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FILED ELECTRONICALLY

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Presentation in CS Docket No. 02-70

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, the Broadband Service Providers Association ("BSPA") submits this notice of an *ex parte* presentation in the above-captioned proceeding.

On September 18, 2002, John D. Goodman (Executive Director, BSPA), Chad S. Wachter (Knology), Edward B. Krachmer (Preston Gates Ellis & Rouvelas Meeds LLP), and I met with James R. Bird, Nandan Joshi, and Kimberly Reindl of the Office of General Counsel; Royce Sherlock, Roger Holberg, Erin Dozier, John Scott, and Patrick Webre of the Media Bureau; and Simon Wilkie of the Office of Plans and Policy, to discuss the potential anticompetitive effects of the proposed merger of Comcast Corporation and AT&T Broadband.

In particular, we discussed how the merger, if approved without conditions, would result in an increase in the frequency and/or severity of discriminatory pricing practices directed at BSPA members through the secret and selective targeting of BSPA member customers. We also discussed how the merger, if approved without conditions, would further constrict BSPA members' access to critical programming, especially programming delivered utilizing new technologies. In addition, we provided an overview of BSPA and its membership.

Meeting Agenda
FCC Media Bureau and Merger Task Force
September 18, 2002

1. BSPA supports prohibitions against Discriminatory Pricing as a condition for the AT&T Comcast Merger.
 - a. Discriminatory pricing behavior needs to be remedied regardless of actual price.
 - b. Current market practice of Comcast is intended to block competition.
 - c. We fully agree with the assertions and issues as presented by RCN and Starpower.
 - d. Similar discriminatory and predatory practices have been experienced by other BSPA Members including Wide Open West and Knology.
 - e. We feel the ultimate remedy needs to have broad application to all LFA and competitive market situations.
 - f. Our recommended condition is as follows:

AT&T Comcast shall notify all customers in a local franchise area and the local franchising authority of all new rates, including promotional rates, offered to any customer in a local franchise area as soon as possible in writing and in all events no later than thirty (30) days after any such rate is offered to such customer.

2. BSPA requests that Program Access conditions be applied to the AT&T Comcast Merger.
 - a. Historical BSPA concerns have focused on satellite and terrestrially delivered content.
 - b. The FCC has acknowledged continuing concern over the use of vertical integration and market power to deny program access and limit competition.
 - c. Current market activity indicates AT&T Comcast will limit program access if given opportunity.
 - i. InDemand decision to limit VOD distribution
 - ii. Preferential InDemand VOD content source contracts
 - iii. Comcast assertion to use VOD as a major new weapon
 - iv. Comcast attempt to lock up VOD content with exclusive contracts.
 - v. Continuing Terrestrial Issues
 - d. Our recommended condition is as follows:

AT&T Comcast shall not use its market power or vertical integration to restrict or influence the availability of programming content to any competitive MVPD regardless of content source, type of program content, or regardless of delivery technology employed.

This would prevent the merged entity, by virtue of its vertical integration or market power, from using program access as a competitive weapon against distribution competition.

Rate Disclosure Conditions Should Be Imposed on the AT&T Comcast Merger to Preserve Cable Competition

Comments Submitted by:
Broadband Service Providers Association (BSPA)
September 18, 2002

We request that the FCC impose conditions on the AT&T Comcast merger related to the use of discriminatory pricing strategies, which are used for the express purpose of eliminating competition. These tactics are predatory in that they use the income from higher rates offered in less competitive environments to eliminate competition where it does exist. These significantly lower rates are neither published nor offered consistently within a local franchise authority.

The BSPA and its members first discussed their growing concern over discriminatory and predatory pricing as part of BSPA's initial comments and testimony regarding the AT&T Comcast Merger. BSPA also discussed these concerns as part of testimony by WideOpenWest's Mark Haverkate before the Senate Judiciary Committee on April 3, 2002. (Text attached) Incumbent cable operators initially denied that they ever employed such practices. When confronted with documentation that proved the activity occurred, incumbent cable operators responded that such conduct was fully justified and normal due to intense competition.

The market behavior of AT&T Comcast did not change and in some regards became more geographically spread and intense. The BSPA again presented its position as part of comments filed with the FCC regarding the Annual Assessment of the Status of Competition in the Market for the delivery of Video Programming, Docket 02-145, and stated:

“1. By Engaging in Secret and Discriminatory Predatory Pricing, Incumbent Cable Operators Undermine Competitive Entry”

“Increasing concentration in the cable industry further facilitates incumbent predatory pricing strategies by providing a larger monopoly revenue base to offset the temporary losses of predatory pricing schemes in select markets. As predatory prices are not sustainable, incumbent cable operators are clearly expecting to recoup such costs through a resumption of monopoly pricing should BSPA members be driven from the market. In some cases, the incumbent monopolist raises rates in nearby communities to compensate for temporary losses in competitive communities.

Incumbent cable operators tend to tailor their response to competitive entry as narrowly as possible, often limiting their rate and cash incentives to customers lost to BSPA members. Making matters worse, these apparent predatory offerings are frequently made in secret and never made public. The secrecy of such offerings permits incumbent

cable operators to limit their losses from their predatory below-cost deals to only the most price-sensitive customers. In addition, because such rates are secret, enforcement of the Commission's uniform rate requirements in communities that have not been certified as competition is thwarted.¹ Regardless of whether all such offerings are below cost, BSPA suggests that the Commission strongly consider whether it wishes to see the multichannel video market develop in this fashion – with large numbers of similarly situated customers, many captive to entrenched monopolists, paying significantly different rates to the same company for the same service.”

