Testimony of

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TESTIMONY OF
DAVID L. COHEN
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BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
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"RECONSIDERING OUR COMMUNICATIONS LAWS:
ENSURING COMPETITION AND INNOVATION"
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Thank you, Mr. Chairman and Members of the Committee.
This Committee has a long history of overseeing developments in communications industries and the Internet, and you have diligently promoted policies to ensure competition in these markets.

We welcome this chance to talk about the state of competition in communications, to present our views on proposals for new and dangerous so-called "network neutrality" regulation, and to discuss video programming issues, including program access and program content. I will share Comcast's perspective and experience in hopes of demonstrating why there are no problems with the Internet or video businesses that require new government regulation, that any regulations intended to prevent future perceived problems will likely do more harm than good, and, finally, that any risk of actual harms are already fully addressed by existing laws.

I think it is important to begin by describing the competitive state of the video and broadband marketplace. There are three points that apply equally to the Internet and the multichannel video markets.

First, these markets are functioning extremely well today. Almost every home in America can choose from at least three multichannel video providers, and with the entry of the Bells into video, those choices will grow. Since 1992, the number of cable programming networks has grown from about 100 to nearly 500, while the percentage of networks affiliated with a cable operator has decreased from over 50% to approximately 20%; and, in less than a decade, broadband networks have been deployed to over 90% of all U.S. households, and 84 million American adults now have a broadband connection in their homes. In our view, this robust competition is proof positive of the well-known, if ungrammatical, maxim: "If it ain't broke, don't fix it."

Second, any new regulation will harm business and consumers by reducing investment in facilities-based competition and will most certainly trigger the law of "unintended consequences." And, as the Washington Post noted this week, new regulations would stifle innovation: "If you want innovation on the Internet, you need better pipes: ones that are faster, less susceptible to hackers and spammers, or smarter in ways that nobody has yet thought of. The lack of incentives for pipe innovation is more pressing than the lack of incentives to create new Web services."1

Third, current laws -- and especially the antitrust laws -- provide appropriate safeguards if any are needed above and beyond the role of market forces.

We face intense and growing competition in every business we are in. And competition has regulated us far more swiftly and effectively than the laws passed in 1992.

As legislators, you understand accountability. You must stand for election once every six years. Our constituents vote every month, when they pay their bills. And every time they walk into an electronics store, pick up their Sunday paper, check their mail, or watch a ballgame, they see us and our competitors fighting for their vote. This is a vigorously competitive marketplace that is working to benefit consumers. There is no need for new laws and regulations.

With that, let me turn to the worst new idea in Washington: regulating the Internet under the cloak of so-called "network neutrality."

I. INTERNET REGULATION/"NETWORK NEUTRALITY"
Perhaps one of the fastest growing uses of broadband Internet services is to carry the gigabits of documents full of opinions about something called "network neutrality."

Much of the discussion has been overblown, and, as Professor David Farber of Carnegie Mellon University recently observed, the companies that "forecast the death of the Internet as we know it, unless their favorite bill gets passed, [are shedding] lots of heat, [but] not much light."2 I will try to provide some light here today.

My main request would be that Congress continue to place its faith in pro-competitive, deregulatory communications policies. I urge you to let the marketplace continue to work its magic, backstopped -- as always -- by the antitrust laws.

More specifically, first, I think it is beyond dispute that high-speed Internet access services (which I'll generally refer to as "broadband services") are an enormous success, and that this success has occurred largely because of deregulatory policies. Second, all of the hand-wringing about potential abuses is based on speculation, not facts, and much of it comes from advocates who have predicted "the end of the Internet as we know it" for years -- and who have been consistently wrong. Third, regulation of the sort that is being proposed will have many concrete, adverse consequences, and no real benefits.

A. Cable Deregulation Has Been a Crucial Element in the Emergence of Residential Broadband Services.
It is widely acknowledged that the development of broadband services is one of the biggest success stories in the history of communications. What is less commonly known is how deregulation fostered the massive investments in network infrastructure that first we, and then our competitors, made in order to develop and deploy broadband access services.

Recall that when Congress decided to put the cable industry under heavy economic regulation in 1992, investment capital dried up, which stunted our ability to rebuild and improve our networks.3 Those regulations also froze the development of new programming and services.4

But then Congress passed the Telecommunications Act of 1996 (the "1996 Telecom Act") and removed the most onerous forms of rate regulation for cable companies.

Suddenly, Wall Street had renewed faith in our industry, and private risk capital began to flow. Over the next decade, the cable industry invested over $100 billion to improve our networks -- investment that made it possible for us to offer digital video services, videoon- demand ("VOD"), high-definition television ("HDTV"), voice-over-Internet-protocol ("VoIP"), and residential broadband service.6 Compared to the Internet access services available prior to cable's introduction of broadband -- a dial-up telephone connection that typically operated at speeds of 14.4, 28.8, or 53 thousand bits per second -- "cable modem service" or "high-speed cable Internet" operated at 1.5 million bits per second -- and today, four to six times faster than that! In other words, thanks to private investment and risk-taking,7 consumers were suddenly being offered a new service that operated 50, 100, and now as much as nearly 150 times faster.8

