

INTRODUCTION

The Justice Department has a track record of bringing and winning Section 2 cases to challenge illegal monopolization of key industries in circumstances where the monopoly is durable, and the exclusionary conduct is brazen and unrepentant. The cable television industry exhibits the characteristics that make it a classical target for a government Section 2 case: Its dominant position has persisted for over two decades; it has resisted multiple attempts by Congress and the FCC to ameliorate the high prices and other ill effects on consumers; and it is openly and notoriously impeding entry by efficient new rivals, even using regulation designed to protect consumers as a weapon against entry.

Again and again, over a period from 1986 to the present, the Justice Department, the FCC, and Congress have repeatedly recognized that incumbent cable operators are behaving uncompetitively:

- In the 1992 Cable Act, Congress found that “[f]or a variety of reasons, including local franchising requirements . . . , most cable television subscribers have no opportunity to select between competing systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competition. The result is undue market power” Cable Television Consumer Protection and Competition Act of 1992, § 2(a)(2). Between 1986 and 1992, Congress found that “monthly rates for the lowest priced basic cable service have increased by 40 percent or more for 28 percent of cable television subscribers [while] average monthly rates have increased 29 percent during the same period. The average monthly cable rate has increased almost 3 times as much as the Consumer Price Index” *Id.* § 2(a)(1).
- In just the past few weeks, the FCC found that incumbent cable operators are using contractual exclusivity restrictions to prevent competition for the approximately 30 percent of Americans who live in MDUs. FCC, Report and Order, Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, MB Docket No. 07-51 (released Nov. 13, 2007). The Commission found that these restrictions “typically are a complete bar to entry into MDUs by fiber-deploying LECs such as Verizon, AT&T, and Qwest”; that the lengthy duration of the restrictions (sometimes perpetual) bears no relation to any legitimate purpose; and that the imposition of such restrictions increases “when new competitors are on the verge of entering a particular market.” *Id.* ¶¶ 9, 10, 27. The FCC found that these restrictions “cause significant harm to competition” and are “an unfair method of competition.” *Id.* ¶¶ 26, 27.
- In another docket earlier this year, the FCC found that the franchise process was being manipulated so that “new entrants eager to provide video service are often delayed, and in some cases derailed, by the unreasonable demands made by local franchising authorities” Second Report and Order ¶ 3, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, MB Docket 05-311 (released Nov. 6, 2007). The FCC concluded that “the operation of the local franchising process in many jurisdictions constituted an unreasonable barrier to entry.” *Id.*

- The Justice Department, in its ongoing competition advocacy, noted earlier this year that “restrictions and conditions on entry tend to shield incumbents from competition” and “that additional competition, particularly from wireline providers, has the potential to provide lower prices, better quality services, and more innovation to consumers.” Ex Parte Submission of the Department of Justice at 3, Implementation of Section 621(a)(1) of the Cable Communications Policy Act, MB Docket No. 05-311 (filed May 10, 2007) (footnote omitted). In a series of letters to state legislators, the Assistant Attorney General for Antitrust urged States to help in eliminating entry barriers to cable competition, citing the facts that customers who had choices “obtain[ed] better quality, better packaging, better pricing, and better programming.” Letter from Assistant Attorney General Thomas O. Barnett to Ohio Senator Robert Schuler at 3 (Apr. 30, 2007) (footnote and citation omitted).

New entry by wireline competitors is occurring on the broadest scale ever attempted. Verizon is investing approximately \$23 billion to deploy an advanced, fiber-to-the-premises network called “FiOS,” in 16 states around the country. By 2010, FiOS is projected to reach 18 million homes and businesses.

Customers for FiOS benefit directly from the advanced new services at competitive prices. But even customers who remain with the incumbent cable operator benefit, as the incumbent must respond to competition from FiOS by cutting its price, investing in new technologies of its own, and improving the quality of its service. A 2006 study by the FCC showed an extra 17 percent reduction in cable rates in the presence of wireline competition, and economists at the Brookings Institution have estimated a nationwide benefit to consumers of between \$7 billion and \$14 billion per year from the entry of companies such as Verizon.

Cable incumbents, feeling pressure on their supra-competitive margins from entry, have responded here as they have responded to prior entry attempts over the past two decades. Cable incumbents have misused the franchise process to block, delay, or increase the cost of entry; they have commenced or threatened to commence litigation against municipalities that were considering competitive franchises; they have denied access to programming; they have disseminated false and misleading information about the entrant; they have imposed conditions on landlords to exclude new entrants from multi-tenant buildings which comprise large portions of the local market; they have entered into contracts with the municipalities to restrict new entrants; they have refused to interconnect with new entrants on fair terms. The long list of exclusionary practices is partly described in this paper.

The FCC and several States have enacted remedial provisions to try to eliminate some of the entry barriers. Verizon is very appreciative of these efforts. Yet the cable incumbents have continued to challenge the authority of the FCC and States to lessen the entry barriers. Because barriers remain in place that delay or raise the cost of entry, consumers continue to suffer poorer service and higher prices.

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I. VERIZON'S FIOS NETWORK

A. The Deployment of FiOS

Verizon is investing approximately \$23 billion to deploy a fiber-to-the-premises network – known as “FiOS” – in thousands of communities in 16 states around the country, reaching 18 million customers’ premises by the end of 2010.¹ FiOS provides greater capacity and capabilities than any alternative available to mass-market consumers today, including more video programming channels (particularly high-definition channels) in many markets, higher-speed Internet access (already up to 20 Mbps upstream and 20 Mbps upstream, and up to 100 Mbps downstream in the near future).² FiOS incorporates new technologies, such as gigabit passive optical network (G-PON) technology that dramatically increases Internet access speeds.³

As of the third quarter of 2007, Verizon had installed more than 457 million feet of fiber, and FiOS Internet was available to more than 8.5 million homes and businesses in over 2,000 communities across parts of 16 states.⁴ Verizon has hired between 3,000 and 5,000 employees across the country to help build the new FiOS network. Despite this massive effort, both the cost and pace of Verizon’s entry have been adversely affected by the entry barriers described in Parts III and IV of this paper.

B. FiOS TV

One key service that Verizon offers over FiOS is a multichannel video service, FiOS TV, that competes directly with the video services that incumbent cable operators currently offer. FiOS TV matches or exceeds the capabilities of cable in all key respects – more digital channels, more high-definition (“HDTV”) channels, and more features – and does so at competitive prices. FiOS TV customers can currently choose from nearly 400 digital video and music channels, more than 20 HDTV channels, and more than 10,000 video-on-demand titles.⁵ FiOS TV also accompanies Verizon’s industry-leading voice and data services, giving consumers the

¹ The \$23 billion estimate includes approximately \$18 billion in net expenditures to deploy the network, and approximately \$5 billion to connect individual subscribers to FiOS, based on Verizon’s projections of the number of subscribers to FiOS. The \$23 billion does not include savings that Verizon hopes to achieve from avoiding future maintenance of its legacy copper telephone network between 2004 and 2010.

² Verizon offers four principal variations of FiOS Internet, with speeds up to 15 Mbps downstream/15 Mbps upstream (20 Mbps stream/20 Mbps downstream in six states), 5 Mbps downstream/2 Mbps upstream, 15 Mbps downstream/2 Mbps upstream, and 30 Mbps downstream/5 Mbps upstream. Verizon offers downstream speeds of up to 50 Mbps in Connecticut, Florida, Massachusetts, New Jersey, New York, and Rhode Island. As of the end of the third quarter of 2007, Verizon serves more than 1.3 million FiOS Internet customers, representing a penetration rate of 20 percent.

³ See Verizon press release (Mar. 27, 2007), available at <http://investor.verizon.com/news/view.aspx?NewsID=825>.

⁴ FiOS Internet service is offered in California, Connecticut, Delaware, Florida, Indiana, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Texas, Virginia, and Washington. See Verizon News Release, *Verizon To Expand Its Fiber-Optic Network to 59,000 Additional Homes in Portland, Ore., Metro Area* (Feb. 19, 2007).

⁵ Verizon, *Press Kits: Fact Sheet: Verizon FiOS TV Features*, http://newscenter.verizon.com/kit/fiber/factsheet_fios_tv_features.html; Verizon News Release, *TV Choice and Competition Near for Residents of Stewart Manor, N.Y.: Village Approves Video Franchise for Verizon* (Nov. 6, 2007).

advantages of an optional so-called “triple-play” offering. FiOS TV is currently offered to more than 4.7 million customer premises in parts of 12 of the 16 states in which Verizon has deployed FiOS.⁶ As of the end of the third quarter of 2007, Verizon served 717,000 FiOS TV customers, representing a penetration rate of more than 15 percent.⁷

FiOS TV contains numerous innovations over current cable offerings, including: (1) grouping channels by content to make it easier for customers to navigate; (2) multi-room digital video recorders that allow customers to view content in different rooms within their homes and to view and record content at the same time; (3) FiOS TV widgets, enabling interactivity with the Internet on the television; (4) a media manager application that allows consumers to view photos stored on their PCs over their TVs; and (5) personalized settings and controls, allowing parents to block programs by channel, rating or category, and even to eliminate adult programs altogether. FiOS pricing is competitive with that of cable companies: Verizon’s lead offer (the “FiOS TV Premier package”) generally offers over 200 digital channels and more than 20 HDTV channels for \$42.99. By contrast, a December 2006 report by the FCC found that cable operators, on average, offer 142 digital channels and 12 HDTV channels for \$56.⁸ Verizon recently announced that by the end of 2008, it will increase the number of HD channels fivefold, to 150 channels, and will offer more than 1,000 HD titles on-demand.⁹

II. COMPETITIVE WIRELINE VIDEO ENTRY CREATES SUBSTANTIAL CONSUMER BENEFITS

The Department of Justice has recognized that “additional competition, particularly from wireline providers, has the potential to provide lower prices, better quality services, and more innovation to consumers. ILEC deployment of extensive facilities to compete with the incumbent cable companies may induce not only additional competition in video distribution, but also quicker deployment of advanced broadband services to consumers.”¹⁰ Verizon’s deployment of FiOS produces these benefits.

A. FiOS Benefits Consumers of Video Programming

Verizon’s entry into the video market has increased the competitive pressure on cable companies. FiOS TV subscribers grew by nearly 40 percent in the last quarter alone, and

⁶ Verizon, *Investor Quarterly Q3 2007* at 8. FiOS TV is currently offered in parts of California, Delaware, Florida, Indiana, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, Texas, and Virginia. See Verizon News Release, *More Cable TV Choice for Medway, Mass., Consumers* (Sept. 28, 2007).

⁷ Verizon, *Investor Quarterly Q3 2007* at 6, 8.

⁸ *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, 21 FCC Rcd 15087, ¶ 23 Table 4 & Attachment 2 (2006).

⁹ Verizon News Release, *Verizon Plans Fivefold Increase in HD Channels on FiOS TV in 2008* (Nov. 1, 2007).

¹⁰ Ex Parte Submission of the Department of Justice in MB Docket No. 05-311, at 2-3 (FCC filed May 10, 2006); see also, e.g., Letter from Thomas O. Barnett, Assistant Attorney General, Antitrust Division, Department of Justice, to Massachusetts Senator Michael W. Morrissey, Chair, Committee on Telecommunications, Utilities and Energy, at 1-2 (Apr. 30, 2007).

Verizon projects that it will have 3 to 4 million FiOS TV subscribers by 2010, serving 20-25 percent of the households reached by its network.¹¹

FiOS TV is a direct competitor to cable television, and its greater capacity, competitive pricing, and innovative services make it an attractive alternative.¹² FiOS's recent market entry has already had a dramatic impact on cable companies. As Lehman Brothers observed in November 2007, "telco TV gains appear to be coming almost entirely from cable."¹³

Cable companies themselves acknowledge the importance of telco entry. For example, Cablevision's Chief Operating Officer commented to analysts that "churn [was] impacted by FiOS competition."¹⁴ Asked whether Cablevision's churn would further increase because of FiOS, the COO noted that "it is a function of how franchises are granted and when they are granted."¹⁵ Comcast's COO Stephen Burke stated that "Verizon is real, [FiOS] exists in our footprint, Verizon is taking video customers from us. . . . So there is no question, we are feeling that competition."¹⁶ Time Warner CEO Richard Parsons acknowledged that phone companies would present "tough competition," but noted cable's advantage as an entrenched incumbent: "While the phone companies are only starting to dig up your yard, cable is in your home."¹⁷

Where cable incumbents face wireline competition, consumers benefit from lower prices and higher quality. Cable operators that face competition from FiOS respond by lowering their prices for, and increasing the quality of, their high-speed Internet access and cable services.¹⁸ By

¹¹ See J. Czwartacki, Verizon, *FiOS Facts* (Aug. 10, 2007), <http://policyblog.verizon.com/PolicyBlog/Blogs/policyblog/CZBlogger1/344/FiOS-Facts.aspx>.