“One fact is clear: Incumbent cable operators have reacted to competitive entry in a number of cases with startlingly large rate cuts and/or other special offers. These have included, for example, a 50 percent rate reduction in Kansas City, a 50 percent reduction in Arcadia and Monrovia, California followed by additional offers of every third month free, 33 percent rate reductions in Texas, and churn incentives in Alabama including \$300 cash payments and the forgiving of past-due bills.”

RCN and Starpower have experiencing these anti-competitive tactics in their current operations that compete with Comcast. In response to these circumstances they submitted comments to the FCC on August 14th and August 16th, 2002. The reality is that these anticompetitive practices are not limited to RCN and Starpower but have been experienced by other BSPA members that compete with Comcast and AT&T, including Knology and Wide Open West. Recognizing BSP competition as the real effective long-term threat, Comcast and AT&T have mounted their recent campaigns to stop BSP growth and eliminate this type of competition before it reaches any more markets or potential customers. The BSPA believes that recent activities are predatory and should therefore be prevented with a condition on the merger.

We believe the solution is not rate regulation but full and fair disclosure of all rates offered within an LFA so that all potential customers and the LFA authorities can take advantage of the offers and monitor the equity of rate availability. We feel the following condition would create an appropriate environment of required disclosure for all potentially affected geographic markets.

AT&T Comcast shall notify all customers in a local franchise area and the local franchising authority of all new rates, including promotional rates, offered to any customer in a local franchise area as soon as possible in writing and in all events no later than thirty (30) days after any such rate is offered to such customer.

¹ See 47 C.F.R. § 76.984.

Statement of Mark Haverkate
President and Chief Executive Officer,
WideOpenWest
On Behalf of the Broadband Service Providers Association

Before the United States Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition, and Business and Consumer Rights

“Dominance on the Ground: Cable Competition and the ATT-Comcast Merger”

April 23, 2002

Mr. Chairman, members of the Committee, my name is Mark Haverkate, and I am the chief executive officer of WideOpenWest, a broadband communications company providing residents and small businesses in five states with cable television, high speed internet, and telephone services.

I appear today on behalf of my company, and also on behalf of the Broadband Service Providers Association (“BSPA”), an organization founded in October 2001, and consisting of thirteen pioneering companies committed to building competitive broadband networks in communities across the country.¹

We appreciate your invitation to participate in this hearing. We have great concerns about the proposed merger between AT&T and Comcast, and look forward to discussing them with you today.

Introduction

Ten years ago, neither my company, nor any of the members of the BSPA, existed in the form they do today. Their creation was in direct response to the Telecommunications Act of 1996 – which brought down barriers to competition among telephone, cable, and data service providers – and to advances in fiber optic and other technologies that made it possible to provide all of these services through “one wire.”

¹ The member companies of the BSPA are Altrio Communications, Carolina Broadband, ClearSource, Everest Connections, Gemini Networks, Grande Communications, Knoology, RCN, Seren Innovations, Starpower Communications, Utilicom Networks, WideOpenWest, and WinFirst.

Through this marriage of law and technology, the means has been borne to bring the great benefits of competition to consumers everywhere: as the FCC has proved, where consumers have a choice between providers of communications services, they pay lower prices, get better service, and have a greater range of more advanced offerings to choose from.

For example, WideOpenWest – or WOW as most of our customers call us – began operations in March of 2000, connecting our first customers in the Denver metropolitan market, where we continue to operate a digital cable and high speed Internet system in direct competition with AT&T Broadband. We are proud of the innovation we brought to the residential communications market, being the first cable television operator to champion the cause of open access for ISPs, the first company to offer flat rate unlimited long distance telephone service, and the first company to offer residential Internet customers a choice of three speed and price options.

In November of last year, WOW stepped forward when no one else would to acquire Ameritech's extensive competitive cable television systems in the Midwest markets of Chicago, Columbus, Cleveland, and Detroit. We are now adding digital and Internet services to those networks in order to bring residents there unprecedented – and much appreciated – consumer choice.

My company, and all the members of the BSPA, are bringing these benefits to consumers in dozens of communities around the country today.

Yet we are far from satisfied. Our goal is to expand much further, bringing the benefits of competition to every community that wants it.

To do so, however, we face significant challenges. As we build our systems it is imperative that we:

- Can count on vigorous enforcement of the nation's antitrust laws, to ensure that incumbents do not use their vast market power to stifle competition before it can become fully established.
- Have fair access to video programming that customers want to watch.
- Have fair access to utility poles and conduits.
- Have fair access to residents of multiple dwelling units – often the first toehold for competitors entering a market.
- Are not discriminated against in the application of franchising, tax and other laws.

The proposed merger between AT&T and Comcast has significant implications with respect to each of these areas. Whether that merger occurs, and under what conditions, will therefore have a major impact on whether the promise of the broadband industry is met, and consumers in other parts of the country have real choice in the purchase of cable television and other communications services in the future.

The Proposed Merger Would Reduce Competition

In many of our markets, the incumbent we face is either Comcast or AT&T Broadband. As a group, the members of the BSPA today have franchises to build systems in communities with more than 15 million households – nearly half which are now being provided service by either Comcast or AT&T. For some companies this number is much higher. In the case of WideOpenWest, for example, more than 75 percent of our territory is now being served by

systems owned by either Comcast or AT&T. For other members of the BSPA, that percentage is even higher.