When cable achieved this great success by being the first to introduce high-speed Internet services and stimulating consumer demand, the telephone companies -- also known as "incumbent local exchange carriers" or "ILECs" -- were quick to follow and introduce their own residential broadband service, known as "digital subscriber line" ("DSL") service. As a Federal Communications Commission (the "FCC") staff report explained:
The ILECs' aggressive deployment of DSL can be attributed in large part to the deployment of cable modem service. Although the ILECs have possessed DSL technology since the late 1980s, they did not offer the service, for concern that it would negatively impact their other lines of businesses. The deployment of cable modem service, however, spurred the ILECs to offer DSL or risk losing potential subscribers to cable. In various communities where cable modem service becomes [sic] available, the ILECs would soon deploy DSL service that was comparable in price and performance to the cable modem offering. Thus, prior to cable modem deployment, the ILECs had little incentive to deploy DSL and the consumer had no choice for high-speed Internet access.9

Thus, from the start, this has been a marketplace in which deregulation begets investment, and investment begets competition.10

More recently, of course, the telephone companies have recognized that their old copper plants cannot deliver the kinds of transmission speeds that attract broadband enthusiasts, and the ILECs are now investing in massive fiber builds to try to catch-up with cable. Cable Internet and DSL are becoming more ubiquitous, and consumers are signing up in droves. According to one recent report, 84 million American adults now have broadband services at home, up 40 percent just in the past year.

And, while most residential broadband users today are using cable Internet and DSL services, other broadband modalities are developing rapidly. The promise of broadband over powerlines was illustrated just last month when several companies, including General Electric, invested in Current Technologies.13 Meanwhile, DIRECTV and WildBlue are making massive investments in broadband over satellites;14 several wireless carriers are rolling out third-generation wireless services -- combining broadband with a mobility component;15 and unlicensed technologies such as Wi-Fi and Wi-Max offer yet another broadband possibility.

No wonder, then, that the FCC has recognized the "significant development of new Internet-based services, and new access technologies," cited the "proliferation of new advanced telecommunications networks and services," and emphasized that "multiple advanced broadband networks can complement one another in bringing advanced telecommunications capability to all consumers."17

Importantly, the FCC also perceived the value of multiple, competing, differentiated networks, and the role of pro-competitive, deregulatory policies in bringing this about:
Having multiple advanced networks will also promote competition in price, features, and quality-of-service among broadband-access providers. This priceand-service competition, in turn, will have a symbiotic, positive effect on the overall adoption of broadband: as consumers discover new uses for broadband access at affordable prices, subscribership will grow; and as subscribership grows, competition will constrain prices and incent the further deployment of new and next-generation networks and ever-more innovative services. Minimal regulation of advanced telecommunications networks and services is needed to ensure that this happens.

Let's give credit where it is due. The success of broadband also owes much to the great many companies, other organizations, and individuals that have created services and applications to exploit the potential of broadband. They, too, play an important role in keeping broadband investment growing and broadband subscribership increasing.

Google, Amazon, eBay, and Microsoft have all contributed to the demand for broadband services, and, as their multi-billion dollar revenue streams and market capitalizations reflect, they have reaped rich rewards for doing so.

They, like we, were encouraged by another important feature of the 1996 Telecom Act, Congress's far-sighted decision to look to competition, not regulation, to govern the evolution of Internet services. No provision of the 1996 Telecom Act was more important, or wiser, than the decision to make it the "policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."19 Of course, Congress's embrace of this policy did not discourage a few nay-sayers from seeking to impose regulatory restrictions on cable Internet almost from the day it

was it first launched. But the FCC resisted those entreaties,20 as has Congress, and broadband investment, innovation, subscribership, and utility have been growing ever since. It is difficult to imagine any other development of the past decade that has done so much to improve Americans' quality of life or the growth of the economy.

B. There Is No Basis for Congressional Intervention in the Marketplace.

It is a sad and perverse truth that, so long as some people will build networks, other people will try to regulate them. For the past several years, we have been fighting off proposals for "network neutrality," a term that I prefer not to use because it is inherently misleading. The term has been kicking around for several years, and it never means the same thing twice. It is the sheep's clothing donned by those who want to regulate the Internet for their own purposes.

Proponents of regulation say that there is "a problem" in the broadband marketplace. At least they have been consistent about that! I saw a "Net Neutrality Scare Ticker" on the Internet that says, "Did you know it's been 1300 days, and there's still no net neutrality problem."21 That's how long it has been since Microsoft, eBay, and others announced the creation of the "Coalition of Broadband Users and Innovators." Nearly four years after they first said "the sky is falling," there still aren't any pieces of sky on the ground.

That is why I believe that the best thing you can say about "network neutrality" is that it is a solution in search of a problem.22

And it didn't all start in November 2002. The roots go deeper. You can find the same kinds of overheated rhetoric and apocalyptic predictions in an Amazon filing in June 200223 and throughout earlier FCC debates over "interactive television" in 2001,24 "advanced instant messaging" in 2000,25 and "forced access" proceedings that started in 1999.

After all of this time, what is the evidence of abuse? One, single, small telephone company that no one ever heard of was found to be blocking Vonage's VoIP calls -- and within days of the complaint, the telephone company had ceased such conduct.