¹² Satellite television, by contrast, cannot be easily offered as a bundle with broadband and voice service. It also has persistent problems with quality of service. Satellite users, especially in urban areas, can experience difficulty achieving the line of sight necessary for service. See, e.g., S. Wang, et al., JP Morgan, *Cable TV/DBS: The Commoditization of Distribution* at 23 (Dec. 22, 2005) ("[T]here is a portion of the country, namely highly urban areas (which we estimate to be about 8 million homes) where it is difficult to receive DBS signals due to satellite line-of-sight issues."); J. Bazinet, Citigroup, *Cablevision Systems Corp (CVC)* at 3 (Apr. 17, 2007) ("[M]ost DBS transponder capacity sits on the western half of the U.S. Given the curvature of the earth, this reduces the DBS look angle, which in turn raises the odds of a line-of-sight obstruction between the dish and satellite."); Comments of DIRECTV, Inc. at 9, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255 (FCC filed Sept. 19, 2005) ("DIRECTV estimates that as many as one-half of all MDU dwellers cannot 'see' satellites from their windows and balconies.").

¹³ V. Jayant, et al., Lehman Brothers, *TelcoTV Primarily Impacting Cable* at 1 (Nov. 2, 2007).

¹⁴ *Q1 2007 Cablevision Systems Corp. Earnings Conference Call – Final*, FD (Fair Disclosure) Wire, Transcript 050307al.784 (May 3, 2007) (statement by Cablevision Systems Corp. COO Tom Rutledge).

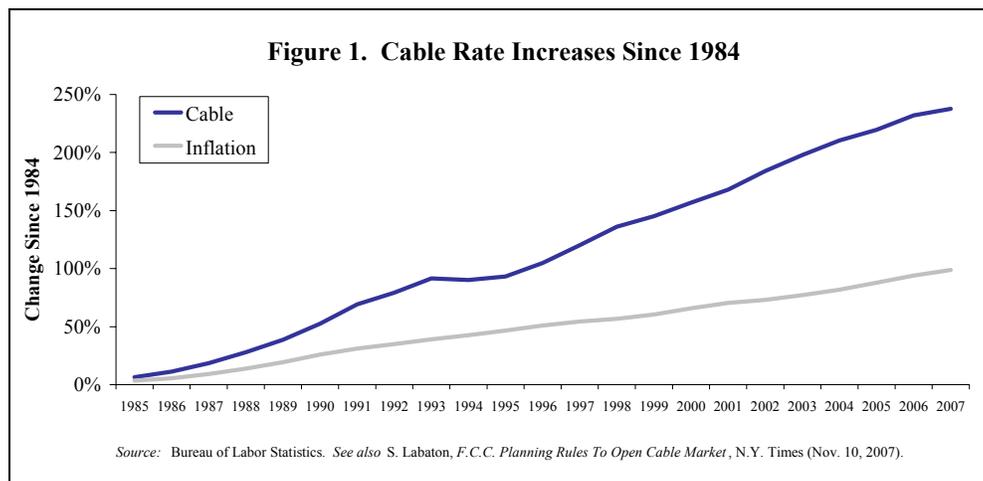
¹⁵ *Id.*

¹⁶ *Comcast Corporation at Goldman Sachs Communacopia XVI Conference – Final*, FD (Fair Disclosure) Wire, Transcript 091807ah.758 (Sept. 18, 2007) (statement by Comcast Corp. COO Stephen Burke).

¹⁷ M. Reardon, *CEO: Consumers Liking Bundled Telecom Services*, CNET News.com (May 3, 2006), http://news.com.com/2100-1033_3-6067904.html.

¹⁸ See, e.g., D. Barden, et al., Bank of America, *Battle for the Bundle: Consumer Wireline Services Pricing* at 9 (Jan. 23, 2006) ("The rollout of Verizon's FiOS service in select markets has elicited thinly advertised, yet highly competitive pricing responses for incumbent cable providers. . . . In each of these markets the respective cable provider . . . has responded with competitive pricing, well below their national average. . . . We discovered that incumbent cable customer sales reps were willing to offer more competitive pricing after mentioning FiOS, and significantly more competitive than Web pricing and out-of-region pricing.").

contrast, without such competition, cable companies have been able to raise rates at will for nearly two decades, as numerous studies have found. See Figure 1 & Table.



Repeated Findings of Anticompetitive Cable Rates	
FCC (2006)	“Expanded basic prices rose more than 6 percent or twice the rate of inflation last year. Prices are 17 percent lower where wireline cable competition is present.” 21 FCC Rcd 15087, ¶2
DOJ (2006)	“[E]vidence in the record suggests that DBS is not fully effective in constraining incumbent cable providers and that additional competition, particularly from wireline providers, has the potential to provide lower prices.” DOJ Ex Parte in MB Docket No. 05-311 (FCC filed May 10, 2006)
FCC (2005)	“Cable operators in the communities belonging to the noncompetitive group increased their monthly cable rates by 5.6 percent on average during the time period surveyed. Cable operators in the competitive group increased their monthly cable rates by 3.6 percent.” 21 FCC Rcd 2718, ¶ 44
GAO (2005)	“cable prices were approximately 16 percent lower in areas where a second cable company—known as an overbuilder—provides service.” GAO-05-257 at 33 (Apr. 2005).
GAO (2004)	“Almost all of the incumbent cable operators we contacted said they lowered their cable and high-speed Internet prices in the markets where a [Broadband Service Provider] was operating in order to be more competitive.” GAO-04-241 at 12-13 (Feb. 2004).
FCC (2003)	Cable operators increased their rate by 8.2 percent over the 12 months ending July 1, 2002; “The competitive group charged \$37.84 and the noncompetitive group charged \$40.26, as of July 1, 2002. ¹⁴ This represents a 6.4% differential, close to the 5-year average differential of 6.5%.” 18 FCC Rcd 13284, ¶ 5
GAO (2003)	“cable rates were approximately 15 percent lower in areas where a wire-based competitor was present.” GAO-04-8 at 10 (Oct. 2003).
U.S. PIRG (2003)	“[T]he only markets where cable prices have held steady, or simply not risen as fast, or in some cases fallen, are those in which cable operators face direct, wireline competition from overbuilders.” US PIRG, <i>The Failure of Cable Deregulation</i> , at 28 (Aug. 2003).
FCC (2002)	“In those areas where a cable operator faces effective competition from a wireline overbuilder (i.e., where a finding of effective competition was based on the LEC test or the wireline portion of the overbuild test), we found that operators tend to offer

	more channels at a lower rate.” 17 FCC Rcd 6301, ¶ 10
Consumer Fed’n America (2002)	“In fact, only intramodal, head-to-head competition appears to have the expected effects. The presence of wireline competitors lowers price and increases the quality of service.” M. Cooper, Consumer Federation of America, <i>The Failure of ‘Intermodal’ Competition in Cable Markets</i> at 6 (Apr. 2002).
GAO (2002)	“[T]he presence of a second cable franchise (known as an overbuilder) does appear to constrain cable prices. In franchise areas with a second cable provider, cable prices are approximately 17 percent lower than in comparable areas without a second cable provider.” GAO-03-130 at 9 (Oct. 2002).
FCC (2001)	“By July 1, 2000, cable operators facing competition were charging, on average, \$32.40 while operators not facing competition were charging \$34.11, also a 5.3% differential.” 16 FCC Rcd 4346, ¶ 6
FCC (2000)	“for 1999, the categories that face head-to-head competition (the overbuild and LEC subcategories combined) had rates that were, on average, 19% lower than the noncompetitive group.” 15 FCC Rcd 10927, ¶ 24
FCC (1999)	““The gap in average monthly rates between competitive and noncompetitive operators has widened.” 14 FCC Rcd 8331, ¶ 4
FCC (1998)	““Our Report indicates that the presence of true, head-to-head competition to cable has a substantial downward effect on cable rates.” 13 FCC Rcd 1034 (1998) (Statement of Chairman William E. Kennard).
FCC (1997)	“The noncompetitive group charged higher prices than the competitive group for each of the three time periods studied.” 12 FCC Rcd 22756, ¶ 39
FCC (1994)	“[T]he Commission determined that the rates in markets that were overbuilt were an average of sixteen percent lower than the rates in markets that were not overbuilt.” 9 FCC Rcd 7442
FCC (1990)	“direct competition has resulted in reduced per channel rates for cable service” 5 FCC Rcd 5013, ¶ 98 (1990).
GAO (1990)	“GAO’S survey showed, in the 3 years since deregulation, average increases of 39 and 43 percent, respectively, for the most popular and the lowest priced basic services, and a 21-percent increase in revenue per subscriber.” GAO/RCED-90-199 at 3 (June 1990).

Government agencies have noted the salutary effects of competitive wireline entry on the behavior of the incumbents. In 2006, the FCC found that wireline competition resulted in 17-percent reductions in monthly rates, while satellite competition did not appear to constrain pricing.¹⁹ (The FCC has also noted that “Verizon’s ‘Everything’ package in Keller, Texas, is 13 percent below that of the incumbent cable operator.”²⁰) Further, although the FCC no longer provides data regarding the average rate per channel, in 2005 it found 27 percent reductions in per-channel rates where wireline competition was present, compared to 2.6 percent reductions from satellite competition alone.²¹

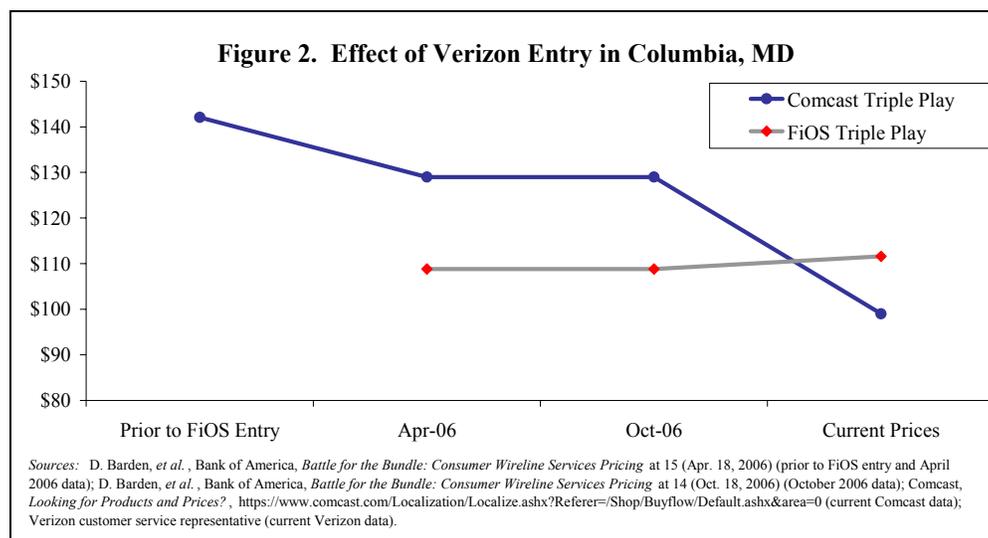
¹⁹ *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, 21 FCC Rcd 15087, ¶¶ 13-14 (2006). See also U.S. General Accountability Office, *Direct Broadcast Satellite Subscribership Has Grown Rapidly, But Varies Across Different Types of Markets*, GAO-05-257 (Apr. 2005), <http://www.gao.gov/new.items/d05257.pdf>.

²⁰ *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*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, ¶ 50 (2007) (“Section 621 Order”).

²¹ *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, Report on Cable Industry Prices, 20 FCC Rcd 2718, ¶ 29 Table 4 (2005).