The members of the BSPA are highly concerned about the adverse effects of the proposed merger between Comcast and AT&T. I want to discuss two of the reasons for our position with you today.

First, the merger parties now control several key programming channels that all residential customers want access to. In the future, they will control more, including many sources of interactive and “on demand” programming. Yet they have already shown themselves willing to use their control over that programming for anticompetitive purposes. We fear the merger only will make this situation worse.

Second, the merger parties have also shown themselves to willing to resort to unfair and anticompetitive pricing tactics to prevent us from entering their communities and preserve their own monopolies. We fear that the merger would lead to even greater use of these tactics, in a targeted and coordinated way, with even more devastating results.

Merger Would Reduce Competitors’ Access To Key Programming Services

As the Chairman of the FCC has recognized, “content is king” in the broadband world. Unless a competitor carries what subscribers want to watch, it cannot survive.

Comcast and AT&T today own numerous national and regional programming services that BSPA members need in order to compete. The merger parties have also announced their intention to use their combined resources to gain control over additional programming services. They have also shown that they will use their control over programming as a sword against competitors, and to undermine efforts to enter the merged entity’s markets.

For example, Comcast owns, either in whole or in part, seventeen programming services carried by it and other cable television systems. These services comprise six percent of all those distributed nationally. Some of these services are extremely popular with certain segments of the population.²

These services include three regional sports networks: Comcast SportsNet, which is carried on Comcast systems in the Philadelphia market; Comcast SportsNet Mid Atlantic, which is carried on Comcast systems in the Washington and Baltimore markets; and Comcast Sports Southeast, which is carried on Comcast Systems in various markets in the Southeast. All three networks feature real time sporting events played by local professional and collegiate teams, as well as sports news and discussion shows. Comcast has exclusive rights to much of the programming carried on these networks.³

Comcast also owns two other regional programming services, the Comcast Network and the Sunshine Network,. Its other programming interests include QVC, E! Entertainment, Golf Channel, Discovery Health Channel, iN DEMAND, Outdoor Life, and style.⁴

AT&T holds positions in three national programming services: E! Entertainment, style, and iN DEMAND. It also has equity in three regional ones: Fox Sports New England, New

² *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, ¶ 158, CS Dkt No. 01-129 (rel. Jan. 14, 2002) (“Eighth Annual Report”).

³ *In re Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Applications and Public Interest Statement, at 14 (filed Feb. 28, 2002) (“Applications and Public Interest Statement”).

⁴ Applications and Public Interest Statement, at 15.

England Cable News, and Pittsburgh Cable News Channel.⁵ By virtue of its approximately 25 percent interest in Time Warner Entertainment, it has ownership interests in several more: Home Box Office, Cinemax, Comedy Central, and CourtTV.⁶

BSPA members must have equal access to the programming services controlled by Comcast and AT&T if they are to compete effectively in their markets, and provide the benefits of that competition to consumers.

This is particularly true with respect to the regional sports programming networks, which have long been recognized as “must have” programming. Many potential customers care deeply about sports, and will not subscribe to the service of any competitor that does not carry the sports programming they want to watch.⁷ This fact has been borne out by hard data by BSPA member RCN: according to a survey it conducted, 40-58 percent of cable subscribers indicated that they would be less likely to subscribe to cable service if it lacked local sports programming.⁸

⁵ Applications and Public Interest Statement, at 25. AT&T spun off its Liberty Media subsidiary last summer, and with it AT&T’s attributable interest in numerous additional programming services formerly owned by Tele-Communications Inc. Whether and the extent to which AT&T has exclusive or preferential terms for carriage of these services today is unknown.

⁶ Applications and Public Interest Statement, at 25, 53. AT&T also has a slightly less than 5% ownership interest in Cablevision Systems Corp., which owns numerous important programming services, including American Movie Classics, Bravo, Fox Sports Net, and the MSG Network. *See id.* at 20 & n.27.

⁷ Eighth Annual Report, ¶¶ 171-74; *see also In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, ¶ 183 (“Seventh Annual Report”); *Impact of Sports Programming Costs on Cable Television Rates*, GAO/RCED-99-136, at 3 (June 1999).

⁸ *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, ¶ 184 n.650 (“Sixth Annual Report”).

For the same reason, iN DEMAND is considered an essential offering, since it features not only films and other entertainment programs, but sports packages as well. HBO, too, is considered a “marquee” programming service, and one that competitors must be able to offer their customers.

The other programming services owned by the merger parties are also of great importance to the competitiveness of BSPA members. QVC, in particular, is key because it is the most popular home shopping service on cable television today, and is also a source of revenue for systems that carry it.⁹ Others are as well – at least to certain segments of the population. To individuals in these groups, the ability to watch certain golf tournaments, or more extensive coverage of the Tour de France, is important enough to control their choice of broadband or cable service provider.¹⁰ While the number of such subscribers would vary among service areas, the experience of the BSPA members is that some number of customers in each would cancel their service if they could no longer watch this programming.¹¹ If access to several such services were denied, the total number of customers lost could be highly significant.

⁹ QVC is carried to over 77 million homes. *See* Eighth Annual Report, App. D, Table D-6. Systems that carry QVC are paid a portion of the gross revenue generated from sales to buyers within their franchise areas. Where more than one system serves a particular area, these payments are divided in proportion to each system’s number of subscribers as a percentage of the total number of subscribers within the franchise area.