In the four years since these dire predictions, the Internet companies that have cried out for regulation of the Internet to save their businesses have enjoyed unprecedented prosperity. Google, which was only starting to get popular in 2002 and was not a publicly-traded company, now has a market cap of approximately $125 billion;28 Yahoo!'s market cap doubled from approximately $25 billion in 2003 to over $59 billion in 2005;29 and eBay's market cap has gone from $34.2 billion in 2003 to $61 billion in 2005.30 As the chart below demonstrates, the leading proponents of regulation have seen their revenues, net income, and profits explode since 2002:

	2003 Data	2005 Data	Percentage Change
AMAZON			
Revenue	$5.26 billion	$8.49 billion	61.41%
Net Income	$35.3 million	$333 million	843.34%
Profit	$1.33 billion	$2.16 billion	62.41%
GOOGLE			
Revenue	$1.47 billion	$6.14 billion	317.69%
Net Income	$105.7 million	$1.47 billion	1290.73%
Profit	$895.1 million	$3.86 billion	331.24%
MICROSOFT			
Revenue	$32.19 billion	$39.79 billion	23.61%
Net Income	$9.99 billion	$12.25 billion	22.62%
Profit	$27.94 billion	$34.44 billion	23.26%
YAHOO!			
Revenue	$1.63 billion	$5.26 billion	222.7%
Net Income	$243.8 million	$1.90 billion	679.33%
Profit	$1.37 billion	$3.45 billion	151.82%
EBAY			
Revenue	$2.17 billion	$4.55 billion	109.68%

Net Income $454.8 million $1.08 billion 137.47%
Profit $1.86 billion $4.02 billion 116.13%

Should hands-off policies that have successfully stimulated hundreds of billions of dollars worth of investment be jettisoned because one company once blocked some VoIP calls? I think the answer is obvious: no! In fact, the Administration recently opined that adopting such regulations would be premature.

And, once the "regulatory creep" begins, where would it stop? How could Congress ignore Microsoft's dominant position in computer operating systems and in Internet browsers, Google's dominant position in Internet searches, eBay's dominant position in on-line auctions, or Amazon's dominant position in online retailing of books (and a growing number of other products)? In each of these areas, there is plenty of basis for speculating about potential "abuses," and in some respects the potential for abuses is not entirely hypothetical.

For example, Microsoft bundles and integrates more and more of its applications with its own operating system -- a "layer" of the Internet over which it continues to have great dominance -- and Google has complained that Microsoft's new Internet Explorer 7 browser, which arrives preinstalled in virtually every computer currently sold, defaults to MSN Search;32 Google and Yahoo! give prominence to paid search results over other search results;33 and Yahoo! has a privileged position above all others as the portal on AT&T's and Verizon's Internet services.34 Not one of these practices is neutral.

The companies that are currently telling Congress how "prophylactic" regulation is unintrusive and benign would quickly change their tune if this regulation were expanded to include them.

Let's remember the characteristics of the broadband marketplace that we are talking about here. There are still tens of millions of dial-up customers that we and other broadband providers would like to persuade to purchase broadband services. Will they make that switch to an Internet service provider who blocks access to content, prevents use of applications, or precludes attachment of devices? Of course not.

If Comcast were to try to "deny, delay, or degrade" the Internet experience that our more than nine million cable Internet customers have paid for, how can we possibly expect to keep them as customers, much less attract new ones? We have a proven track record.

We have never blocked our customers' access to lawful content and we repeatedly have committed that we will not block our customer's ability to access any lawful content, application, or service available over the Internet.

Remember, cable Internet is the premium service. We may charge more than DSL because cable Internet is worth more. We provide faster speeds and better reliability, and we have no intention of diminishing the value of our service by denying consumers the wonderful freedoms of the Internet they have come to expect. Since we began offering our cable Internet service, we have consistently increased our transmission speeds, without a corresponding increase in price, in order to meet consumer demand. Any provider that does not meet the needs of users will suffer a serious backlash from consumers and policymakers.

That is the way that competitive markets work. Our business is intensely rivalrous with DSL today, and we expect it to be even more so as we face increasing competition from the Bell companies' expanded fiber optic deployments, wireless broadband, satellite broadband, broadband over powerlines, and Wi-Fi and Wi-Max.

What if competition weren't working? Broadband providers remain subject to the antitrust laws. And, though there is no pattern of anticompetitive abuses, and there is no reason to expect that any provider will obtain substantial and sustained market power, the fact remains that antitrust enforcers are on the job.

The Sherman Act provides legal bases to challenge conduct that is alleged to be anticompetitive or harmful to consumers, whether the harm is the result of horizontal concentration or vertical integration. Section 1 of the Sherman Act prohibits concerted action that restrains trade. Section 2 of the Sherman Act prohibits any conduct that

amounts to an attempt to monopolize. Of course, no claim under the antitrust laws can be made in the absence of market power, which does not exist in today's broadband marketplace and is almost certain not to exist tomorrow.

In addition, the Federal Trade Commission (the "FTC") and Department of Justice (the "DOJ") have substantial authority to investigate and enforce conduct alleged to be anticompetitive. For example, under Section 5 of the Federal Trade Commission Act, the FTC can prospectively enjoin conduct that it determines is an unfair method of competition, even when that conduct may not violate the antitrust laws. In fact, the FTC has already asserted "jurisdiction to investigate and bring cases involving broadband Internet access services, including cable modem and DSL services."36 Thus, proponents of "network neutrality" regulation are asking Congress not only to regulate in the absence of a problem, but also to ignore existing legal safeguards.

Antitrust laws are by far the best way to address any occurrence of the kinds of problems that network neutrality proponents say they are concerned about. As four distinguished scholars recently explained:

Current proposals would affect all broadband providers regardless of whether they wield monopoly power and without any analysis of whether the challenged practice actually harms competition. In the process, they threaten to restrict a wide range of innovative services without providing compensating customer benefits. The problem is that it can be difficult, if not impossible, to determine in advance whether a particular practice would promote or harm competition.