Numerous private studies and analyses also confirm the consumer benefits from new entry into cable markets. A 2006 survey of consumers in Keller, Plano, and Lewisville, Tex. found that cable customers there reported saving (on average) \$22.30 per month because of cable competition.²² Consumer Reports similarly noted that an industry market-research firm had found Verizon's entry into video markets had led to lower cable prices in those geographic areas.²³

Verizon's experience confirms that its FiOS product is forcing cable to compete vigorously on price and quality. Comcast dropped its prices in the Philadelphia area, for example, when Verizon entered the video market. In November 2006, Verizon introduced FiOS TV service in the Philadelphia area. Comcast first cut its price on its "triple play" bundle (phone, data and video service) by \$25 per month in August 2006, as Verizon prepared its launch, and then by another \$27 per month in November when Verizon actually launched. In contrast to this \$52 per month price cut in the Philadelphia area, Comcast's triple-play bundle in Pittsburgh, where Verizon had not yet rolled out FiOS service, decreased in price by only \$10 per month over the same time period. As Figure 2 shows, Comcast has also decreased the price of its bundle in Columbia, Maryland, in response to Verizon's entry.



This experience has been repeated in many other markets. According to Bank of America, incumbent cable operators have offered price cuts of 28-43 percent in Herndon, Va.; Keller, Tex.; and Temple Terrace, Fla., but have generally "not actively advertised" these discounts or made them available to areas not served by Verizon's FiOS TV.²⁴ In Hillsborough County, Fla., "[a]nticipation of [Verizon's franchise approval] ... triggered a local marketing

²² American Consumer Institute, *Does Cable Competition Really Work? A Survey of Cable TV Subscribers in Texas* at 2 (Mar. 2, 2006), <http://www.aci-citizenresearch.org/Consumers%20Saving%20from%20Competition.pdf>; see also American Consumer Institute, *ConsumerGram: Consumers Come Closer to Seeing Billions in Benefits* at 2, <http://www.theamericanconsumer.org/cable2.pdf>.

²³ *Internet Service: Fiber Joins the Fray*, Consumer Reports (Feb. 2007).

²⁴ Bank of America Equity Research, *Battle for the Bundle: Consumer Wireline Services Pricing*, at 10 (Jan. 23, 2006).

blitz. Bright House Networks, the dominant cable TV company in the county, has started testing new package prices, offering deep discounts to customers in certain neighborhoods and to those who threaten to switch to Verizon.”²⁵

In Richmond, Va., Comcast cut its prices for its triple play bundle by \$31 per month a few months before Verizon rolled out its FiOS service – an anticipatory price cut that Verizon FiOS executives have seen repeated in numerous markets. In Manatee and Sarasota Counties in Florida, Comcast did not raise prices for the first time in a decade, following Verizon’s FiOS deployment in Manatee County and pending franchise negotiations in Sarasota County. An analyst noted that “[f]or [Comcast] to not raise rates is historical.”²⁶ The local press reported that “Comcast customer service representatives are scurrying from door to door, pushing special cable deals worth hundreds of dollars in one of the first areas where Verizon is launching its television service.”²⁷

The benefits to consumers from FiOS competition are not limited to price. Competition also spurs cable companies to improve their quality of service and to offer a broader selection of content. A 2003 report from the U.S. General Accounting Office reported that incumbent cable operators said that they provided better quality of service in response to competition.²⁸ And cable operators are increasing the number of high-definition channels offered to customers, in part to meet competition from telephone companies. For example, Comcast has been increasing the number of HDTV channels it offers in markets where Verizon has begun providing FiOS service.²⁹ Comcast states that it now offers 30 HDTV channels in “most” markets, compared to 20-25 a year ago.³⁰

Economists are virtually unanimous about consumer benefits from increased competition in markets for video programming. Robert Crandall and Robert Litan of the Brookings Institution found that as a result of telephone company entry into video markets, “prices would drop by 13.5 percent and wireline MVPD [video] subscribers would increase by between 29.7 percent and 39.1 percent.”³¹ They calculated that as a result, “total consumer surplus (or the benefit of lower prices and additional channel offerings) for the nation would rise by between

²⁵ R. Mullins, *County OKs Verizon Cable TV*, Tampa Tribune at 1 (Feb. 2, 2006).

²⁶ L. Mayk, *A Cable TV Rate Shocker: No Boost*, Sarasota Herald-Tribune at A1 (Apr. 26, 2006).

²⁷ L. Mayk, *Cable Battle Heats Up; Customers Get the Spoils*, Sarasota Herald-Tribune at A1 (Feb. 5, 2006).

²⁸ See U.S. General Accounting Office, *Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8, at 9-10 (Oct. 2003), <http://www.gao.gov/new.items/d048.pdf>.

²⁹ See, e.g., Hemingway, *Comcast Adds CNN, TBS HD Channels in Northeast: Cable Operator Now Offers 28 HD Channels in Region*, Broadcasting & Cable (Oct. 2, 2007), <http://www.broadcastingcable.com/article/CA6486099.html> (“Comcast is rolling out CNN and TBS high-definition channels in Massachusetts and parts of New Hampshire Tuesday.”).

³⁰ *Comcast Adds 7 HD Channels in Houston: Some of the Channels Have Already Been Added to Other Markets*, TVPredictions.com (Oct. 22, 2007), <http://www.tvpredictions.com/chouston102207.htm>; K. Gibbons, *Comcast Adds 5 HD Networks in Philly: Top Cable Operator Says HD Roster Up to 25 Nets Plus VOD*, Multichannel News (Sept. 25, 2007), <http://www.multichannel.com/article/CA6482759.html?q=Comcast+HDTV>.

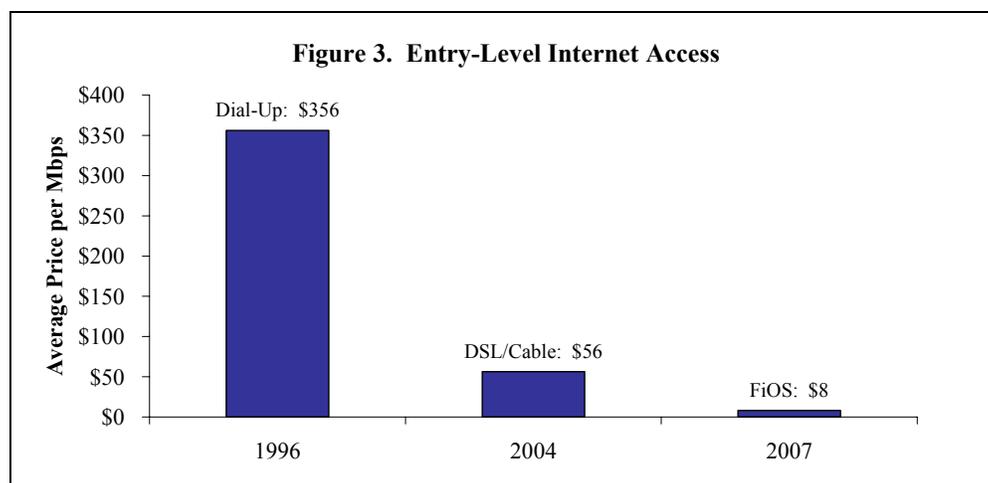
³¹ Robert W. Crandall & Robert Litan, *The Benefits of New Wireline Video Competition for Consumers and Local Government Finances* at 4 (2006), http://www.criterioneconomics.com/docs/TELCO_MVPD_Entry_Cable_Franchise_FINAL.pdf.

\$7.46 billion per year and \$13.99 billion per year, and total consumer value, which is the sum of consumer surplus and total consumer payments for MVPD services, would increase by between \$12.45 billion and \$22.25 billion per year.”³²

Robert Crandall, Gregory Sidak, and Hal Singer estimate that widespread wireline entry would result in consumer welfare benefits of between \$26 billion and \$40 billion.³³ In a similar vein, Thomas Hazlett, former Chief Economist at the Federal Communications Commission, found that “[w]ere head-to-head wireline video rivalry, now offered to just under five percent of U.S. households, to extend nationwide, annual benefits to consumers are estimated to approximate \$9 billion, with overall economic welfare increasing about \$3 billion per year.”³⁴ Yale Braunstein at Berkeley has similarly concluded: “There is very little direct competition in the cable industry, but where there is, consumers generally see both lower prices and additional service offerings.”³⁵

B. FiOS Benefits Consumers of Broadband Service

Verizon’s FiOS investments enable consumers to obtain greater bandwidth at lower prices than ever before. A decade ago, most consumers were still using 56 kbps dial-up connections to access the Internet. Today, the vast majority of consumers can obtain access to a DSL connection that provides 3 Mbps, or a cable modem connection that provides 5 Mbps.³⁶ FiOS already offers downstream speeds up to 50 Mbps, and eventually speeds up to 100 Mbps. The average price for wireline broadband Internet access has dropped from \$356 per Mbps per month in the dial-up era, to \$3-\$8 per Mbps per month in the FiOS era. See Figure 3.



³² *Id.*

³³ Robert W. Crandall, J. Gregory Sidak & Hal J. Singer, *Should Internet Protocol-Enabled Video Service Provided over a Telephone Network Be Regulated as a Cable Service?* at 26-27 (Feb. 2006).

³⁴ Thomas W. Hazlett, *Cable TV Franchises As Barriers to Competition*, George Mason Law & Economics Research Paper No. 06-06 (Mar. 5, 2006), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=889406.

³⁵ Yale M. Braunstein, *Expected Consumer Benefits from Wired Video Competition in California* at 2 (Apr. 2006), http://people.ischool.berkeley.edu/~bigyale/cable/Video_comp_Apr_2006.pdf.

³⁶ See M. McCormack, *et al.*, Bear Stearns, *October Broadband Buzz: A Monthly Update on Critical Broadband Issues* at 5-6 (Oct. 31, 2006).

Cable companies respond to FiOS deployment (and DSL competition) by increasing speeds and effectively cutting prices. In the past three years, the downstream speeds of major cable operators' fastest offerings have increased from 2-4 Mbps to 4-15 Mbps.³⁷ Cable modem operators have reduced their prices for bandwidth, most often by offering consumers more bandwidth for the same price. On a per-Mbps basis, cable modem prices have decreased by 70 percent (in real terms) over the past three years,³⁸ not considering further discounts that are available to customers who buy their cable modem service as part of a bundle with voice and cable services.³⁹ As FiOS speeds become more widely available, cable modem operators will be forced to respond further to remain competitive.

For example, when Verizon rolled out FiOS service in northeast Indiana, Comcast responded by doubling the speed of its fastest cable modem service. A Comcast spokesman noted that the FiOS deployment was a factor in Comcast's decision.⁴⁰ The Comcast spokesman only admitted the obvious, since Comcast first launched its faster modem service in four markets – all four of which had Verizon's FiOS service. A news article reporting on Comcast's upgrade observed: "Comcast is increasing the speed of its broadband service in what looks like an attempt to keep pace with Verizon Communications' [FiOS] service."⁴¹

Other cable companies similarly raised cable modem speeds to compete with FiOS. Cox and Adelphia cranked up speeds in Northern Virginia where FiOS was deployed.⁴² Time Warner did the same in Syracuse, N.Y. where, "[n]ot so coincidentally, Verizon Communications ha[d] been offering its [FiOS] . . . service . . . for over a year."⁴³ And a website devoted to discussing broadband issues recently reported that "a Time Warner Cable insider" had informed it that Time Warner was increasing its standard broadband offering in New York to 10 Mbps, and adding a new offer of 20 Mbps.⁴⁴ Cablevision, the cable incumbent most directly affected by FiOS because of its strong presence in the New York area, raised its speeds in 2006 to "up to 15 Mbps

³⁷ C. Moffett, *et al.*, Bernstein Research, *The Dumb Pipe Paradox (Part II): Patchwork Pipes* at Exhibit 1 (Feb. 28, 2006). *See also* J. Hodulik, *et al.*, UBS, *Is the Broadband Duopoly under Threat?* at 3 (May 10, 2006) ("Wired downstream speeds of 1-3 Mbps two years ago have been upgraded to 3-6 Mbps today. . . . Meanwhile, prices have come down dramatically.").

³⁸ *See* Scott Cleland, NetCompetition.org, *Why Competition Obviates Net Neutrality*, presentation for the FTC Internet Access Task Force at 5 (Sept. 26, 2006) ("Real cable modem prices have fallen ~70% as speeds have increased from 1.5Mbps to 5+ Mbs over the last two years with no price increase."); *see also, e.g.*, J. Hu, *Comcast To Raise Broadband Speed*, CNET News.com (Jan. 16, 2005), http://news.com.com/Comcast+raises+broadband+speed/2100-1034_3-5537306.html.

³⁹ *See* C. Moffett, *et al.*, Bernstein Research, *Quarterly VoIP Monitor: Playing Follow the Leader (. . . Cablevision, That Is)* at 8-9 (Sept. 20, 2006).