¹⁰ The Golf Channel is reportedly of immense importance to golf enthusiasts. The Outdoor Life Channel also appeals to core groups of sports enthusiasts; for example, several years ago it obtained exclusive rights to cover the Tour de France bicycle race in the United States.

¹¹ *See* Statement of Brian Roberts, President, Comcast Corporation) (“Golf Channel, people thought nobody would ever want to watch a golf channel. Golf Channel is probably one of the best brands in television if you happen to like golf.”) (joint analyst meeting) (Dec. 21, 2001).

Merger Parties Have Withheld Programming To Defeat Competition

The merger parties have previously shown they are willing to use their control over programming to suppress competition in the market for multichannel video distribution services.

For example, it is well known that access to sports programming is crucial for any new entrant to this market. Comcast knows that, too, so in the late 1990s, when it was establishing Comcast SportsNet, it assiduously refused to allow RCN (or DirecTV or EchoStar) to carry that service on any of its systems in the Philadelphia area. The DBS providers both filed complaints against Comcast with the FCC, but because the programming service is not distributed by satellite, and is instead distributed by terrestrial means, neither was able to persuade the FCC to order Comcast to grant it access to this programming. RCN was able to avoid this fate but just barely – it now has access to SportsNet programming, but only for three months at a time.

AT&T, too, has not been above using its own exclusive access to programming as a sword against competition. For example, in Kansas City the incumbent cable operator – a joint venture between AT&T and AOL Time Warner called Kansas City Cable Partners (“KCCP”) – has refused to allow BSPA member Everest Connections carry “Metro Sports,” a local sports network KCCP has established.¹² This service has exclusive rights to certain popular sports programming, such as the basketball games played by the University of Missouri, other college basketball and football games, professional soccer matches, high school sporting events, and

¹² AT&T and Time Warner are both 50% owners of KCCP. In addition, Time Warner’s interest is mainly held through its subsidiary, Time Warner Entertainment, in which AT&T owns about 25%. *See Applications and Public Interest Statement, App. 7.*

more. Everest's efforts to gain access to this programming service have been stymied by the fact that KCCP distributes it by microwave transmission, not satellite.¹³

Since Everest is not allowed to carry Metro Sports, it is effectively prevented from signing up residents for whom watching sports is a priority. This is true, as Everest's marketing staff has found out, even for residents who are otherwise dissatisfied with service from KCCP.¹⁴ To add insult to injury, KCCP allows Comcast – which provides service in several adjacent suburbs, but which does not compete with KCCP – to carry this programming.¹⁵

The proposed merger could lead to an expansion of the programming tactics Comcast and, to a lesser extent, AT&T have used to impede competition in their markets, and increase the adverse impact of these tactics on both BSPA members and consumers. It would provide an incentive for both Comcast and AT&T to discriminate in the sale of their programming not only to benefit their own systems, but those of their new partner as well. It would also provide additional leverage to obtain exclusive access to programming owned by third parties, which the merged entity could use to pressure its competitors in multiple markets.

¹³ The FCC's program access rules protect – to some extent – competitors' access to satellite delivered programming owned by vertically integrated cable programming vendors. It does not extend to programming delivered by terrestrial means.

¹⁴ Some of the sports programming that appears on Metro Sports is produced by Mizzou Sports Properties ("Mizzou"). Because KCCP has refused to allow Everest to carry Metro Sports, Everest has tried to obtain this programming directly from Mizzou so Everest could produce its own sports programming channel for its systems. Yet, KCCP, anticipating this response, has locked up this programming by means of an exclusive contract with Mizzou.

¹⁵ The communities in the Kansas City metropolitan area served by Comcast include Olathe in Kansas, and Raytown, Independence and other communities in Missouri.

The merger parties have also expressed their intention to develop new programming services, which they have strongly implied they do not intend not to share with competitors. As the parties have recently stated to the FCC,

Comcast's established expertise in producing local and regional programming will enhance the ability of the merged entity to offer AT&T Broadband customers the kinds of community-oriented coverage that Comcast already provides today to many of its customers. . . . [This programming] offers potential customers a reason to sign up for Comcast's services, and offers existing customers one more reason to continue to subscribe.¹⁶

To the extent such services were the sole source for regional sporting events and other highly popular programming, new entrants could be denied access to the ingredients that are most critical to their success as competitors.

Secret, Selective Discounting

Over the past year many members of the BSPA have been subjected to extreme, targeted discounting by Comcast and AT&T in order to drive us out of business. These discounts are huge, and they are only offered to our customers or residents in our communities that want to switch to us from the incumbent. They are not advertised or made available generally – they are granted secretly over the telephone or in the doorways of our customers' homes. For example:

- Throughout southeastern Michigan, in markets where WideOpenWest competes with Comcast, residents we sign up for service are being offered rate discounts of between 33 and 50 percent to switch back to Comcast. They are also being offered free digital service, free pay per view, and other

¹⁶ Applications and Public Interest Statement, at 42, 44.

giveaways. Existing Comcast customers that try to cancel their service to sign up with us are being offered similar benefits not to do so. Importantly, these offers are not publicized, nor are they made available to anyone other than our existing customers and those Comcast customers who have asked to be disconnected in order to switch over to us.