Current antitrust law solves this problem by blocking practices only when those who oppose them can demonstrate actual harm to competition. We believe that such a case-by-case approach that focuses on actual, rather than potential, harm to competition represents the best way to protect consumers while giving the Internet the breathing room it needs to move forward. Blanket regulation, which some network neutrality initiatives support, is not a good policy choice.37

C. "Network Neutrality" Regulation Would Address Hypothetical
Problems, but Would Cause Real Harms.
Because proposals for "network neutrality" regulation vary, so would the effects. Still, any such unnecessary regulation will cause significant harms. For example, such regulation would:

Deter Investment.
Investment capital goes where it is welcome, as is vividly demonstrated by the results of regulation and deregulation in the cable industry. But, as one senior financial analyst recently warned Congress, "Mandated 'Net Neutrality' would further sour Wall Street's taste for broadband infrastructure investments, making it increasingly difficult to sustain the necessary capital investments."38 Another senior financial analyst explained: I believe that it is too early to introduce regulation on . . . net neutrality as the market is still in its early stages. Instead, I feel that at this point it is essential that market forces and consumer demand drive the economic model. . . . [T]here are profound risks of unintended consequences in the event that key fundamental aspects of today's landscape are regulated at such an early stage of development, innovation, and creativity.39

Hinder Innovation.
Since its introduction, cable Internet service has evolved and improved rapidly. And, so have the myriad services that can be accessed by way of cable Internet. The current dynamic nature of the broadband marketplace allows business models to change overnight, as new approaches are developed to bring new options to consumers. These changes can occur rapidly in large part because regulation does not get in the way. "Net neutrality" regulations would severely hinder such innovation.40 "Literally, 'net neutrality' would result in an increasingly unreliable Internet as more and more highbandwidth applications contest for space on networks that nobody would have an incentive to expand."41

New regulations would likely thwart our ability to offer new services and applications to consumers. It's not hard to imagine a programmer wanting to offer an HD webcast of a popular sporting event, concert, or perhaps a political event. Maybe the next World Cup or the next Olympics will have an HD web component. It is doubtful that in a "net neutrality" world we would be permitted to guarantee the kind of quality control they would need. What about physicians who may want to monitor critical patients, especially in rural areas? Could we offer a guaranteed quality of service for that? What about HD video conferencing for businesses, government, universities or individuals? Real

time, high quality services are difficult in a "best efforts" Internet. What is wrong with letting companies experiment and continue to innovate, while letting the market sort this out for the good of consumers?

Cable companies can best focus on meeting consumer needs when pricing, technical specifications, bandwidth allocations, terms of service, and third-party business relationships are determined by business judgments and customer feedback, not by inflexible government rules. No policymaker could reasonably determine that the business models of 2006 will be the right ones for 2008, 2010, or beyond. This is no time to adopt a regulatory scheme that would "slow innovation and deny the full potential of affordable online technologies."42

Impede Network Management and Consumer Protection.
A broadband provider must make countless decisions about ways to manage its network to provide the best possible experience for its customers and protect them from the many lurking dangers on today's Internet. For example, it must be able to stop viruses; prevent "phishing" (the practice of sending e-mails to end users posing as established businesses to trick the user into relinquishing personal information), "pfarming" (using viruses to automatically transport end users from legitimate websites to phony websites), and other scams; curtail unwanted commercial e-mail (spam); control "rogue modems" (dial-up modems attached to company computers that allow hackers to hijack a company's computer network to make unauthorized calls), and "zombie computers" (computers attached to the network that have been compromised by computer viruses or trojan horses and are used to send spam, commit advertising click-through fraud, and launch denial of service attacks).

Protecting customers and delivering a good Internet experience is not limited to curtailing spam or thwarting identity theft, for example. Another way in which we protect our customers is by assuring that our service can continue to provide a growing range of applications while still effectively supporting the applications our customers have come to expect. This issue is becoming even more critical as new applications, like peer-topeer, take more and more capacity.

Our broadband Internet access service operates over a shared network; thus, use of capacity by one user means that it is not available to another. Capacity is not "reserved" for individual users. Operators manage capacity to assure that all of their customers realize the benefits of their services, using today's applications and those that will inevitably arrive tomorrow. As usage grows, whether from more users or more applications, network operators typically must add capacity to maintain a quality experience. Naturally, there are limits on how much operators can spend to try and maintain general service levels in a "best efforts" service. Therefore, one bandwidth intensive application used by one group of users can have substantial adverse effects on the network's ability to deliver other applications to all users.

All of these decisions often must be made on a moment's notice. If each and every one of these decisions creates a possible cause of action, there is a real danger that network providers will have no choice but to delay taking actions needed to protect consumers.

What the regulatory zealots really want is the ability to challenge, and have the government review, virtually any network management decision a broadband provider makes. Turning day-to-day network management decisions and routine commercial disputes into complaint proceedings, with attendant costs, delays, and second-guessing by a government agency, would surely delay and distort the decisions that must be made for purposes of network management and consumer protection. Those decisions are hard enough as it is, and they are subject to the harsh but unerring discipline of consumers who vote -- every day -- with their wallets. And their solution is to assure that the consumer pays more, rather than having the networks intelligently managed to the benefit of all consumers.