⁴⁰ J. Glenn, *Comcast to Double Download Speeds*, Fort Wayne J.-Gazette (Mar. 28, 2006).

⁴¹ M. Reardon, *Comcast Matches Verizon Fios Speeds*, CNET News.com (Mar. 28, 2006), http://www.news.com/Comcast-matches-Verizon-Fios-speeds/2100-1034_3-6055095.html.

⁴² *Id.*

⁴³ M. Reardon, *Time Warner Increases Speeds to 10 Mbps/1 Mbps in Fios Territory*, CNET News.com (Aug. 30, 2006), http://www.news.com/8301-10784_3-6111101-7.html.

⁴⁴ *Time Warner: 20Mbps, New Speeds in NYC*, BroadbandReports.com (Oct. 1, 2007), <http://www.dslreports.com/shownews/Time-Warner-20Mbps-New-Speeds-in-NYC-88041>.

downstream and 2 Mbps upstream, at no additional charge,⁴⁵ and introduced a premium tier for up to 30 Mbps downstream.⁴⁶ Observing these trends, telecommunications analysis firm IDC noted that “[b]roadband speed is increasing, particularly in areas that are key triple-play markets for either cable or telcos. Broadband is at the center of this battle, and speed will only grow in importance.”⁴⁷

The threat of competition from FiOS is prompting cable operators to invest in developing new cable modem technologies. At the May 2007 National Cable & Telecommunications Association show, Comcast demonstrated cable modem technology that is supposed to deliver speeds of up to 150 megabits per second. As one article noted, “[t]he new cable technology is crucial because the industry is competing with a speedy new offering called FiOS, a TV and Internet service that Verizon Communications Inc. is selling over a new fiber-optic network. The top speed currently available through FiOS is 50 megabits per second, but the network is already capable of providing 100 Mbps and the fiber lines offer nearly unlimited potential.”⁴⁸

C. Wireline Entry Promotes Programming Diversity

Fiber-to-the-premises networks like Verizon’s have greater capacity than cable networks, and therefore can carry more programming channels. Verizon’s FiOS TV customers currently can choose from nearly 400 digital video and music channels, over 20 high-definition channels, and more than 10,000 video-on-demand titles.⁴⁹ By the end of 2008, Verizon will offer 150 high-definition channels and more than 1,000 video-on-demand titles in high definition.⁵⁰

Wireline entrants like Verizon have strong incentives to carry independent programming networks, while vertically integrated cable networks often have denied carriage to independent networks. In the Washington DC area, for example, Comcast operates its own regional sports network and refused to carry the independent Mid-Atlantic Sports Network (“MASN”) that distributes the Washington Nationals games, which meant that Comcast subscribers could not view those baseball games until Comcast and MASN reached a settlement in August 2006.⁵¹ Verizon had had a carriage agreement with MASN since November 2005.⁵² Time Warner Cable similarly refuses to carry MASN in North Carolina.⁵³

⁴⁵ Cablevision News Release, *Cablevision’s Optimum Online Surpasses 2 Million Customers* (Dec. 14, 2006).

⁴⁶ Cablevision News Release, *Optimum Online Completes Significant Value-Added Speed Increase for All Customers* (June 21, 2006).

⁴⁷ M. Davis, et al., IDC, *U.S. Consumer Internet Traffic 2007-2011 Forecast: The Impact of Net Neutrality on Service Provider Infrastructure Investment* at 7 (June 2007).

⁴⁸ R. Nakashima, *Comcast CEO Shows Off Super Quick Modem*, Associated Press (May 9, 2007), <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/05/08/financial/f144552D93.DTL&hw=tv&sn=031&sc=362>.

⁴⁹ Verizon, *Press Kits: Fact Sheet: Verizon FiOS TV Features*, http://newscenter.verizon.com/kit/fiber/factsheet_fios_tv_features.html; Verizon News Release, *TV Choice and Competition Near for Residents of Stewart Manor, N.Y.: Village Approves Video Franchise for Verizon* (Nov. 6, 2007).

⁵⁰ Verizon News Release, *Verizon Plans Fivefold Increase in HD Channels on FiOS TV in 2008* (Nov. 1, 2007).

⁵¹ Comcast Press Release, *Comcast and MASN Announce Carriage Agreement* (Aug. 4, 2006).

⁵² Verizon News Release, *MASN Signs Verizon To Broadcast Washington Nationals Games* (Nov. 9, 2005).

⁵³ Mid Atlantic Sports Network, *Play Ball Now: North Carolina*, <http://www.playballnow.org/northcarolina/>.

Similarly, Verizon and AT&T offer the new NFL Network as part of their most popular entry-level tier package for no extra cost. Incumbent cable operators Cablevision, Comcast, and Time Warner charge subscribers an additional fee to receive this channel.⁵⁴

D. Wireline Entry Promotes Competition for Bundles

With cable companies now promoting packages of voice, video, and broadband Internet services throughout the country, telco entry into video promotes competition not only for the individual services that cable companies offer, but also for the bundle. A large and increasing number of consumers prefer to purchase these services on a bundled basis from a single provider. These bundles offer the convenience of a single bill and one-stop shopping, and typically provide discounts that are made possible from the efficiencies (such as reduced marketing costs) of providing multiple services to a single subscriber.

Multi-product bundles are ubiquitous. They function most directly as a form of quantity discount that, by inducing increased sales, can enable a firm to reduce its costs by taking advantage of scale economies,⁵⁵ multi-product production and distribution synergies,⁵⁶ and economies of scope.⁵⁷ Bundled pricing can also lower costs by reducing uncertainty about aggregate demand,⁵⁸ and it can reduce overhead and marketing expenses and economize on the quality-signaling benefits of well-known brands.⁵⁹ Bundle discount programs can give diverse customers greater flexibility to choose an optimal combination of products that suits their particular and changing needs, while enabling both the customers and the supplier to avoid the transaction costs of more particularized negotiations.⁶⁰

Moreover, customers themselves increasingly insist on consolidating and reducing the number of their vendors.⁶¹ Verizon's experience is that more than two-thirds of customers now

⁵⁴ See NFL Network, "Truth about cable monopolies," available at <http://www.iwantmyNFLnetwork.com/truth.php>.

⁵⁵ See, e.g., Asim Ansari, et al., *Pricing a Bundle of Products or Services: The Case of Nonprofits*, J. MARKETING. RES. 86 (1996); Thomas T. Nagle & Reed K. Holden, *The Strategy and Tactics of Pricing: A Guide to Profitable Decision Making*, at 3 (3d ed. 2002).

⁵⁶ David S. Evans & Michael Salinger, *Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law*, 22 Yale J. on Reg. 37 (2005), available at <http://ssrn.com/abstract=550884>.

⁵⁷ See, e.g., Nagle & Holden, *supra* n.55, at 306-07; Yannis Bakos & Erik Brynjolfsson, *Bundling Information Goods in Pricing, Profits, and Efficiency*, 45 Mgmt. Sci. 1613, 1619 (1999) ("Bundling can create significant economies of scope even in the absence of technological economies in production, distribution or consumption.").

⁵⁸ Yannis Bakos & Erik Brynjolfsson, *Bundling and Competition on the Internet*, 19 Marketing Sci. 63, 64 (2002).

⁵⁹ See, e.g., Michael A. Salinger, *A Graphical Analysis of Bundling*, 68 J. of Bus. 85 (1995).

⁶⁰ See Nagle & Holden, *supra* n.55, at 244-46.

⁶¹ See, e.g., Robert J. Vokurka, *Supplier Partnerships: A Case Study*, 39 Production & Inventory Mgmt. J. 30 (1998); Philip B. Evans & Thomas S. Wurster, *Strategy and the New Economics of Information*, Harv. Bus. Rev. at 70 (Sept.-Oct. 1997); Chun-Hsiung Liao & Yair Tauman, *The Role of Bundling in Price Competition*, 20 Int'l J. of Indus. Org. 365 (2002); Gary D. Eppen, et al., *Bundling — New Products, New Markets, Low Risks*, Sloan Mgmt. Rev. at 7 (Summer 1991); Stefan Stremersch & Gerard J. Tellis, *Strategic Bundling of Products and Price: A New Synthesis for Marketing*, 66 J. Marketing 55, 70 (2002) ("We find that product bundling of existing products may be optimal because it creates added value for consumers, saves costs, and creates differentiation in highly competitive markets."); Andrea Ovans, *Make a Bundle Bundling*, Harv. Bus. Rev. at 18, 20 (Nov.-Dec. 1997) (quoting the author of one study of 100 companies for the proposition that bundling reduces information and transaction costs for

buy at least two or more services from a single provider (not including long-distance service). For a majority of consumers, broadband Internet and multi-channel video programming are the most important component of these bundles.

III. EFFORTS TO DELAY VERIZON'S COMPETITIVE ENTRY

Verizon's \$23 billion investment in FiOS makes good business sense if Verizon can compete for three types of services: voice, video, and broadband. As the Department of Justice has noted, "[s]ome new video providers, such as the telephone companies, are providing video services over upgraded networks that support voice, video, and higher-speed broadband services. Because the revenues from offering video factor into the profitability of these upgrades, a delay in receiving a cable television franchise can cause new entrants to postpone modernizing their networks."⁶² Moreover, the hottest competitive battles between the telephone companies and the cable incumbents are fought on the ground of the "triple play," and consumers often want and expect to purchase all three services from one provider. When incumbent cable operators succeed in delaying Verizon's entry into video markets, they delay broadband competition from FiOS as well.⁶³

A. The Local Franchising Process

Verizon is seeking local franchises to provide video programming service. As the Department of Justice and the FCC have recognized, the process of obtaining local franchises – which required new entrants to individually negotiate franchise agreements with thousands of local franchising authorities ("LFAs") throughout the country – has been a major barrier to entry. The Department found, for example, that "LFAs have in some cases imposed unnecessary delays in the application process, made demands for goods and services that are unrelated to the provision of video services and substantially increase the cost of entry, and imposed build out requirements that have unnecessarily discouraged competitive entry."⁶⁴

Some regulators recognize and have sought to correct the anticompetitive games played via local franchising rules. Verizon today can obtain state-wide franchises in five states; and the FCC recently established – over the objection of cable companies and some local municipalities – rules designed to make the local franchise process more predictable and faster. These are welcome reforms.

Early in Verizon's rollout of FiOS, franchise agreements usually took more than a year to complete. Verizon had 113 franchise negotiations underway by March 2005, but by March 2006

consumers: "When done correctly, bundling provides customers with simplicity and order in an otherwise chaotic world.")

⁶² Letter from Thomas O. Barnett, Assistant Attorney General, Antitrust Division, Department of Justice, to Massachusetts Senator Michael W. Morrissey, Chair, Committee on Telecommunications, Utilities and Energy, at 3 (Apr. 30, 2007).

⁶³ See *Section 621 Order*.

⁶⁴ Ex Parte Submission of the Department of Justice in MB Docket No. 05-311, at 7 (FCC filed May 10, 2006).

had secured only 10 agreements.⁶⁵ Even when Verizon has obtained franchises, it often could not obtain them for an entire region at the same time. This incremental, unpredictable process prevented Verizon from achieving economies of scale at the regional level in its marketing and operations. Cable incumbents, by contrast, had already achieved those economies, making it harder for Verizon to compete when it was denied the efficient scale that was available to it.

The original justification for municipal franchising – opening up the public rights of way which had been designed to prevent private holdup by individual landowners – was subverted to create a new type of private holdup by incumbent cable operators who struck bargains with municipalities to block competitors’ access to the rights of way. Cable incumbents have a long history of purchasing exclusive access guaranteeing market dominance in exchange for generous payments and concessions to local governments. The spirit of the historical process was well captured by the former mayor of New York, John Lindsay, when he called cable franchises “urban oil wells beneath our city streets.”⁶⁶

As the FCC found, the franchising process has been marked by inordinate delays. Some delays have been the result of inattentiveness or complicated procedural requirements by LFAs. Other delays were manufactured by some LFAs as a negotiating tactic to extract conditions and concessions from a new entrant. And incumbent cable operators do everything they can to insert themselves into, and delay, the process in order to forestall competition. While the process drags on, the incumbent is able to take steps to further entrench its dominant position and to make it more difficult for a new entrant to compete successfully.