- In Austin, Corpus Christi, and other markets in Texas, both Grande and ClearSource are being subjected to deep discounting by AT&T, through its joint venture with AOL Time Warner, Texas Cable Partners.¹⁷ In Austin, for example, TCP is offering discounts of between \$16 to \$28 per month to customers of these competitors in order to lure them back to the incumbents' own service.¹⁸
- In Kansas City, Everest is being subjected to comparable tactics by AT&T, through its joint venture with AOL Time Warner, Kansas City Cable Partners. In that market, however, KCCP has gone even further than its Texas affiliate – promising Everest customers additional payments of \$200 if they switch back to KCCP, and even more if they agree to write testimonials in favor of KCCP's service. KCCP has also made so-called customer “loyalty test” offers to residents in areas where Everest is building

¹⁷ Texas Cable Partners owns cable systems across Texas, and is 50 percent owned by AT&T. The remainder of the partnership is owned by a partnership controlled by an AOL Time Warner subsidiary, Time Warner Entertainment.

¹⁸ *See, e.g., Time Warner Cable Discounts Draw Fire From City, Competitor, Austin American-Statesman* (Feb. 19, 2002).

out its system, through which customers in these neighborhoods are guaranteed discounts on service prices if they agree to stay with KCCP for 12 months. To fund these discounts, KCCP has raised the price of service for other neighborhoods served by its system.

- In Augusta, Georgia, Comcast is offering discounts in excess of 50 percent for basic and digital cable, high speed data, and other services – but only in areas where Knology offers competitive services. These offers are not made generally throughout Comcast’s service area, but are instead mailed directly to Knology customers and new residents in competitive neighborhoods.

Secret, selective discounting like this will destroy competition if it is allowed to continue. Giving big discounts to a chosen few is a cheap way for incumbents to exact the greatest possible toll on new entrants. And while that relative handful of customers gets a big financial benefit, once the competitor is forced from the market they – with the rest of their neighbors – will resume paying the pre-competition, monopoly rate: just like customers do in the in communities where competitors have not yet entered.

In truth, the merger parties are waging a behind-the-scenes hostile take-over of our company and the entire competitive broadband industry – one customer at a time. It is a clever strategy, and one that is likely to work if it is allowed to continue. Moreover, once they achieve this goal, they will also have complete control over the huge market for cable modem Internet access, and again know no restraint in what they charge for it.

The Federal Communications Commission recognizes these facts, and publicly stated that secret and selective discounting threatens to destroy broadband competition. In its recent report

on the state of competition in the cable television industry, the Commission reviewed these actions and concluded:

The vast resources of a large MSO may simply prove too much if brought to bear in a targeted fashion against a single system entrant. Moreover, we are concerned about the signal such targeting may send to others who would compete in the MVPD market, and particularly to the financial markets to which a new entrant may well be dependent for resources. . . . [S]uch practices . . . tend to limit competition and discourage new entry.¹⁹

These tactics will only get worse if the merger is approved. Combining the resources of both AT&T and Comcast, without preventing the merged entity from targeting BSPA members in this manner, will allow the new company to coordinate and intensify these actions – with lethal effect on competitors. If this is allowed to happen, it will be too much for many of our companies to endure.²⁰ The result would undermine competition in the market for broadband services across the country.

Merger Parties Engage In Other Anticompetitive Conduct

The selective discounting programs now being used by the merger parties against BSPA members are not the only means they are using to prevent entry, impede competition, and deny consumers choice. Numerous other tactics are also being employed, and are producing comparable results.

¹⁹ Eighth Annual Report, ¶ 209.

²⁰ For example, the merged company could use these predatory tactics simultaneously in multiple markets served by a particular competitor, thereby forcing that competitor to fight battles, and expend scarce resources, in each of these markets at the same time.

These tactics include efforts to prevent competitors from getting franchises, or to saddle them with onerous or unrealistic terms. They include securing exclusive contracts for certain programming services that they do not own – and that are not owned by other MSOs, or are not delivered by satellite, thereby making it impossible for the competitor to gain access through use of the FCC’s program access rules. They include taking action to impede or slow competitors’ ability to build their systems, get access to utility poles, and serve multiple dwelling units.

All of these tactics impose substantial financial burdens on BSPA members, and directly reduce the level of competition they are able to provide. The merger parties plainly pursue them to eliminate from the market the only competitor they have that can match them for quality and value, and can provide consumers with a more complete range of communication services than they themselves can.

BSPA members believe that, given the track record of the merger parties, combining their assets and management would lead to coordinated campaigns in multiple markets targeting one or more of them to achieve this goal. If that were to happen, competition would suffer – if not disappear altogether. Entry would be prevented, expansion would be delayed, consumers would be denied choice, prices would rise, and the market would be denied all the other benefits that competitive communications providers provide.

Conclusion

I want to be very plain that our company is ready for competition. So are all the members of the BSPA. That competition may well be bare-knuckled, and we expect that. But the tactics we are seeing today go well beyond a fair fight. They are the equivalent of a bully

slipping on brass knuckles before starting the fight begins. No competitor can long stay in the ring under these circumstances.

Six years ago Congress adopted as federal policy the goal of bringing facilities-based competition to the national markets for multichannel video, telephony, and data services.²¹ WOW and the other members of the BSPA have answered this call, and are now in the process of bringing all of its benefits to consumers around the country. But we are now at a crossroads: If we cannot put a stop to the tactics Comcast, AT&T and other incumbents are using against us, and if we cannot get fair access to the programming customers want to watch, then this goal will either be long delayed in its achievement, or undermined altogether. If this happens, then all your hard work, and of the FCC, and of the many, many local franchising authorities around the country with which we have worked to bring competition to their communities, will have been for nothing.

Thank you again for inviting me here today. We stand ready to work with this Committee in any way we can to ensure that the fruits of competition are within the reach of consumers everywhere.

