

**Before the
Federal Communications Commission
Washington, D.C. 20054**

In the Matter of)	
)	
Annual Assessment of the Status of)	MB Docket No. 03-172
Competition in the Market for the)	
Delivery of Video Programming)	

COMMENTS OF BROADBAND SERVICE PROVIDERS ASSOCIATION

John D. Goodman
Executive Director
Broadband Service Providers Association
1735 New York Avenue, N.W., Suite 700
Washington, D.C. 20006
(202) 661-3945

Martin L. Stern
Preston Gates Ellis & Rouvelas Meeds LLP
1735 New York Avenue, N.W., Suite 500
Washington, D.C. 20006
(202) 628-1700

*Attorneys for Broadband Service Providers
Association*

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SUMMARY

The Broadband Service Providers Association (“BSPA”) is an organization of a new breed of last-mile service providers – companies that are building new, facilities-based, advanced, last-mile broadband networks for the delivery of compelling bundles of voice, multichannel/on-demand video, and high-speed data/Internet services directly to homes and small businesses across the country.¹ Its mission is to promote and support the development of a competitive, facilities-based, broadband industry which will increase infrastructure investment, create customer choice, lower prices, and provide critical network redundancy.

BSPA member companies provide bundled offerings of multichannel video and media, telephone, and high-speed Internet access services to residential customers and small businesses over their integrated platforms. These facilities-based broadband service providers (“BSPs”) compete with incumbent cable operators and other multichannel video providers, as well as incumbent and competitive local exchange carriers.

Currently, BSPA members have 17.7 million homes under franchise, and have over 44,000 miles of fiber deployed. BSPA members have over 1.1 million customers with an average of two services sold per customer. Even in today’s challenging economic environment members, have continued to invest in their networks and continuing operations, and increase their customer and service penetration rates. Total capital investment of BSPA members now exceeds \$6 billion.

¹ The current members of BSPA, all of which are last-mile, facilities-based providers, are: Altrio Communications, Inc.; Astound Broadband; Everest Connections; Gemini Networks; Graceba Communications; Grande Communications; PrairieWave Communications; Knology; RCN Corp.; Starpower Communications, LLC; Utilicom Networks LLC; SureWest; and WideOpenWest.

Unfortunately, incumbent cable operators have responded to the early success of BSPs by erecting and/or continuing to maintain significant barriers to entry. Incumbent cable operators continue to leverage vertical relationships and exploit regulatory loopholes to restrict competitive access to programming, and use their buying power to enforce exclusive agreements with unaffiliated programmers.

These current program access problems exemplify the need for the Commission to recognize in its historic *Tenth Annual Report* that technology has advanced to the point where many of the traditional program access issues threaten to become even more significant content access issues pertaining to all participants in the media, Internet, and consumer electronics industries. BSPA urges the Commission to take this opportunity to begin to develop a broad technology and end-user device neutral perspective regarding access to content, which will ensure the continued development of competitive video and broadband markets.

Other barriers to entry in the multichannel video market created and maintained by incumbent cable operators also remain. These include predatory and discriminatory pricing, exclusive arrangements for access to multi-tenant dwelling units, and outright manipulation of the local regulatory process to thwart competitive entry. At the same time, other barriers to entry and deployment also continue to persist. These include delays in addressing complaints pertaining to access to ILEC and utility poles, conduits, and rights-of-way; unreasonable local and municipal regulation of access to public rights-of-way; and an overly regulated OVS regime.

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The Broadband Service Providers Association (“BSPA”) hereby submits these comments in response to the Federal Communications Commission’s (“Commission’s”) Notice of Inquiry in the captioned proceeding (“*Notice*”).² In the *Notice*, the Commission seeks information, comment, and analysis regarding competition in the market for the delivery of video programming and barriers to such competition.

INTRODUCTION AND BACKGROUND

Through the *Notice*, the Commission has begun the process of preparing its *Tenth Annual Report* to Congress on competition in the market for delivery of video programming. In the last ten years, particularly since passage of the Telecommunications Act of 1996,³ new competitors, such as the members of the BSPA, have made significant inroads in the multichannel video market.⁴ At the same time, while ten years have passed since the Commission’s initial cable

² *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 03-185, MB Docket No. 03-172, *Notice of Inquiry* (rel. July 30, 2003)(“*Notice*”).

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)(“1996 Act”).

⁴ The current members of BSPA, all of which are last-mile, facilities-based providers, are: Altrio Communications, Inc.; Astound Broadband; Everest Connections; Gemini Networks; Graceba Communications; Grande Communications; PrairieWave Communications; Knology; RCN Corp.; Starpower Communications, LLC; Utilicom Networks LLC; SureWest; and WideOpenWest.

competition report, many of the most pressing competitive issues that vexed new entrants and policymakers alike, continue at the fore.

As discussed below, today's broadband service providers ("BSPs") are not the "overbuilders" of the *First Annual Report*, which relied on a single stream of revenue from the distribution of multichannel video programming. BSPs are providing state-of-the-art video, voice, and data service over newly deployed advanced local networks in many large cities and rural areas throughout the country. Currently, BSPA members have 17.7 million homes under franchise, and have over 44,000 miles of fiber deployed. BSPA members have over 1.1 million customers with an average of two services sold per customer. Even in today's challenging economic environment members have continued to invest in their networks and continuing operations, and increase their customer and service penetration rates. Total capital investment of BSPA members now exceeds \$6 billion.