Cable incumbents cannot claim that the new franchise reforms have eliminated the entry barriers; those same companies are in various courts challenging the state reforms and the FCC’s new rules. This has been an historically persistent problem. Twenty one years ago, the Supreme Court held that it was a First Amendment violation for a city to prohibit additional cable entrants.⁶⁷ Fifteen years ago, Congress passed a clear law prohibiting unreasonable denials of additional cable entry.⁶⁸ Yet, as the FCC this year found, these strong prior measures did not fix the problem. Verizon still has numerous franchise proceedings pending that are over a year old.

B. Abuse of the Franchise Process

The difficulties that Verizon has experienced can be grouped into several broad categories: (1) excessive delays; (2) attempts by cable incumbents and local franchising authorities to impose excessive geographic build-out requirements; and (3) attempts by cable incumbents and LFAs to impose other unreasonable conditions on Verizon’s franchises.

⁶⁵ Reply Comments of Verizon on Video Franchising at 35, *Implementation of Section 621(a) 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 (FCC filed Mar. 28, 2006).

⁶⁶ Thomas W. Hazlett, *Cable Television*, in 2 *Handbook of Telecommunications Economics: Technology Evolution and the Internet* 192, 215 (Sumit K. Majumdar *et al.* eds., Elsevier Science 2006).

⁶⁷ *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

⁶⁸ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (“1992 Act”), 47 U.S.C. § 541(a)(1) (“a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise”).

1. Excessive Delays in Awarding Franchises

After Verizon initiates the franchise process, an LFA typically responds by providing a list of demands. Verizon and the LFA then negotiate over that list. The more exorbitant the conditions those initial lists contain, the longer negotiations typically take. Put differently, the price of a fast franchise approval is for to accede to most or all of the LFA's initial demands – whether or not those demands are reasonable or lawful. In addition, sometimes delay results from convoluted franchising procedures or bureaucratic inattentiveness, exacerbated by the tactics of cable incumbents. The franchises that Verizon has obtained through individual negotiation generally have taken Verizon between 6 and 12 months, and not infrequently more, to secure.

After considering an extensive record compiled by Verizon and other participants in its recent cable franchising proceeding, the FCC concluded that “unreasonable delays in the franchising process have obstructed and, in some cases, completely derailed attempts to deploy competitive video services.”⁶⁹ It added that such delays “are particularly unreasonable when, as [in Verizon's] case, the applicant already has access to rights-of-way.”⁷⁰ The Department of Justice has likewise found that “delays in the franchising process deter entry. Although . . . in a number of cases ILECs have succeeded in obtaining franchises in what seems to be a reasonable period of time, that does not change the fact that in a significant number of other cases there have been lengthy delays, which have harmed the interest of consumers in those franchise areas.”⁷¹ The examples of delay on which the FCC and DOJ based this conclusion are legion. A few experienced by Verizon follow:

a. In one Virginia community, Verizon initiated negotiations in July 2004. By November 2004, Verizon had negotiated a final franchise agreement with the town attorney, establishing a timeline for notice, commission, and review by the Town Council, with a tentative final vote date of February 22, 2005. Verizon filed its franchise application with the town on December 6, 2004, and ten days later a notice for public hearings was published. The Town Council met to discuss the agreement on December 13, 2004, and referred the agreement to the Town Cable Commission. The Town Cable Commission demanded significant changes to the negotiated agreement and hired an outside attorney. During this same period, the council dismissed the town attorney, and negotiations restarted virtually from the beginning. Negotiations continued until November 2005, at which point the town dismissed its outside attorney. A third attorney for the town took charge of negotiations, and restarted them virtually from the beginning. The town attorney also said – without any apparent regard for the Cable Act – that the town was not sure it is “interested” in having a competitive cable franchise.⁷²

⁶⁹ *Section 621 Order* ¶ 22.

⁷⁰ *Id.* ¶ 23.

⁷¹ Ex Parte Submission of the Department of Justice in MB Docket No. 05-311, at 8-9 (FCC filed May 10, 2006).

⁷² Declaration of Marilyn O'Connell ¶ 18 (“O'Connell FCC Decl.”), *attached to* Comments of Verizon on Video Franchising, *Implementation of Section 621(a) of the Cable Communications Policy Act of 1983 As Amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311 (FCC filed Feb. 13, 2006).

b. Franchise negotiations in another Virginia community dragged on for more than 17 months, with Verizon and the LFA still far apart. Verizon initiated these negotiations in August 2004. At the time, the LFA provided Verizon with an extensive list of demands. After Verizon rejected these demands, negotiations moved at a glacial pace.⁷³ When Virginia moved to pass franchising reform legislation in 2006, some progress was made. A franchise was eventually granted after a total effort of 21 months.

c. When Verizon approached the LFA for a California community in November 2004, it was told that it would be required simultaneously to negotiate with three other nearby LFAs as a consortium. Verizon acceded to this request in August 2005, and was unable to obtain even the consortium's initial list of demands until after it did so. On January 11, 2006, the consortium's counsel told Verizon that they had rejected Verizon's model agreement, that Verizon would be required to pay a \$25,000 application fee, and that they wanted to use the *final* agreement Verizon negotiated with Fairfax County, Va. as the *starting* point for negotiations. The consortium also forwarded to Verizon a long list of demands, including that Verizon provide cable services to large parts of these communities that fall outside of Verizon's telephone service area and in which Verizon has no telecommunications facilities. Consortium representatives suggested that they might be willing to compromise on their demand that Verizon build out-of-franchise *so long as* Verizon acceded to other (unacceptable) demands.⁷⁴

d. In one county in Florida, LFA staff required Verizon to file and refile different versions of its franchise application, demanding additional detail and concessions each time before they would submit Verizon's application to the county board for approval *to initiate* negotiations. Verizon's original application was filed in November 2004, and the county board did not authorize formal negotiations until a year later.⁷⁵

e. In another community in California, Verizon provided a draft franchise application in November 2004. Verizon did not receive a list of initial demands from the LFA until July 2005. Negotiations stalled on that extensive list for months. In January 2006, the LFA finally indicated that they would reconsider their position on some of the demands in their July 2005 list.⁷⁶

2. Excessive Geographic Build-Out Requirements

Some LFAs have demanded, as a condition for awarding a franchise, that Verizon build out its network and provide cable service to areas outside the geographic boundaries of Verizon's choosing. The FCC has concluded that when telephone companies, such as Verizon, "are required to build out where they have no existing plant, the business case for market entry is significantly weakened because their deployment costs are substantially increased."⁷⁷ The Antitrust Division of the Department of Justice has similarly concluded that "mandated build-out

⁷³ *Id.* ¶ 19.

⁷⁴ *Id.* ¶ 20.

⁷⁵ *Id.* ¶ 21.

⁷⁶ *Id.* ¶ 22.

⁷⁷ *Section 621 Order* ¶ 38.

requirements” have “significant entry-detering effects” and recommended that they be prohibited “except where necessary to prevent income discrimination.”⁷⁸

Verizon plans to deploy FiOS in areas where it makes economic sense, given marketplace dynamics such as consumer demand, competition from cable, and other local factors that affect the cost of deployment. Where Verizon deploys FiOS, it typically builds out an entire wire center (which are the building blocks of Verizon’s local telephone network) and makes service available to customers throughout the area served by that wire center, without regard to political boundaries, neighborhoods, or the incumbent cable operator’s franchise territory. On the other hand, with the exception of a limited number of “greenfield” situations, Verizon has not deployed its FiOS network in areas outside of its local telephone service area where it has no existing facilities.

Verizon already plans to deploy FiOS to a very large portion of its local telephone service territory – to thousands of communities in 16 states, passing 18 million customer premises. Some LFAs have nonetheless demanded that Verizon deploy FiOS throughout their particular jurisdiction, regardless of whether it would require Verizon to deploy FiOS beyond its planned wire-center deployment, and regardless of whether Verizon even provides local telephone service throughout that area. Given Verizon’s network architecture, such requirements may undermine the business case for FiOS deployment, forcing Verizon to build facilities outside of its service area or to convert wire centers to FTTP when it had not planned to do so. And these problems can be compounded by the fact that many wire centers may serve customers in multiple political subdivisions. If each of those communities seeks to impose similar build-out obligations – and, in some cases, they have – the costs increase dramatically and can make entry economically infeasible. The following are examples of demands that LFAs have made for excessive build-out requirements of this sort:

a. A county in Virginia rejected Verizon’s proposed density limitation of 30 homes per linear mile, requiring instead that Verizon abide by a lower 20 homes-per-linear-mile limitation. The added construction cost associated with a change from 30 homes to 20 homes would increase total costs by 50 percent. This would add approximately \$20 million to Verizon’s costs to enter this particular market.⁷⁹

b. Before Texas passed its statewide franchising statute, a town in that state demanded that Verizon serve its entire territory. Verizon responded by offering to serve approximately 97 to 98 percent of the town’s territory.⁸⁰ The town rejected this offer and terminated negotiations with Verizon for over a year.

⁷⁸ Ex Parte Submission of the Department of Justice at 12, *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 (FCC filed May 10, 2006).

⁷⁹ O’Connell FCC Decl. ¶ 25.

⁸⁰ *Id.* ¶ 26.

c. Before California passed its statewide franchising statute, some LFAs in California argued that state law mandated that Verizon build out to the incumbent's entire franchise area, even when that required going significantly beyond its telephone service area.⁸¹

3. Attempts To Extract Excessive Fees or Impose Unreasonable Terms Unrelated to the Provision of Cable Service

Verizon frequently received demands by LFAs for large monetary payments or other types of in-kind contributions as a condition of receiving a franchise. Often the LFAs said that their agreements with cable incumbents required them to seek these payments or contributions. Even though Verizon made clear that it will pay franchise fees and provide reasonable PEG capacity consistent with the terms of the Cable Act, franchising authorities demanded more. These demands included: (1) payments for "support" of PEG channels; (2) excessive application, acceptance, or processing fees; (3) reimbursement of LFAs' consultant and attorneys fees; (4) payments or in-kind contributions that are designed to force Verizon to construct communications networks or to subsidize various other municipal projects or initiatives that are unrelated to Verizon's video programming; and (5) attempts to regulate the design and construction of Verizon's FiOS network and non-cable services provided over that network.

a. LFA Demands for Excessive "PEG Support"

A number of LFAs sought excessive fees to support PEG channels. LFAs typically demanded that Verizon provide, at a minimum, the same PEG support as the incumbent, despite the fact that matching the incumbent would enrich the LFA far beyond what it needs to support its PEG channels and programming. In the vast majority of cases, the facilities and equipment needed to develop and transmit PEG programming were already deployed, and often were not even being used to their capacity. In Verizon's experience, LFAs did not make a showing to Verizon that they needed additional PEG support beyond the levels they were already receiving. And there is no reason to presume that Verizon's entry would increase the amount of PEG programming that is required by a locality or the costs of producing this programming. Examples of excessive PEG-related demands include:

1. An LFA in Florida demanded that Verizon match the incumbent cable operator's cumulative PEG payments, which would exceed \$6 million over the 15-year term of Verizon's proposed franchise. When Verizon asked for the basis of this demand, the LFA stated that the \$6 million was Verizon's portion of a \$13 million, back-of-the-envelope "needs assessment" that covered both PEG support and the expansion of the LFA's institutional network.⁸²

2. A California community likewise demanded that Verizon match its incumbent cable operator's cumulative PEG support. This included up-front charges of more than \$500,000

⁸¹ *Id.* ¶ 27.