²¹ See, e.g., S. Rep. No. 104-230, at 1 (1996) (Congress seeks to accelerate the “deployment of advanced telecommunications services to all Americans [and] open[] all telecommunications markets to competition”) (conference report for Telecommunications Act of 1996).

Program Access Conditions Should Be Imposed on the AT&T/Comcast Merger to Preserve Cable Competition

Comments submitted by:
Broadband Service Provider Association (BSPA)
September 18, 2002

In 1992, Congress recognized that the cable industry was using its control over access to video programming to stifle the development of Multichannel Video Programming Distribution (MVPD) competition, and enacted the statutory prohibition on exclusive distribution of vertically-integrated programming and other discriminatory conduct involving access to programming. In the ten years since passage of this legislation, incumbent cable operators have continued to pursue various strategies that use access to programming as a competitive weapon. One such strategy involves the denial of access to terrestrially-delivered programming. Incumbent cable operators are now attempting a new strategy to use program access as a barrier to entry – through the denial of access to video-on-demand (“VOD”) programming. Unless conditions are imposed on the AT&T/Comcast merger, program access difficulties will prove to be significant barriers to the spread of competition in the cable television industry.

- Program access remains critical to competition. The FCC recognized this earlier in 2002 by extending the statutory prohibition on satellite-delivered program exclusivity for another five years.¹ The FCC continues to affirm the need for fair access to all relevant programming for MVPD competition to succeed.²
- Through dramatically increasing horizontal concentration in the cable industry, the AT&T/Comcast merger exacerbates program access issues for MVPD competitors. As incumbent cable operators continue to consolidate, incumbents will leverage their buying power and vertical integration to force their program suppliers to deny programming to competitors.
- Comcast has been a leading provider of terrestrially-delivered programming that strategically refuses to make such programming available to competitors. Comcast does this with impunity as the FCC has concluded that the statutory program access provisions, as currently written, only apply to satellite-delivered programming.
- In addition, recent market behavior of AT&T and Comcast demonstrate their intent to use vertical integration and market power to deny or limit access to VOD services.

VOD, the next generation of content delivery systems, is widely expected to become a dominant segment of the video industry over the next ten years. VOD provides viewers with the ability to access selected programming to watch at their leisure over a given period of time – but without the hassles of VHS or DVD rental, return, or late fees. VOD is theoretically beyond the scope of current FCC program access rules. However, VOD is expected to replace a significant segment of both current pay per view (PPV) and VHS/DVD rental business. It will also introduce advanced services

like the re-broadcast of scheduled programming. Comcast has announced its intention to introduce VOD in the near future.

- InDemand, a company in which AT&T and Comcast are two of four partners, is the overwhelmingly dominant provider of PPV and will be a dominant provider of VOD. Competitive cable operators are unable to duplicate this programming source because they lack the necessary economies of scale and vertical integration.
- While InDemand currently makes PPV available to all MVPD operators, it has decided to restrict its distribution of VOD-based content to its four owner companies and it has denied access to such VOD programming to Altrio and WideOpenWest in the last 30 days.
- In addition, Comcast is actively negotiating with NBC for the exclusive right to deliver video-on-demand versions of NBC's broadcast programming within Comcast's territory. This has particular competitive significance because VOD can create additional enhanced access to network programming. BSPA members have invested billions of dollars in their state of the art next generation systems in order to host this type of next generation service while Comcast seeks to limit the potential value of these investments by limiting access to broadcast content.

Program access conditions should be imposed on the AT&T/Comcast merger so that the merged entity will not be able to use its expanded control and market power over terrestrially-delivered and VOD programming to thwart competition by denying access to critical next-generation programming. Such a competitive remedy is necessary to ameliorate the otherwise anticompetitive effects of the merger.

¹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act, Sunset of the Exclusive Contract Prohibition*, FCC 02-176, CS Docket No. 01-290, *Report and Order*, ¶ 32 (rel. June 28, 2002) (“*Program Exclusivity Prohibition Extension Order*”). In the *Program Exclusivity Prohibition Extension Order*, the FCC recognized that “access to vertically integrated programming continues to be necessary in order for [competitive] MVPDs to remain viable in the marketplace.” *Id.* at ¶ 32. The FCC recognized that “[f]ailure to secure even a portion of vertically integrated programming would put a nonaffiliated cable operator or competitive MVPD at a significant disadvantage *vis-à-vis* a competitor with access to such programming” and that “if [competitive MVPDs] were to be deprived of only some of this ‘must have’ programming, their ability to retain subscribers would be jeopardized.” *Id.* at ¶¶ 32, 33.

² *Id.* at ¶ 73 (“terrestrial distribution of programming could have a substantial affect on the ability of competitive MVPDs to compete in the MVPD market”).