Produce Unintended Consequences.
Decades of experience show that every legislative enactment has unexpected flaws, produces distortions in the marketplace, and generates countless unintended adverse effects. Consider the detailed regime of wholesale relationships the 1996 Telecom Act sought to regulate between ILECs and competitive local exchange carriers in an attempt to promote competition. Crafted and implemented with the best of intentions, the regime consumed years of rulemakings and litigation and led to a distorted marketplace with first too much and then too little competitive entry. It is impossible to find a single policymaker who will claim that this worked out as intended. Why, with far less justification than there was for those rules in 1996, would we want to repeat the experience?43

"Network neutrality" rules would presumably be intended to protect consumers' access to the valuable services that are available today. But such rules may well prevent the next generation of innovative services from ever developing, as current market participants spend the next decade mired in rulemakings and litigation.44 "Google and other Web site operators . . . don't seem to comprehend the legal and political danger they'll face once they open the neutrality floodgates."45

Reduce Competition.
Network neutrality regulation could reduce competition in two ways. First, as Randy May of the Progress & Freedom Foundation has observed, "[r]endering broadband providers perfectly neutral by dictating that they be nothing more than dumb pipes, unable to treat any applications or content that use their network facilities in any way differently, would, in fact, neuter the Net,"46 denying consumers the benefits that flow from competitive differentiation.

Broadband providers would have little incentive to invest in enhancing their networks in order to differentiate their service from their competitors. Second, it would discourage investment in alternative distribution mechanisms, undercutting facilities-based competition, which is the best protection against the development or misuse of market power. Government regulation of communications networks is a disincentive for investment in facilities-based competition.

If potential entrants are forced to offer the same exact service, i.e., transmission service, and cannot differentiate their service in some way, why would they enter a market where they will have to compete based on price against established competitors? They wouldn't.

For all these reasons, and more, "network neutrality" regulations will surely do more harm than good. But there's another important consideration: if "neutrality" is a central tenet of the Internet, there is no justification for regulating Internet access providers while not regulating providers at other "layers" of the Internet, including inputs as to which market power issues are less speculative and the record of real problems is far longer. Once Congress starts down the path of guaranteeing the "neutrality" of the Internet by government regulation, that path would logically lead to regulation of all aspects and all layers of the Internet, a path that is as certain to thwart the policy that the Internet be preserved "unfettered by Federal or State regulation."

II. VIDEO COMPETITION AND PROGRAM ACCESS AND CARRIAGE
Let me turn now to video issues and, in particular, to the subjects of program access and program carriage. I'll also want to say something about program packaging and pricing. Here, too, there are many proposals for greater government interference in the marketplace, and here, too, such proposals ignore key facts and flout common sense.

I think it is useful to begin with "the big picture." Two years ago, the FCC concluded that: "[T]he vast majority of Americans enjoy more choice, more programming and more services than any time in history."48 Two years later, that statement can be made with even more conviction. It is undeniable that American consumers now enjoy access to an unprecedented array of video programming delivered in a growing number of ways by an ever-increasing number of competing providers. Comcast is one of those providers. And in every community that we serve, we are competing with DIRECTV, with Dish Network (EchoStar), often with companies like RCN, Knology, and WideOpenWest ("WOW"), and increasingly with companies like AT&T and Verizon.

This competition has driven our company, and the entire cable industry, to improve. But more importantly, it has given the American consumer the richest cornucopia of video programming in the world, with huge diversity of voices and content, meeting almostevery conceivable need and interest.

A. Video Distribution Is Highly Competitive.
When Congress and the FCC assess competition in video distribution, they have tended to confine their analysis to what they call the "multichannel video programming distributors," or "MVPDs." These include traditional cable television operators, "broadband service providers" like RCN, WOW, and Knology, direct broadcast satellite ("DBS") providers like DIRECTV and Dish Network, local exchange carriers like Verizon and AT&T, providers of Multichannel Multipoint Distribution Service, electric utilities, and satellite master antenna TV systems. Taken as a whole, the growth of these competitors has been extraordinary since Congress passed the 1992 Cable Act. At that time, nearly 14 years ago, Congress foresaw the possibility of significant potential competition from these providers of

multichannel video services, and it took measures to promote that competition. Today, that competition is real, robust, and thriving, as the most recent data from the FCC and other sources affirm.

The most remarkable development has been the growth of DBS. DIRECTV and EchoStar each offer their services to almost every household in the United States, and they have captured over 28 million customers. Each year for the past five years, the DBS companies have added two to three million new customers, while the cable industry in the aggregate has added approximately zero. Each of those two companies is now larger than every cable company in America except for Comcast.

But now, the Bell Operating Companies are also making a large-scale entry into the multichannel video marketplace, and we believe they, too, have the potential to be formidable competitors.

MVPDs are not, however, the only source of video programming. Anywhere from 15-20 million households prefer to rely on over-the-air television. And in several markets, local broadcast stations are banding together to create a multichannel over-the-air alternative offering dozens of cable networks to compete with cable and satellite.

USDTV is now operational in four cities (Albuquerque, Dallas, Salt Lake City, and Las Vegas), and for $19.95 per month provides its customers with 25-40 channels, including all the local broadcast stations (and their HD signals) and many of the most popular cable networks.

We think that the rapidly changing video marketplace compels Congress and the FCC to view "video competition" even more broadly. Today, tens of millions of Americans also supplement their viewing with DVD and videotape rentals and purchases, and Netflix has become a national phenomenon. In addition, an increasing number of Internet streaming and download options are emerging - witness the incredible explosion of services and devices at the Consumer Electronics Show earlier this year. From iPods to mobile phones to digital video recorders, everything is becoming a "video download" device. The problem with television in America is not lack of choice - the problem is how a consumer can manage all of that choice!