⁸² Errata Letter of Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene Dortch, Secretary, FCC, MB Docket No. 05-311, at 1 (Mar. 6, 2006).

for PEG access equipment and facilities, and revolving charges that brought the total to approximately \$1.7 million.⁸³

3. Many LFAs in one metropolitan area attempted to charge three percent of cable operators' revenues for PEG support on top of the statutorily permitted five percent franchise fee. Not only did these charges plainly violate the Cable Act, but these LFAs also did not even attempt to show that this support was actually needed for PEG uses.⁸⁴

Further, in some cases, LFAs demanded not only that Verizon match the PEG capacity and support that the incumbent cable operator provides, but also demanded that Verizon provide *greater* PEG capacity and support. For example, one community in Massachusetts demanded that Verizon set aside 10 PEG channels, while the incumbent provides only two. Another town in Massachusetts demanded that Verizon provide PEG support payments that exceed what the incumbent is required to provide. This town also demanded from Verizon a franchise fee at the statutory maximum of five percent, even though the incumbent pays only three percent, and a performance bond that is twice as high as the incumbent's.⁸⁵

Demands that Verizon, as a new competitive entrant, meet or exceed the financial burdens imposed on established incumbents for PEG capacity and support can create substantial barriers to entry. Incumbents agreed to such payments – even in excess of what federal law would permit an LFA to demand – in the knowledge that they would be able to capture an entire local market without competition, and charge supra-competitive prices. Verizon, by contrast, can expect to capture only part of the market, and to charge only competitive prices. As the FCC has observed, “incumbent and competitive operators are not on the same footing, [because] LFAs do not afford competitive providers the monopoly power and privileges that incumbents received when they agreed to their franchises.”⁸⁶

b. Excessive Application, Acceptance, or Processing Fees

Like businesses that seek to conceal the true price of their products by tacking on excessive “processing” or “shipping and handling” fees, LFAs have frequently demanded excessive “application” or “processing” fees over and above the five-percent franchise fees they are authorized to collect under federal law. Whatever these fees are called, they have the same effect: to require Verizon to hand over a large sum of money as a condition of initiating or continuing the franchise process. Examples of these unreasonable requests include:

1. In Virginia, many LFAs required “acceptance fees” at the time Verizon was awarded a franchise. One LFA required Verizon to pay \$225,000; another required \$50,000; a third also required \$50,000; and a fourth required \$100,000. Two other Virginia LFAs required

⁸³ O’Connell FCC Decl. ¶ 31.

⁸⁴ *Id.* ¶ 32.

⁸⁵ O’Connell FCC Decl. ¶ 33.

⁸⁶ *Section 621 Order* ¶ 48.

“application” fees, paid at the time Verizon filed its franchise application, of \$10,000 and \$50,000, respectively.⁸⁷

2. Two LFAs in California required application fees of \$25,000 and \$20,000, respectively. Another community in that state requested an upfront application fee of \$30,000 plus an agreement to pay additional attorneys’ fees of up to an additional \$20,000.⁸⁸

3. Two LFAs in Pennsylvania required \$30,000 and \$50,000 application fees, respectively.⁸⁹

4. A major Maryland LFA required a \$25,000 application fee to begin the negotiation process.⁹⁰

c. LFA Demands for Attorneys’ and Consultants’ Fees

A number of LFAs demanded that Verizon pay for the consultants or attorneys hired by the LFAs to negotiate on their behalf, in addition to the maximum franchise fee permitted by the Cable Act. In many cases, the only reason these consultants or attorneys are needed in the first place is because the LFA wants to extract from Verizon as many concessions as possible. LFAs that are interested in introducing video competition quickly can probably handle negotiations with minimal, if any, outside assistance. Indeed, some LFAs large and small – Fairfax County and the City of Fairfax, Va., for example – have done just that. Other LFAs, however, brought in outside firms whose main function is to extract as much value from the franchise applicant as possible.

Because these firms are typically paid by the hour, their incentives are to delay the franchise process as much as possible, contrary to the interests of the consumers they were hired to serve. Ordinarily, of course, these incentives would be counterbalanced by the LFA’s own incentive to minimize its costs. But when the LFA is able to shift those costs to competitive entrants, and when day-to-day management of negotiations is left in the hands of the LFA’s outside attorney or consultant, a truly perverse situation can occur in which Verizon is required to finance obstructionist behavior to its own and consumers’ detriment. The following are examples of attorney-fee demands encountered by Verizon:

1. One Virginia LFA demanded that Verizon pay its attorneys’ fees for its outside law firm that advised the county on the franchise and negotiated on behalf of the county. As part of negotiations with this LFA, Verizon ultimately agreed to pay attorneys’ fees up to a cap (\$75,000). The firm has now exceeded this amount, and the LFA has enacted an ordinance requiring Verizon to pay more.⁹¹

⁸⁷ *Id.* ¶ 35.

⁸⁸ *Id.* ¶ 36.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* ¶ 38.

2. A major Maryland LFA demanded that Verizon pay its expenses and attorneys' fees, and has passed an ordinance to that effect. Verizon expects these fees to be excessive, in part because Verizon first would be required to pay the fees of attorneys retained by the county executive to assist in negotiating the agreement, and then, once the agreement is submitted to the county Council for approval, would be required to pay separate fees for the Council's attorneys.⁹²

3. A small Virginia LFA demanded that Verizon pay (and Verizon has paid) \$30,000 so far to compensate an outside attorney. This LFA had already dismissed two attorneys with whom Verizon has negotiated. Accordingly, Verizon paid for a third separate round of negotiations, after two rounds that were simple wastes of money.⁹³ This situation well illustrates the problem that arises when an LFA can shift the costs of negotiation and has no incentive to control them.

d. LFA Demands for Communications Networks and Other Compensation Unrelated to the Video Franchise

Verizon also received many demands from LFAs that are completely unrelated to video programming. These LFAs viewed cable franchise applications as opportunities to obtain extensive communications networks or facilities, called "institutional networks," or to subsidize some other municipal pet project or policy initiative. These demands impose costs beyond those permitted by the Cable Act and create additional burdens on Verizon and other competitive entrants. Examples of these demands include:

1. In one Massachusetts community, the LFA initially demanded that Verizon provide funds for the town to purchase street lights from a third-party owner; install cell-phone repeaters at town hall; provide subsidized cell phones and service to town employees; wire all houses of worship; provide free Internet access to all town buildings; and make parking available at Verizon's downtown facility for patrons of the public library.⁹⁴

2. Another city in Massachusetts demanded that Verizon provide dark fiber to all public buildings in the franchise.⁹⁵ "Dark" fiber is fiber not presently being used to provide service. Such a demand is necessarily unrelated to any actual services Verizon is providing.

3. A Virginia county initially demanded that Verizon connect 220 traffic signals in the county with fiber; provide telecommunications services to approximately 60 organizations "who work with the [LFA's] Department of Human Services to provide medical, psychological, educational, nutritional, employment and housing assistance to at-risk segments of the community"; provide high-speed cell phones for "approximately 1000 employees"; provide discounted broadband access in public housing; and allow the county free use of Verizon

⁹² *Id.* ¶ 39.

⁹³ *Id.* ¶ 40.

⁹⁴ *Id.* ¶ 42.

⁹⁵ *Id.*

manholes, conduits, and utility poles. After more than a year of negotiations, the county agreed to drop some of these demands.⁹⁶

4. Another Virginia LFA demanded that Verizon provide eight-strand dark fiber to all public buildings, even though all of these buildings were already wired with fiber. Verizon estimates that the price for providing these facilities to an ordinary retail customer would be approximately \$2.3 million.⁹⁷

5. A Pennsylvania LFA demanded that Verizon provide free wireless broadband service to local police. The LFA's incumbent cable operator faced no such requirement, and Verizon's Pennsylvania subsidiary that sought the franchise does not provide wireless broadband service. The LFA also demanded that Verizon provide free high-speed Internet access to the town's two municipal buildings.⁹⁸

6. A city in California initially demanded that Verizon provide free Internet access at public facilities, maintain at no cost the city's existing fiber-optic cable to all city locations, and provide data transmission facilities to various public schools.⁹⁹

7. During preliminary franchise discussions, officials in one New Jersey community suggested that they would "like" free or reduced-fee broadband Internet service for municipal employees in return for awarding a franchise. They also requested free Internet access for public schools, and free connections for security cameras the town is placing on poles. The officials suggested that, if Verizon agreed to these conditions, they might reduce the amount of PEG support that Verizon would be required to provide.¹⁰⁰ This offer, of course, merely confirmed that the LFA's initial PEG demand exceeded what was necessary.

8. A number of LFAs in New York demanded free broadband Internet access for municipal locations.¹⁰¹

e. Attempts by LFAs To Regulate the Design and Construction of Verizon's FiOS Network and Non-Cable Services Provided over That Network

Some municipalities have asserted that Verizon's competitive entry into their local video programming markets grants them authority to regulate the design or construction of the FiOS network, or to collect franchise fees on broadband and voice services provided over that network. Other municipalities have sought to regulate Verizon's construction of the FTTP network even before to the FiOS build-out. Some LFAs have demanded Verizon's acquiescence to their regulatory authority as a condition of a cable franchise.

⁹⁶ *Id.* ¶ 43.

⁹⁷ *Id.* ¶ 44.

⁹⁸ *Id.* ¶ 45.

⁹⁹ *Id.* ¶ 46.

¹⁰⁰ *Id.* ¶ 47.

¹⁰¹ *Id.* ¶ 48.

Local attempts to regulate the FiOS network itself, or to regulate non-video FiOS services, burden Verizon's competitive entry in two ways. First, the regulations are themselves burdensome and costly to comply with. Verizon has designed FiOS and planned the FiOS build-out in accordance with established federal and state standards, rather than to satisfy local requirements imposed after the fact. Nor has its business planning taken into account local franchise fees on broadband and voice services, because LFAs have no authority to charge such fees under federal or state law. Second, the burden of local attempts to regulate FiOS are magnified by the inconsistency of local schemes. Each LFA typically has its own unique set of conditions in mind, and complying with multiple LFAs' conditions would require Verizon to make system-by-system adjustments that would reduce the efficiencies of planning and operating on a regionwide or national basis. These adjustments would compromise the economies of scale on which Verizon's FiOS deployment plan depends.

Examples of local attempts to regulate FiOS and non-video FiOS services include:

1. A major Maryland LFA demanded, as a condition of a franchise, that Verizon allow the LFA to regulate non-cable services that are subject to exclusive FCC jurisdiction.¹⁰²
2. In Pennsylvania, numerous municipalities claimed that they are entitled to five percent of Verizon's voice and data revenues from FiOS, in addition to a five percent cable franchise fee.¹⁰³
3. In a filing before the New York Public Service Commission, the towns of Larchmont and Mamaroneck asserted that once Verizon obtains a cable franchise, they will have regulatory authority to require Verizon to "entirely rebuild" FiOS, regardless of the impact on Verizon and despite Verizon's independent authority under federal and state telecommunications laws to deploy FiOS.¹⁰⁴
4. A Maryland LFA demanded that Verizon obtain a franchise before the LFA would issue any permits for the company to begin FiOS construction.¹⁰⁵
5. One community in Virginia refused to give Verizon permits for fiber deployment. It demanded that Verizon bury its fiber at an additional cost of \$3 to 4 million.¹⁰⁶

C. Cable's Anticompetitive Campaign To Thwart Wireline Competition

The franchise process also is susceptible to influence from incumbent cable operators, who see it as an opportunity to protect themselves from competition by imposing delay and expense on Verizon. There are many examples of incumbent-driven delay in the franchising process.

¹⁰² *Id.* ¶ 51.

¹⁰³ *Id.* ¶ 52.

¹⁰⁴ *Id.* ¶ 53.

¹⁰⁵ *Id.* ¶ 54.

¹⁰⁶ *Id.* ¶ 55.

1. Litigation and Threatened Litigation

Incumbent cable operators have repeatedly filed or threatened to file lawsuits against local franchising authorities to stop them from awarding competing franchises. Local authorities, many of which are so small that litigation could be financially ruinous to them even if they ultimately prevailed, take these threats very seriously.

a. In Nyack, N.Y., a well-known local litigator representing Cablevision told the village trustees that the Verizon franchise under consideration was “an invitation to litigation.”¹⁰⁷ Two days earlier, Cablevision submitted a letter stating that it had a “right and need to develop a complete record to support any further contest should the village vote to authorize a franchise.”¹⁰⁸ At a later hearing, Nyack’s attorney explained: “We don’t know if we’re gonna get sued. I wouldn’t doubt it. I wouldn’t be surprised.”¹⁰⁹ He added: “I don’t think that it would be in the best interest of the Village to spend a whole lot of resources defending such an action.”¹¹⁰

b. Cablevision’s threats to sue Nyack also affected Verizon’s negotiations with surrounding New York municipalities. For example, during a subsequent hearing in neighboring South Nyack, a trustee noted his concern about Cablevision’s threats to sue Nyack. The Trustee went on to ask the Cablevision representative: “I wonder if a decision has been made to sue South Nyack by Cablevision. Would you . . . comment on that?”¹¹¹ The representative said that Cablevision was still considering its options.

c. Similarly, during hearings in Massapequa Park, N.Y., trustees expressed concern that a Cablevision lawsuit was inevitable, noting that the cable industry had historically used the courts to protect its dominant position. As the village attorney stated, “the concern I have is that the Village will be in a position where we will find ourselves with a challenge, *good faith or otherwise*, which will expose us to significant legal fees and the like.”¹¹² Prior to the vote to authorize a competitive franchise, the mayor “implore[d]” Cablevision not to “get caught up in legal challenges.”¹¹³

d. In Keller, Tex., incumbent Charter Communications wrote to the city counsel that if Keller approved a franchise for Verizon, “Charter will have no choice but to pursue all

¹⁰⁷ Nyack Tr. at 75 (Nov. 10, 2005); *see also* A. Drury, *Nyack Permits Verizon Cable*, J. News (Nov. 29, 2005) (“William Powers, a Cablevision spokesman, said no decision had been made on suing Nyack.”).