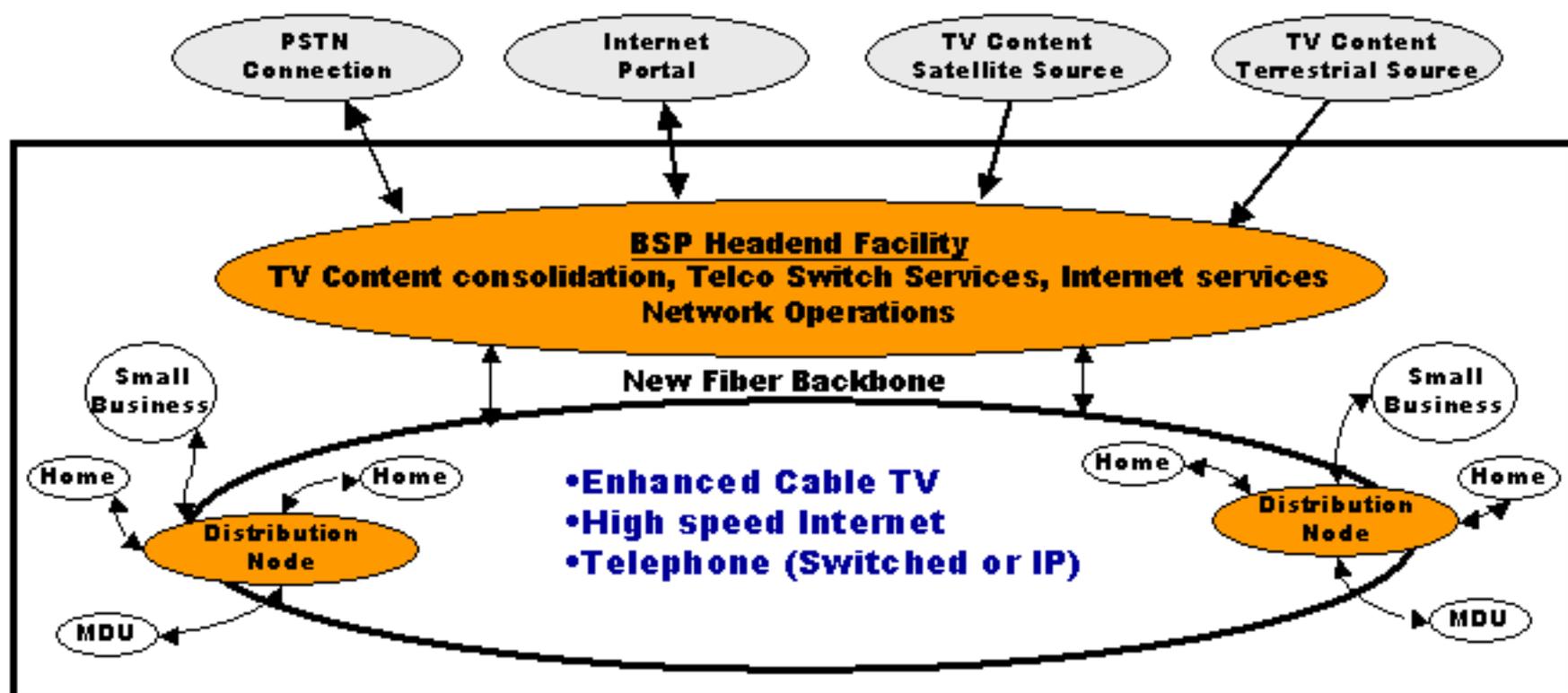
**Broadband Service Providers Association
(BSPA)**

**Overview Presentation
September 2002**

John D. Goodman, Executive Director

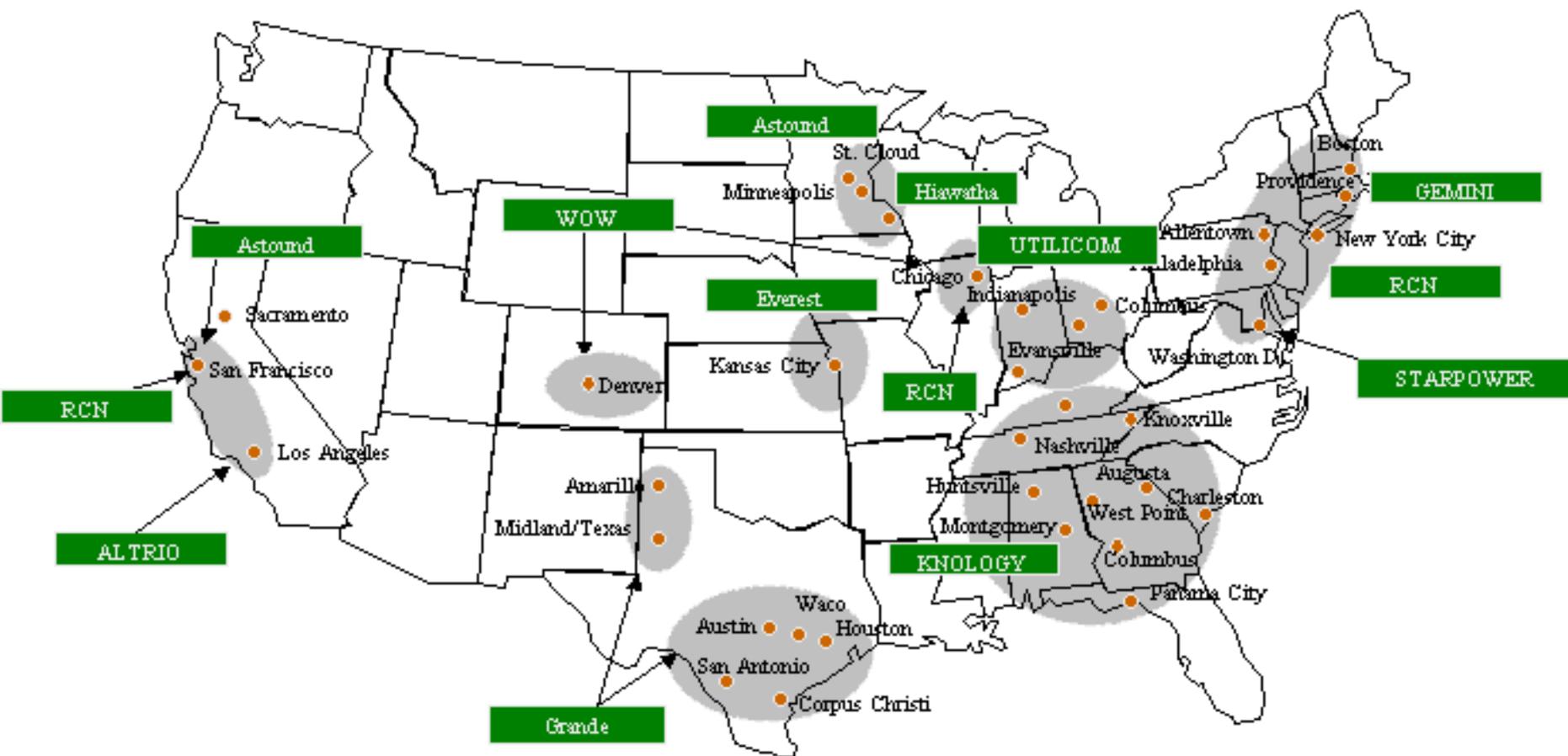
- ✔ **Introduce the BSPA**
- ✔ **Identify BSPA concerns and policy priorities**
- ✔ **Initiate ongoing discussions**

