to jump start CLEC entry into the telephone business, but through regulatory lobbying and action, the ILECs largely were able to maintain their dominance. However, Charter and other cable operators are providing the first significant wireline competition to ILEC-provided circuit-switched telephone service. Telephone competition did not emerge the way Congress and the FCC envisioned it, but it has started to emerge, thanks largely to cable's "triple play" bundle.

The Impact of Bundling. The market reality today is that services are being sold largely as a bundle of video, voice and data, and a "quad play" including wireless services may become the norm in the near future. Consumers see the value of bundles and they demonstrate this through their purchasing decisions. Almost half of Charter's customers purchase services in bundles. Consumers like the discounts they receive for purchasing services as a package, as well as the convenience of receiving a single bill and point of service for those services. Unlike wireless offerings, customers are not "locked in" to receiving service from us for any minimum period.

I should stress that consumers are not required to purchase services in a bundle from Charter. Charter sells its services separately and in a different variety of bundles. And most importantly, if customers don't like Charter's bundle, they can choose instead to purchase single services or bundles of similar services from ILECs, and even DBS providers can offer bundled services today through their ILEC partnerships. Unquestionably, the communications service market has never been more competitive, and consumers now have a staggering array of choices available to them.

Until recently, voice, video and data were three separate product markets. Today, they constitute one single overarching product market – the market for integrated communications services, divided between residential and commercial/enterprise sub-markets. Market analysis should reflect this and look beyond the narrow perspective of video market shares and service offerings – a mistake repeatedly made by the FCC in its market analysis.

For example, in its most recent Cable Pricing Report released in December 2006, the FCC completely ignored the fact that cable services commonly are sold within a bundle, and even went so far as to distort its findings by refusing to disclose data showing the pricing of cable's multichannel video services on a **per-channel basis.**[48] In contrast to the FCC's simplistic and distorted "analysis" of cable prices, which predictably showed increased cable prices (the result obviously desired by FCC Chairman Kevin Martin), a study by the National Cable & Telecommunications Association ("NCTA") found that cable's "triple play" bundle of services actually costs **23% less** than it did ten years ago:

> In 1996, a package of local and long distance service, 46 channels of cable, and incredibly slow 28 [kbps] Internet access would have cost more than $102 – or $129 adjusted for inflation.
>
> Today, a robust bundle from cable – which includes unlimited long distance phone service, Internet access at speeds of 5-15 Mbps, and more than 75 cable channels – frequently is available in an introductory offer for just $99.
>
> That's 23 percent less for a bundle of services that features Internet speeds an incredible 17,000 percent to 50,000 percent faster than 10 years ago.[49]

Appropriate market analysis today should include a consideration of the relative number of subscribers for video, Internet and telephone services served by the various providers serving a particular geographic market.

Alternative Delivery Platforms. The production of television and video programming continues to enjoy steady growth in large part because it is being delivered over multiple platforms. Market analysis should reflect the alternative delivery platforms available for video programming. The Hollywood writers' strike, which is being driven by the issue of royalties from the on-line sale of programming, underscores the importance of these revenue streams – now and in the future.

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48 *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, 21 FCC Rcd. 15087 (rel. Dec. 27, 2006).

49 National Cable & Telecomm. Ass'n, *Cable Prices: The Real Story*, December 2006, available at: http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp10&contentId=3741.

Partnering. Finally, it is important to recognize that an entity like Charter is a relatively small player in the overall communications marketplace. Yet Charter is competing directly with much larger entities – such as DirecTV, EchoStar, AT&T and Verizon – that have a national platform, far more capital, much greater buying power for service inputs, and many other advantages that they will apply against Charter and their other competitors. Under these circumstances, Charter and companies like it should be given leeway under the antitrust laws to partner with other similarly sized players to enhance competition with their larger, national rivals.

V. CONCLUSION

Charter understands and appreciates that Congress, the FCC, the Federal Trade Commission and the Department of Justice want intermodal competition to develop in the communications industry. The efforts to date have been successful and competition within the video marketplace is robust. Indeed, it can be said that the FCC in particular may have gone **too** far in its zeal to promote ILEC entry into the video business – to the point where the Commission has created a regulatory playing field that is tipped in favor of giants like Verizon and AT&T. This approach will impede, rather than enhance, competition in the long run, to the detriment of consumers. We urge the Department of Justice and the FTC not to fall into the same trap.

Respectfully submitted,

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