¹⁰⁸ Letter from Steven J. Gerber (Cablevision) to Walter R. Sevestian (Nyack Attorney), at 2 (Nov. 8, 2005).

¹⁰⁹ Nyack Tr. at 83.

¹¹⁰ Nyack Tr. at 84.

¹¹¹ South Nyack Tr. at 72-75 (Nov. 29, 2005).

¹¹² *See* Massapequa Tr. at 136 (Sept. 12, 2005) (emphasis added). At a subsequent hearing, the mayor explained that “I don’t know quite honestly at what point Cablevision will or will not sue us.” *See* Massapequa Tr. at 37 (Sept. 26, 2005).

¹¹³ *See* Massapequa Tr. at 143 (Sept. 12, 2005).

available legal remedies” and “Charter will have no choice but to take whatever legal action is necessary.”¹¹⁴

e. In Apple Valley, Cal., Charter advised the Mayor that it would “review all of our legal options” after the town granted Verizon a franchise.

f. In Leesburg, Va., Adelphia (now Comcast) wrote the Cable TV Advisory Commission that “if the Town grants Verizon a franchise that is more favorable or less burdensome than Adelphia’s franchise, then Adelphia may be forced to commence litigation.”¹¹⁵

Cable companies do not stop with mere threats of litigation. They have in fact used actual, baseless litigation to challenge the award of franchises to competitors.¹¹⁶ For example, despite the mayor’s plea quoted earlier, Cablevision did in fact sue the Village of Massapequa Park for granting a competitive franchise to Verizon.¹¹⁷ The lawsuit is premised not on the merits of Massapequa Park’s decision, but rather on allegations that the Village Board of Trustees violated New York’s Open Meetings Law by conducting “private” meetings to discuss Verizon’s proposal before the Verizon franchise was approved.

Cablevision’s claims were baseless. For one thing, Cablevision failed to provide the court with the transcript of the five-hour public hearing spanning two days that preceded the Village’s approval, which reflects numerous comments by Cablevision representatives during the review process. For another, sworn statements by the Mayor, each Village Trustee, the Village Administrator, and the Village Attorney all categorically rejected every claim asserted by Cablevision.¹¹⁸ But Cablevision had no need to prevail on the merits of the Massapequa litigation. Merely by filing a lawsuit, Cablevision succeeded in its true aim, which was to intimidate other municipalities. In the two months following Cablevision’s filing, three additional New York LFAs (Muttontown, Upper Nyack, and Dobbs Ferry) informed Verizon that they were unwilling to proceed with franchise discussions due to fear of a similar suit. And

¹¹⁴ Letter from S. Wilson to L. Drescher (Jan. 14, 2005); Letter from S. Wilson to L. Drescher (Jan. 27, 2005).

¹¹⁵ Letter from K. Hall (Adelphia) to Leesburg Cable TV Advisory Commission (Feb. 1, 2005).

¹¹⁶ Cable operators have long resorted to the courts for no reason other than to harass and delay potential entrants and bully localities. In 2000, for instance, Insight sued the City of Louisville, KY, for awarding a competitive franchise to Knology. The trial court disposed of the suit on summary judgment, which the state appellate court affirmed. *See Insight Comm. Co. v. City of Louisville*, No. 2002-CA-000701-MR, 2003 WL 21473455 (Ky. Ct. App. 2003). The delay caused by this litigation and other delay tactics ultimately led Knology to file for bankruptcy, and many consumers were denied access to competitive cable service.

¹¹⁷ *Application of Cablevision Systems Long Island Corp. for Judgment Pursuant to Article 78 v. Village of Massapequa Park et al.*, Index No. 016555/2005(N.Y. 2005).

¹¹⁸ *See* Altadonna Aff. (mayor); Pravato Aff. (trustee); Spinosa Aff. (trustee); Jacobson Aff. (trustee); Pinto Aff. (deputy mayor); Walsh Aff. (village attorney); Caltabiano Aff. (village administrator and clerk). In January 2006, State Supreme Court Justice Anthony Parga dismissed Cablevision’s lawsuit to revoke Verizon’s franchise in Massapequa Park. *See Cablevision Systems Long Island Corp. v. Village of Massapequa Park*, 831 N.Y.S.2d 358 (N.Y. 2006).

the same fears have caused other municipalities to demand broad indemnification provisions in their franchises, imposing further costs on competitive entrants.¹¹⁹

2. Abuses of Administrative Processes

Incumbent cable operators also frequently flood LFAs with letters and requests at hearings to modify Verizon's draft franchise agreement, using the petitioning process itself to delay competitive entry. The standard tactics of bad-faith administrative delay all appear in the cable incumbents' repertoire — last-minute submissions, baseless positions, and objections submitted even before Verizon begins a local franchising process.¹²⁰

Cable operators submit their objections to Verizon's proposed franchises at times that often do not permit meaningful review by the LFA. Cable operators have raised objections — sometimes dozens of pages long — less than 24 hours prior to the hearing to approve the franchise, and in some cases at the hearing itself.¹²¹ This leaves no time for either Verizon or the LFA to address any new objections adequately. Municipalities must either delay the vote on the franchise or risk litigation for violating state franchising regulations.

Many of the objections regarding proposed Verizon franchises appear frivolous. The most common complaint is that the proposed franchise agreement does not meet level playing field requirements. Cable operators frequently submit a lengthy chart or memorandum comparing certain provisions in the incumbent's franchise agreement with the comparable provision in Verizon's agreement.¹²² Yet, a selective provision-by-provision comparison is precisely the type of analysis that the courts have rejected.¹²³

¹¹⁹ See D. Searcey, *Spotty Reception; As Verizon Enters Cable Business, It Faces Local Static*, Wall St. J. at A1 (Oct. 28, 2005) (describing demands from Tampa, Florida). Massapequa Park and Woburn, Mass. also have requested indemnification from Verizon. See Massapequa Tr. at 136-39 (Sept. 12, 2005).

¹²⁰ As described above, threats of litigation frequently accompany correspondence and oral statements to LFAs. Even when the word "litigation" is not directly used, the incumbents invariably note that the LFA's approval of Verizon's franchise agreement violates state law or places the municipality in a legally indefensible position. See, e.g., Memorandum from Cablevision to on Verizon New York, Inc. Application for a Cable Franchise to Village of Massapequa Park 1 (Sept. 8, 2005) ("[T]he Village cannot fulfill its legal duty to 'use due diligence to investigate and assess' Verizon's franchise application, as required by 16 NYCRR § 894.6."); Letter from George M. Jostlin (Charter) to Scott Nassiff (Mayor, Apple Valley, CA) (Oct 24, 2005) ("[T]he draft franchise before the Council does not comply with the MCI or the State Level Playing Field Statute.").

¹²¹ See, e.g., Letter from George M. Jostlin (Charter) to Scott Nassiff (Mayor, Apple Valley, CA) (Oct. 24, 2005).

¹²² See, e.g., Letter and attached charts from Michael E. Olsen to Nyack Trustees (Nov. 2, 2005); Chart from Cablevision on Verizon New York Franchise Proposal to South Nyack (undated); Chart from Cablevision on Comments on Verizon's Massapequa Park Application Franchise; Chart from Cox on Comparison of Herndon Cable Franchise Agreements (undated). It is not unusual for cable operators' comparisons to misstate the terms of the draft Verizon franchise agreement or to cite to a Verizon franchise agreement from an entirely different municipality. Level-playing-field claims are raised even in states without level-playing-field statutes, such as Herndon, VA.

¹²³ See 16 NYCRR § 895.3 (requiring an analysis of the economic and regulatory burdens "taken as a whole"); *New England Cable Television Assoc., Inc. v. Dep't of Public Utility Control*, 717 A.2d 1276, 1287 (Conn. 1998) ("It is the effect of the totality of the terms that controls the determination of whether one certificate is more favorable than another."); *United Cable Television Service Corp. v. Department of Public Utility Control*, 663 A.2d 1011, 1025 (Conn. 1995) ("A proper inquiry requires consideration of the entire package of terms and conditions required of

Incumbent cable companies in Texas and New York have sent letters to LFAs even before Verizon initiated the franchising process.¹²⁴ Because of their timing, it is impossible for these letters to contain any legitimate arguments about Verizon's specific claims. Instead, they are meant only to convey the message to the LFA that consideration of a Verizon video franchise will be a difficult and time-consuming task.

Cable providers, particularly Cablevision, have also misused state-law equivalents to the Freedom of Information Act to delay the franchising process. In nearly every municipality in which Verizon has begun negotiating for a franchise in New York State, but even before Verizon has submitted an application, Cablevision has requested Verizon proprietary information shared with the LFA as part of the franchise negotiations. This information includes construction and service details, maps of service areas, and pricing information. The abusive nature of Cablevision's activity is made even clearer because Cablevision can obtain the information it seeks by other means later in the administrative process. Under New York law, the public has the right to a copy of Verizon's proposed franchise agreement, along with all negotiation materials, once Verizon submits a formal franchise application.¹²⁵ Cable operators have similarly slowed the franchise process by demanding the opportunity to review franchise applicants' proprietary information, including actual dates of construction, services to be delivered, maps of service areas, and pricing information. These types of demands have been made by Comcast in Manatee, Fla.; by Charter Communications in Keller, Tex.; and by Cablevision in Massapequa Park, N.Y.¹²⁶

3. False and Misleading Information

Groups backed by incumbent cable operators have distributed false and misleading flyers and advertisements about FiOS to residents. In Massapequa Park, such distributed flyers claiming that Verizon's new network facilities are "eyesores" that "can block your vision" and will diminish "your property values and the beauty of your neighborhood." Incumbent cable companies have threatened other LFAs considering Verizon's franchise applications with similar measures.¹²⁷

both cable providers in order adequately to determine whether one has been favored over the other."); *Insight Comm. Co. v. City of Louisville*, No. 2002-CA-000701-MR, WL 21473455, at *3 (Ky. Ct. App. 2004) (quoting *United Cable*); *Cable TV Fund 14-A, Ltd. v. City of Naperville*, No 96 C 5962, 1997 WL 280692, at *12 (N.D. Ill. May 21, 1997) (level playing field statute requires "terms and conditions under a new franchise that, when considered as a whole, are no more favorable or less burdensome than the total package of the terms and conditions under the existing franchise"). We are aware of no contrary authority.

¹²⁴ See Letter from Clem Maddox (Comcast) to James Kunke (Community Relations Manager, Lewisville, TX) (April 28, 2005); Letter from Jeffrey M. Clark (Cablevision) to Eugene A. Scarpato (Mayor, Lynbrook, NY) (July 14, 2005).

¹²⁵ See 16 NYCRR § 894.2(c)(1).

¹²⁶ See also, e.g., Letter from D. Heitz (Comcast) to L. Moss (City Manager, Murrieta, CA) at 1 n.2 (April 18, 2005).

¹²⁷ O'Connell FCC Decl. ¶ 61.

4. Exorbitant Franchise Conditions on New Entrants

Incumbent cable operators have engaged in a coordinated¹²⁸ attempt to impose and enforce illegal “level-playing-field” laws that have saddled new entrants with burdens that further deter entry.¹²⁹ These laws purport to prohibit the granting of competitive franchises on terms more generous than the terms of the incumbent’s franchise even when the incumbent agreed to franchise terms beyond the authority of the LFA to require. As the FCC has observed, such laws are poor policy because they “ignore[] that incumbent and competitive operators are not on the same footing.”¹³⁰ It has also found “troubling . . . evidence that suggests incumbent cable operators use ‘level-playing-field’ requirements to frustrate negotiations between LFAs and competitive providers, causing delay and preventing competitive entry.”¹³¹ Verizon has experienced such frustration in numerous negotiations with LFAs.¹³²

5. Denying Access to Programming

Incumbent cable operators have prevented Verizon from acquiring programming content owned by their affiliates on the same terms that the programming is made available to others. Denying access popular programming on reasonable terms is a tactic that goes back decades¹³³ and that can become a significant barrier to competitive entry.