Member companies are a new breed of communication service providers building new advanced facilities - based "last-mile" broadband networks that deliver services directly to homes and small businesses:



One-Wire, One-Call, One-Bill with More Products.

- ✓ **Altrio Communications**
- ✓ **Astound Broadband**
- ✓ **Everest Connections**
- ✓ **Gemini Networks**
- ✓ **Grande Communications/Clearsource**
- ✓ **Hiawatha Broadband**
- ✓ **Knology**
- ✓ **RCN**
- ✓ **Starpower Communications**
- ✓ **Utilicom Networks LLC (d/b/a Sigecom and TOTALink)**
- ✓ **Wide Open West**



This map does not represent all of the locations for the BSPs. It is a representative sample.

We represent the largest untapped opportunity to meet consumer demand.

- ✓ **Total Households under franchise: > 17 million**
- ✓ **Homes passed: > 4 million**
- ✓ **Total current customers: > 1 million**
- ✓ **Total current RGU's: > 2 million**
- ✓ **Total existing capital investment: > \$5.5 billion**
- ✓ **Miles of constructed network: > 32,000**

The stage is set. The time is right for competition.

To promote and support the development of facilities-based broadband voice, video, and data service providers that bring competitive choice to consumers.

- ✓ **Moderation of cable rate increases**
- ✓ **Increased penetration of broadband subscription**
 - **The underlying demand has not been met!**
- ✓ **Increased penetration of enhanced Digital TV**
- ✓ **Expanded next generation services**
- ✓ **Incumbent upgrade investments**
- ✓ **Improved customer satisfaction rates**
- ✓ **Expanded PEG and other public service capabilities**
- ✓ **Applies to small and large metro areas**

- ✓ **BSPA members as part of the broadband/telecom solution.**
- ✓ **Promote facilities-based competition in the final mile.**
 - **1996 Telecom Act Objective**
 - **Solution to “One-Wire” problems**
 - **Redundant national networks critical to Homeland Security**
- ✓ **Immediate regulatory and legislative issues that can address barriers to entry:**
 - **Discriminatory and/or predatory pricing tactics**
 - **Non-discriminatory access to Programming**
 - **Fair access to MDU’s**
 - **Poles/Conduits/Rights-of-way**
- ✓ **Evaluate potential capital market incentives.**

Desired Actions:

- 1. Aggressive enforcement of existing FCC rules and policies, including open publication of all rates and/or “promotions”, and non-discriminatory use of offers. Current proceeding at FCC Enforcement Bureau.**
- 2. Fair consideration of potential predatory pricing behavior. Desire letter of support to DOJ**

Desired Actions:

- 1. Congressional action to clarify and/or expand the current legislation and FCC authority to cover current terrestrial and other emerging forms of program distribution and content like VOD.**
- 2. Consideration of competitive implications of AT&T Comcast Merger. Request conditions related to Program Access and the use of exclusive contracts where the total scale and structure of the new competitor will have material impact.**

**Federal law requires the FCC to
“promote competition in cable communications”**

Desired Actions:

- 1. Complete open dockets addressing MDU access.**
- 2. Allow new broadband providers immediate access to MDU residents.**
- 3. Establish rules that protect all consumer's right to choose among competing providers of cable TV services.**

(Provide the same support to the development of competitive cable as offered to telephone.)

Desired Actions:

- 1. Aggressive enforcement of existing FCC rules and policies, including pre-complaint damages and substantial, “punitive” forfeitures for repetitive non-compliance.**
- 2. “Rocket Docket” treatment of pole attachment complaints.**
- 3. Joinder of Parent Companies to FCC orders to ensure subsidiary compliance.**

Desired Actions:

- 1. Inclusion of BSPA Members in discussions related to potential legislation.**
- 2. Support for new GAO competitive study regarding “BSPA Communities” compared to other less competitive markets.**

- **Reduced barriers to entry and fair competition will bring success and needed investment.**
- **Unmet demand grows each month.**
- **The last mile is the missing link in delivering high speed data/internet services to the residential and small business markets.**
- **We provide a solution with the benefits of competition in voice, video, and data/internet service offerings.**