In this unbelievably dynamic marketplace, neither Comcast nor anyone else can rest for even a moment. Each and every day, we compete to attract new customers and to keep our existing customers happy. This is why Comcast alone has spent over $40 billion since 1996 to add the channel capacity that allows us to deliver 200 or more video channels to almost every home we pass... and added dozens of international and foreign language channels... and added a dozen or more HDTV channels in every market... and become the industry leader in providing video-on-demand, offering our digital homes over 3000 different programming choices any time, day or night, in every conceivable niche, including more local programming. Every single day, our customers freely choose from our vast array of programming and service options. We have to work hard to remain the first choice of our customers - and the way that we do that is by constantly investing in more capacity so that we can add new programming, new channels, and new features.

In short, the video distribution marketplace is more competitive and diverse than ever.

As Congress looks to the future, it's wrong to view television as we viewed it in 1992 - it's a fundamentally different medium, and it has become fundamentally and irrevocably competitive.

B. Video Content Choices Are Abundant.
The explosion of distribution outlets has launched a corresponding explosion in content.

When the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act") was passed, there were approximately 68 national programming networks (and only a dozen or so regional networks) in operation in the United States.49 The majority of them were owned by cable companies (largely because independent programmers, the broadcast networks, and the Hollywood studios were not willing to invest in cable programming at the time)."50 The average household did not have cable at all, and those that did normally had access to about 36 analog channels of programming.

Fast forward to 2006 - incredibly, there are around 500 full-time national programming networks in operation today, and nearly 100 regional networks as well. The number of "vertically integrated" channels has dropped to 20 percent, and Comcast has a financial interest in only seven percent of the networks that we carry. Eighty-five percent of all American TV households take service from an MVPD, and a typical MVPD household enjoys access to over 200 video channels. In addition, many producers - both majors and independents - are creating programming for video-on-demand, and some may use VOD exposure as a springboard for the creation of new full-time channels.

There are three important reasons for this proliferation of programming choices:
??First, the cable industry's investment of over $100 billion to expand our distribution networks and tens of billions more to improve the quality and diversity of our programming offerings;
??Second, the emergence of DBS and other distribution media to provide additional outlets for programming;
??And third, the freedom that the law has given us to package and promote this programming in "tiers," and to create tiers and packages that respond to consumer demand, make economic sense for our industry, and respond to competition from DBS and other providers.

To elaborate on the third point, it is important to note that having the freedom to create programming tiers and bundles lowers key costs and improves the economics of programming in ways that help to support those hundreds of channels. Program tiers lower transaction costs because it is easier, less confusing to customers, and less costly to cable operators to sell a bundle of services in a tier with a single transaction than to try to sell hundreds of different services on an a la carte basis. Tiers reduce marketing costs because program services sold in a tier do not have to spend as much to market the service (or to retain subscribers) as they would if customers were required to make (and could constantly change) individual purchase decisions for each service. Tiers lower distribution costs because the distribution cost per subscriber is the same regardless of the number of channels delivered, so the more channels subscribed to, the lower the average cost of distributing a channel. Tiers increase the value of advertising because they expand viewership by capturing occasional and spontaneous viewers. And tiers reduce equipment costs because the only way in which to deliver services sold a la carte is to require customers to purchase or lease addressable set-top boxes for every TV in their homes.

The benefits of tiering in this fashion are widely understood and appreciated by both network programmers and would-be programmers. That is why so many of them have so vigorously opposed calls to require distributors to sell programming a la carte. The fact that a la carte would result in consumers paying more for less has been recognized in virtually every informed analysis done to date, including studies by the FCC's Media Bureau, the Government Accountability Office, Bear Stearns, Booz Allen, and Paul Kagan, among others. (The FCC subsequently issued a second report that challenged the results of the first, but, as the Congressional Research Service has concluded, the second report's criticisms of the first are "not supported . . . or cannot be proven."51)

Additional flexibility is provided by the ability to add premium channels and services in various combinations, our pay-per-view and VOD programming options, as well as the new Family Tier that we announced in December and will roll out company-wide over the next few months.

C. Government's Role in the Licensing of Program Content Should Be
Reduced.

Since their inception, DIRECTV, EchoStar, and other competing multichannel video distributors have been guaranteed nondiscriminatory access to all satellite-delivered cable networks. And while they have been free to differentiate their multichannel offerings by entering into exclusive programming contracts with whomever they choose, cable operators have been constrained in how they compete.

Today's video marketplace is substantially changed from the marketplace of 1992. Rather than supporting expansion of existing regulation, today's marketplace undermines the original justification for any regulation.

Policymakers have always understood that market forces are superior to government regulation in enhancing consumer welfare, and that is no less true in the area of video content.

Back in 1992, when DBS had yet to launch its first satellite and sign up its first customer, the cable industry faced little direct multichannel competition. In response to consumer complaints, and in the absence of meaningful alternative

sources of programming, Congress passed strict regulations governing the cable industry. But even then, Congress expressed a strong preference for competition over regulation, and its intention to reduce regulation as competition took hold.

In the years since, multichannel video competition has taken deep root, and today is irreversible. Many of the regulations that currently govern the cable industry were intended to address less competitive market conditions that have long since changed.

Two of those regulations that are relevant to this hearing are the so-called "program access" provisions of the 1992 Act,53 and the "program carriage" provisions of that Act.

The relevant provisions of the program access statute were intended to ensure that national satellite-delivered cable programming services in which cable operators had an attributable financial interest would be made available to the industry's competitors on rates, terms, and conditions comparable to those available to cable companies.

The program carriage provisions were intended to ensure that, at a time when cable companies were perceived to be the sole providers of multichannel services, those companies could not play a "gatekeeper" role through actions that unfairly barred or conditioned distribution of independent programmers.