An illustrative example is provided by the case of Rainbow Media, a subsidiary of incumbent Cablevision that owns numerous cable channels. In January 2005, Verizon first approached Rainbow about obtaining access to seven of its programming networks for FiOS TV.¹³⁴ In May 2005, Rainbow sent Verizon a draft agreement for obtaining carriage of AMC, one of its seven networks. Verizon understood at that time that the AMC agreement would serve

¹²⁸ For example, when California was considering reforms to its level-playing-field statute, Adelphia, Charter, and Cox sent nearly identical form letters objecting to the reforms.

¹²⁹ See Thomas W. Hazlett & George S. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the ‘Level Playing Field’ in Cable TV Franchising Statutes*, 3 Bus. & Politics at 21(2001) (“In theory, it was designed to ensure that the second cable franchise wouldn’t get more favorable treatment than the incumbent. But in the ten states where such legislation has been enacted, many cable newcomers contend it has enabled incumbents to manipulate the franchising process. Often at the established company’s urging, local governments hold public hearings and conduct extensive studies on the impact of so-called overbuilders. In the end, communities frequently end up imposing more burdensome financial obligations and construction schedules on second cable systems.”).

¹³⁰ *Section 621 Order* ¶ 48. The FCC has partially preempted local level-playing-field rules, *see id.* ¶ 138, but has not yet acted with regard to state laws imposing similar requirements, *see id.* ¶ 1 n.2 — although its policy analysis applies equally to state laws.

¹³¹ *Id.* ¶ 138 n.476.

¹³² E.g., D. Searcey, *Spotty Reception: As Verizon Enters Cable Business, It Faces Local Static*, Wall St. J. at A1 (Oct. 28, 2005); O’Connell FCC Decl. ¶ 63.

¹³³ See 1992 Act, 47 U.S.C. § 533(f)(2)(B) (directing the FCC to prescribe rules to address this problem by “ensur[ing] that cable operators affiliated with video programmers . . . do not unreasonably restrict the flow of the video programming of such programmers to other video distributors”).

¹³⁴ Among the seven were three national cable networks: AMC, the Independent Film Channel (“IFC”), and Women’s Entertainment (“WE”); three regional sports networks: Fox Sports New York, MSG, and Fox Sports New England; and the Fuse music network. Through Rainbow, Cablevision wholly owned all of these networks except for Fox Sports New England, of which it owned 50 percent.

as a model for additional networks, WE and IFC, as well, and that the other networks would be handled separately.

Negotiations proceeded through June and July of 2005, but on August 12, 2005 Rainbow circulated a revised draft with a new provision with a major substantive change. This new provision required Verizon to obtain “valid *local* franchises” as a condition of carriage of AMC, where the original draft had accepted approval by any “appropriate governmental authority.” (Emphasis added.) It further provided that, where state law abrogates the need to obtain such franchises, Verizon would be required to obtain Rainbow’s “written consent” to continue distributing those channels, which Rainbow “may provide or withhold in its sole discretion.” This new language coincided with the passage of Texas’s statewide franchise legislation through the state legislature, which took place on August 10, 2005.¹³⁵

The nature and timing of Rainbow’s demand for local franchises shows its anticompetitive objective. As an owner and distributor of programming, Rainbow should be indifferent whether Verizon is authorized to enter video markets at the state or local level. But as a subsidiary of an incumbent cable operator, Rainbow recognized the greater competitive threat to its parent from Texas’s streamlined franchising statute. Despite Verizon’s immediate objection to the new language requiring local franchises, Rainbow refused to remove it until December 15, 2005. Even after that, Rainbow insisted on new and less favorable terms, including mandatory carriage of a new HDTV network called VOOM at an exorbitant price¹³⁶ in order for Verizon to gain access to AMC, WE, and IFC.

In addition to the difficulties that Verizon had negotiating directly with Rainbow, Verizon has experienced additional problems in its attempts to obtain access to Rainbow’s programming through the National Cable Television Cooperative (“NCTC”). NCTC is a cable programming and hardware buying cooperative that represents more than 1,100 independent cable operators that serve more than 12 million subscribers.¹³⁷ NCTC negotiates and administers agreements with cable programming networks on behalf of its members. Although a network’s approval is required for an NCTC member to take advantage of one of these agreements, approval is routinely granted to members in good standing. Nevertheless, when Verizon attempted to obtain access to Rainbow programming through NCTC, Rainbow representatives told Verizon that Rainbow would refuse to approve the agreement. Despite repeated requests, however, Rainbow refused to put its refusal in writing.

¹³⁵ See S.B. 5, 2005 Leg., 79(2) Sess. (Tex. 2005), <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=792&Bill=SB5>.

¹³⁶ Rainbow demanded \$4.85 per subscriber for VOOM, which is several times the price the most popular cable networks command, and also demanded that it be carried on FiOS’s basic tier. Both VOOM’s price and the capacity required to transmit an HDTV channel to every FiOS subscriber made this proposition highly unattractive. No other cable operator carries VOOM except for EchoStar, which owns 20 percent of the network (Rainbow owns the other 80 percent).

¹³⁷ See National Cable Television Cooperative, *Welcome to nctconline!*, <http://www.nctconline.org/>.

Ultimately, Verizon filed a program access complaint with the FCC. On October 30, 2006, Verizon and Rainbow finally reached a settlement under which Rainbow agreed to provide Verizon carriage rights for its RSNs.¹³⁸

6. Cable Has Pressured Landlords To Exclude Wireline Competitors

Incumbent cable operators have also used exclusive agreements with landlords of multi-dwelling units as a means to exclude competition. Verizon has encountered numerous situations around the country where it has been prevented from competing for the business of residents of such units by lengthy or even perpetual contracts that bar it from laying the fiber necessary to serve those residents.

a. In May 2006, Verizon received a letter from counsel to Bright House Networks, LLC, asserting that Bright House had an exclusive right to provide video services to residents of a property in Tampa, Fla. for ten years. In June 2006, Bright House's counsel asserted that the agreement gave Bright House "the exclusive right to build a multi-channel video service system on the property and the exclusive right to provide multi-channel video services to the property."¹³⁹ Verizon employees conducted a survey of property owners in the areas in Tampa, Fla. served by Bright House, and found that approximately 42 percent of the multi-dwelling units surveyed were covered by similar exclusive contracts.

b. Incumbent Comcast has been obtaining exclusivity agreements in the Washington, D.C. metropolitan area, and has signed two such agreements in Bethesda (the Kenwood Place condominiums and Topaz House apartments). These agreements give Comcast "the exclusive right and license to construct, install, operate and maintain multi-channel video distribution facilities on the Premises (whether by cable, satellite, microwave or otherwise) and to deliver the Services to the Premises, unless otherwise required by applicable law."

7. Refusal To Interconnect

As a new entrant, Verizon is typically required to mirror the incumbent's obligation to provide public, education, and government ("PEG") programming. In order to provide such programming, Verizon typically must interconnect its network with the incumbent's, in order to obtain that programming to deliver it over Verizon's system. Cable operators frequently refuse to provide such interconnection on reasonable terms, however, in an effort to raise Verizon's cost of entry. Even in those jurisdictions where PEG interconnection is mandated by law, such as New Jersey, the cable industry has been slow in responding to Verizon's interconnection requests, and at least one cable operator – Cablevision – has rejected them outright. In New Jersey, state regulators have been forced to intervene in order to require the incumbents to meet their statutory obligations.

¹³⁸ See *Verizon Telephone Companies and Verizon Services Corp. v. Cablevision Systems Corporation and Rainbow Media Holdings, LLC*, Order, 21 FCC Rcd 13387, ¶ 1 (2006).

¹³⁹ See Letter from Benjamin J. Shin, Sabin, Bermant & Gould LLP, to James C. Stroo, Associate General Counsel – Mass Markets, Verizon, re: River Chase Apartments in Tampa, FL (June 13, 2006).

a. Verizon and Cablevision have conducted two mediations under the auspices with the New Jersey Board of Public Utilities (BPU) but remain far apart as Cablevision continues to demand support for all PEG operations (studio, programming, transport, etc.) contrary to New Jersey law.¹⁴⁰ A formal BPU proceeding is likely given Cablevision's recalcitrance.

b. While Comcast and Verizon have achieved interconnection agreements in other jurisdictions, most notably in Massachusetts, Comcast refused requests to meet or discuss PEG interconnection in New Jersey prior to the involvement of the BPU, which conducted an initial mediation in early October. That mediation was unsuccessful because Comcast refused to interconnect at reasonable a point where Verizon could construct its own direct connection to the PEG origination sites.

c. With the assistance of the BPU, Verizon and Time Warner have agreed to non-pricing terms and conditions, as well as a technical plan for interconnection for all Time Warner properties (14 communities) in New Jersey, but Time Warner has demanded excessive compensation for such interconnection.

8. Other Anticompetitive Acts by Incumbent Cable Operators

Incumbent cable operators have interfered with competitors' efforts to hire contractors¹⁴¹ and to obtain equipment from manufacturers.¹⁴² In reviewing allegations of predatory pricing by incumbents, the FCC has found that incumbents "have the incentive and ability to target pricing in an anticompetitive manner," and in some cases "may well have engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition."¹⁴³

¹⁴⁰ New Jersey law expressly limits the cable incumbent to recovery of one half of the "absorbed costs for extension" of its network to provide interconnection. Cablevision has demanded compensation for costs that go well beyond extension of its network, and include payment for its PEG studio, internal network, and other costs.

¹⁴¹ See, e.g., Petition of RCN Telecom Services, Inc., To Deny Applications or Condition Consent at 17, *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Docket No. 02-70 (FCC filed Apr. 29, 2002) ("RCN is aware of no less than fifteen (15) contractors in the Philadelphia market – representing virtually all of the viable construction and installation contractors in the area – whom Comcast or, prior to its acquisition by Comcast, Suburban Cable, have prevented or tried to prevent from doing business with RCN.").

¹⁴² Reply Comments of WideOpenWest Holdings, LLC at 8-9, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 00-129 (FCC filed Oct. 11, 2001) ("In recent discussions with two of the few manufacturers of video-on-demand servers, WideOpenWest was informed that the manufacturers' products were unavailable in any market where WideOpenWest competes with a named incumbent MSO.... Where the incumbents do not have exclusive deals with vendors, they may still use their dominance in the marketplace to dissuade vendors from offering services to competitive providers. For example, it was recently alleged that AT&T fired a local installations vendor in Utah that apparently agreed to perform services for a small competitive cable system owned by the City of Provo.").

¹⁴³ See *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246, ¶¶ 120-121 (2002) ("*AT&T/Comcast Order*") (Cable companies "have the incentive and ability to target pricing in an anticompetitive manner," and AT&T and Comcast "may well have engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition.").

In September 2002, the Department of Justice confirmed that it was investigating an unnamed cable company for predatory pricing practices.¹⁴⁴ That same year, wireline competitor WideOpenWest (“WOW”) filed a complaint with the FCC alleging that Comcast is improperly targeting price reductions in the areas that WOW serves in Warren, Michigan.¹⁴⁵ According to WOW, Comcast was attempting to negotiate private rates with select subscribers that are so low that “they wouldn’t be able to stay in business if everyone in the market got that deal.”¹⁴⁶ The FCC dismissed the complaint, stating that WOW had not demonstrated “systematic abuses that undermine the statutory objectives,” a threshold established for invocation of the Commission’s enforcement authority regarding cable customer service rules.¹⁴⁷

¹⁴⁴ P. McClintock, *DOJ Focused on EchoStar/DirecTV*, *Daily Variety* at 8 (Sept. 20, 2002); see also *Overbuilders Ask LFAs to Deal With Predatory Pricing by MSOs*, *Communications Daily* (Apr. 5, 2002).

¹⁴⁵ See *Complaint Against Comcast Corporation*, File No. EB-02-MD-033 (FCC filed May 23, 2002); B. McConnell, *Has Comcast Got a Deal For You*, *Broadcasting & Cable* at 18 (Dec. 2, 2002).

¹⁴⁶ See B. McConnell, *Has Comcast Got a Deal for You*, *Broadcasting & Cable* at 18 (Dec. 2, 2002).

¹⁴⁷ *Complaint Against Comcast Corporation for Systemic Abuse of Customer Service Standards Established by the Federal Communications Commission Pursuant to Section 632(b) of the Communications Act of 1934, as Amended*, Memorandum Opinion and Order, 19 FCC Rcd 702, ¶ 1 (2003).