Program access, implemented into rules by the FCC,55 ensured that fledgling DBS providers and other competitors would have access to programming perceived as critical to their success. These provisions represented a major departure from normal competition policy, which would encourage investment and innovation in exclusive programming. Exclusive programming permits competitors to distinguish themselves from one another. For example, DIRECTV has for several years had exclusive rights to the complete package of National Football League games, which has helped it to distinguish itself from both its cable and satellite competitors and contributed to the company's success.

In adopting program access requirements, Congress clearly did not intend to commoditize all video programming. The statute does not apply to any programming in which a cable operator does not have an attributable financial interest, nor does it apply to terrestrially distributed cable networks (of which there were more than a dozen in operation when the 1992 Act was passed). Nor does the statute require that all programming be sold to everyone or sold at the same price to all distributors. Thus, in adopting this striking exception to freedom of commerce, Congress specifically limited its marketplace intrusion, with full knowledge of what it was doing.

Although it could be said that the program access provisions have been a great success, it would probably be more accurate to say that the marketplace is working. In the 14 years since Congress enacted these provisions, there have been far fewer program access complaints filed with the FCC than either the FCC or Congress envisioned (we estimate fewer than 50 in total), and almost none of these complaints has resulted in a ruling adverse to the programmer - in fact, most have been settled. Importantly, as competition has grown, the number of program access complaints has dwindled, not increased. What is clear in today's marketplace is that national programming networks, whether or not affiliated with a cable operator, desire broad distribution of their services and have every incentive to ensure that as many consumers as possible can see their programming, including the 28 million DBS subscribers and the customers of other MVPD competitors.

Perhaps the most frequently reiterated complaint under the program access rules concerns Comcast SportsNet (Philadelphia). The FCC (twice) and the courts (once) have thoroughly considered and rejected complaints by DIRECTV and EchoStar that Comcast's creation and distribution of this high-quality regional sports network violated the program access rules. All have concluded that Comcast was within its rights to make the economically sound decision to terrestrially distribute this network using a preexisting terrestrial distribution system.57

In refraining from making terrestrial programming subject to the program access rules, Congress sought to preserve the pro-competitive benefits of exclusivity in order to foster new program networks -- especially local and regional program networks which are often delivered most economically by terrestrial means.58 Congress recognized that exclusivity can be pro-competitive because it provides incentives for competing multichannel providers to develop unique video services that let them distinguish themselves from one another in the marketplace.

And while the DBS companies and others have cried wolf for nearly a decade, claiming that the FCC's decision would encourage companies to move their most valuable programming off of satellite (and therefore beyond the reach of the program access rules), the fact of the matter is that that has not happened. In fact, each of the four regional sports networks launched by Comcast since it created the Philadelphia network has been satellite-delivered, again for sound economic reasons.

DIRECTV and EchoStar both claim that Philadelphia professional sports programming is "must-have" programming and that they cannot compete in that region without it. The facts, however, do not support that claim.

Since the mid-Nineties, nearly a hundred local Philadelphia professional sports events have been available on local broadcast stations each year, but the DBS companies did not carry these signals (which are available to them free of charge) until they were required to by federal law.60 It is difficult to understand why, if this is "must-have" programming, they would not bother to carry it for free. These events and others on channels such as ESPN, TNT, and OLN are now available from the DBS companies. For example, in the 2005-2006 seasons, 23 of the 82 Flyers games, 54 of the 162 Phillies games, and 17 of the 82 Sixers games were available or will be available to DBS.

Moreover, based on data from Media Business Corp. (as of September 30, 2005), it is clear that DBS penetration in Philadelphia is higher than or comparable to that in many other urban markets. And in the last five years, the DBS companies have tripled their market share in Philadelphia.

As I noted earlier, most programmers - including cable companies that own programming - want maximum distribution for most of their products. But that should not mean that cable companies, DBS companies, and others should not have the freedom to create and invest in some original and exclusive programming as well, in order to distinguish themselves from one another in the marketplace. In fact, Congress and the FCC should consider that the program access rules (and the corresponding restrictions that now apply to DIRECTV as a consequence of its merger with News Corp.) may now be having the perverse effect of reducing investment by the beneficiaries of these rules (including two of the three largest MVPDs in America, DIRECTV and EchoStar) in original programming - why invest and create when you can have access to someone else's work on the cheap?

D. Program Carriage Decisions Should Be Left to the Marketplace.

The program carriage rules were intended to be a guarantee against the ability of a cable operator, which 14 years ago might be presumed to have "monopoly gatekeeper" status, to bar or handicap independent programming networks from gaining distribution. These rules have almost never been invoked, again largely because the marketplace works.

Anyone who has an attractive programming idea, a sensible business plan, and a willingness to negotiate carriage terms that make sense for both the programmer and the distributor, has had the opportunity to build a business.

In the past year, one company (Mid-Atlantic Sports Network, or "MASN") has filed a program carriage complaint, invoking these little-used provisions of law - the first such complaint ever filed against Comcast. A second company (The America Channel, or "TAC") has steadfastly refused to file a program carriage complaint, but it has attempted to leverage every other opportunity to get the government to force Comcast to carry it.

Let me address the MASN situation first. The Baltimore Orioles, as part of a deal with their affiliate, TCR, and Major League Baseball, created a new sports network -- MASN -- with the intention of carrying Baltimore Orioles games in 2007. And in an unprecedented move that I have characterized as the "original sin" of this dispute, Major League Baseball ("MLB") also granted to the Orioles organization control over the television rights of the new Washington Nationals baseball club, along with the television rights to the games of the Orioles, beginning in 2007. But Comcast SportsNet (Washington/Baltimore) ("CSN") has the television rights to Orioles games through the 2006 season, and it paid millions of dollars for the right to negotiate exclusively for renewal of those television rights and for the right to match any third-party offer received after that period of negotiation expired. For the Orioles and MLB to agree to transfer to MASN the rights to Orioles games for annual license fees, and to declare that the Orioles games would be available only on MASN starting in 2007 without providing CSN the opportunity to match this deal, was a blatant breach of CSN's contractual rights. CSN is pursuing its rights in court.

Meanwhile, TCR filed a complaint at the FCC alleging that Comcast's decision not to carry MASN violates the program carriage rules. We have thoroughly refuted TCR's allegations at the FCC and would gladly provide to the Committee upon request copies of the relevant public documents. To summarize briefly, we showed that the factual bases for TCR's complaint were wholly false and that our current refusal to carry MASN is entirely justified given MASN's excessively high carriage fee and its lack of programming: MASN wants Comcast to pay a carriage fee that is higher than 10 (out of 10) other regional sports networks that we know of that have programming from two professional teams and the only programming MASN offers is the Nationals baseball games. It should be noted that some of TCR's allegations at the FCC were so frivolous and so outrageous that a consultant for Major League Baseball -- which is the business partner of the Orioles -- intervened on his own motion to denounce and refute those allegations.

Comcast wants to carry Orioles and Nationals games. But Comcast also wants to protect the contractual rights negotiated and paid for by CSN. We continue to hope for, and work toward, a timely resolution that is in the best interest of our company, our customers, and the teams' fans. We remain in discussions with MLB and the Orioles to see whether a solution can be found.

Now let me briefly address the complaints by TAC. This is a would-be network that asserts that its inability to negotiate a carriage agreement with Comcast is an absolute bar to its viability. The unavoidable fact is that TAC has done none of the things necessary to establish a viable network. It lacks a secure source of financing; it has not assembled any programming expertise; it has no coherent business plan; and -- most importantly -- it has created no programming. Not surprisingly, TAC has found it difficult to negotiate carriage agreements, except with a few start-up distributors whose businesses are as undeveloped as its own.

TAC asserts that independent program networks cannot succeed without a carriage agreement from Comcast and Time Warner, and it claims that those companies will not work with independent program networks.

In response to the first point, I would refer you to the attached column by C. Michael Cooley of The Sportsman Channel, entitled "How I Started a Network Without Comcast."62 Moreover, there are many networks that have become viable with no cable carriage, reinforcing the point that there are a sufficient number of U.S. MVPD households served by competitors to support such programming.

In response to the second point, marketplace facts refute TAC's assertion. Comcast carries dozens and dozens of independent networks. In fact, it has no choice but to carry a significant number of independent programmers. Not only do our customers demand independent programming, but there aren't anywhere nearly enough affiliated programming networks to fill out our channel lineups.

In fact, Comcast owns an attributable financial interest (which, for purposes of the FCC's rules, can be as little as a five percent stake) in only about seven percent of the channels we carry. In other words, 13 out of every 14 channels carried by Comcast are owned by companies that are completely independent. This should not come as a surprise -- it is our goal, and a competitive necessity, to provide the best programming and the best value for our customers, regardless of who owns or produces the programming.

TAC lacks any basis for invoking the program carriage rules, which is the likeliest explanation for TAC's failure to file a complaint with the FCC. But, that has not prevented it from trying other ways to force Comcast to sign a carriage agreement for TAC's nonexistent network. Only a few weeks ago TAC filed an antitrust lawsuit against Comcast and Time Warner that, among other things, sought to block the defendants' acquisition of Adelphia's cable subscribers. The Adelphia bankruptcy court quickly issued a restraining order enjoining TAC from pursuing its suit and then found TAC in contempt of court when TAC filed a motion with the district court to quash and vacate the bankruptcy court's restraining order. Despite this conduct, we have had continuing discussions with TAC over a long period, and we remain open to a meaningful dialogue. But it is important to remember that TAC is entirely in control of its own fate - and its failure to secure any meaningful carriage commitment from our established competitors suggests that the problem lies not with Comcast, but with TAC's business plan.

III. CONCLUSION

Mr. Chairman and members of the committee, the broadband marketplace is exciting, it is robust and rivalrous, it is wide open to new entry and innovation, and it is working.

Similarly, the video marketplace is the most competitive it has ever been; virtually every consumer in the United States can choose to receive video programming from among three different multichannel video providers, in addition to broadcast stations, the Internet, and an ever increasing number of sources, including telephone companies. If Congress were to reject the lessons of the past decade - and were somehow persuaded that we must now regulate the Internet in order to save it - it would have just the opposite effect. Regulation would chill investment, discourage new networks, and freeze the development of the Internet at a critical time in its evolution.

Similarly, in the video marketplace, if Congress were to ignore the enormous successes that have resulted from deregulation and competition in the video marketplace, including massive investments, robust competition, and abundant choice, American consumers will suffer.

We should not focus on regulating today's networks and services. We should focus on liberating tomorrow's networks, so the Internet and video programming platforms can deliver what consumers want: a vast array of communications, information, and entertainment options that are available anytime, anywhere. That's going to take lots more investment, lots more innovation, and lots more competitive differentiation.

Thank you for the opportunity to testify before this Committee!