Despite competitive entry by BSPs and other new entrants, overall the cable market remains highly and increasingly concentrated, cable rates continue to rise, and incumbent cable operators continue to pursue a variety of strategies intended to inhibit competitive entry. Access to key programming content continues as a critical issue for BSPs and other competitors, and incumbents continue to use their control over programming as a competitive weapon. The so-called terrestrial loophole in the program access regime that has been raised by competitors in connection with every annual cable report since the *First Annual Report*, continues to prevent competitor access to local and regional content that is now distributed over terrestrial networks, and incumbent operators stand poised to extend their control over programming to non-linear and Internet-based programming services.

Infrastructure investments are now focused on next generation systems that host multiple services that include different combinations of multichannel video, high-speed data (“HSD”) Internet service (commonly referred to as “broadband access”), and voice telephone services. Continuing technological advancements are converting more and more services to digital formats, with a shift towards bidirectional functionality, allowing greater subscriber interaction with content that had historically been one-way. All of these changes set the stage for the emergence of many familiar competitive issues, which had historically been unique to multichannel video. Some of these issues involve HSD Internet service and access to associated digital content, which is delivered over the same networks as multichannel video, by many of the same industry players, using the same industry structure that has dominated the multichannel video market.

Technological advancements, however, continue to erode the efficacy of the existing content access policy regime, as satellite delivery has given way in many cases to fiber optic, and local, server-based delivery of content. Consumers now use their computers as well as their televisions as a means for displaying video entertainment. The need to ensure fair access to content in this digital and multi-platform environment, which is characterized by some of the same dominant vertical relationships found in multichannel video markets, should be a key policy focus of Congress and the Commission now and in the future. BSPA believes that now is the time for the Commission to begin to establish principles of fair access for consumers and distributors to all digital content regardless of type of content or digital distribution technologies employed.

Other barriers to entry, however, also remain. Some are the creation of incumbent cable operators, such as predatory and discriminatory pricing, exclusive MDU access contracts, and

“level playing field” laws and other similar incumbent-created distortions of the local franchising process aimed at disadvantaging competitors or prohibiting their entry outright. In addition, there continue to be other barriers to entry and deployment that require the Commission’s attention, such as processing delays in pole attachment complaints, continued issues involving access to public rights-of-way, and deficiencies in the open video system (“OVS”) regime.

DISCUSSION

I. THE BSP BUSINESS MODEL CONTINUES TO PROVE ITSELF

A. Scope of BSPA Member Operations.

Deploying state-of-the art, fiber-rich competitive networks nationwide, BSPA members compete directly with incumbent cable operators and other multichannel video programming distributors (“MVPDs”), as well as incumbent and competitive local exchange carriers (“ILECs” and “CLECs”). On the Internet side, BSPA members’ high-speed Internet service competes with DSL and cable modem service, and unlike the cable modem service of most incumbent cable operators, most member systems are currently “open access,” typically with the ability to deal with multiple Internet service providers (“ISPs”). BSPs are building the high-capacity networks that are needed to host all of the current and next generation services that are emerging in today’s digital environment.

BSPs with their current business models did not exist prior to the 1996 Act. Recent experience has shown that the BSP model can and does succeed. BSPs are an important example of long-term facilities based competition that has emerged since the 1996 Act, which create significant competitive benefits in the markets that they enter.

BSP buildouts, however, represent capital intensive investments, having long term financial return outlooks. These investments are more similar to utility-type investments than to

high-margin, higher risk internet service models, which use existing infrastructure and networks, and do not require the construction of new local networks. Typically, the BSP business model does not produce positive cash flow and profitability while the new local network is under construction, making BSPs the focus of targeted anticompetitive tactics pursued by entrenched deep-pocket incumbents.

The recent economic downturn in the telecom industry has dramatically slowed investment in BSP network buildout as it has in other telecom sectors. Despite current BSP networks being smaller than originally planned, many BSPs have produced positive cash flow and continue to expand the base of satisfied customers and services sold. In local markets throughout the country, consumers are enthusiastically endorsing BSP competition.

BSPs have evolved to become a significant competitive force in the marketplace compared with legacy “cable overbuilders,” which have historically focused exclusively on multichannel video offerings. BSPs, on the other hand, provide three primary services (multichannel video, telephone and Internet access) as a bundled offering over a single, integrated network. In contrast to the Commission’s *First Annual Report* in 1994 when the Commission reported that it was aware of only “a few new overbuilding proposals,” and that “overbuilding seems to have remained quite limited,”⁵ BSPA members, all of whom have

⁵ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Annual Report*, 9 FCC Rcd 7442, 7472 (1994).

entered the market since the 1996 Act, have operations in nearly half the states in the country, including all major regions other than the Pacific Northwest.⁶

Indeed, even during the difficult economy of the past year, BSPA members have continued to invest in new networks, and expand their customer base and services sold. BSPA members currently have over 15.6 million households under active franchises where they offer service; they also have 2.1 million households under franchise with the right to build as capital becomes available. Constructed systems now operate 41 headend facilities and pass approximately four million homes, representing over 44,000 miles of fiber distribution network and over \$6 billion of capital investment. In the aggregate, BSPA members have over 1.1 million customers.

BSPA members have an average customer penetration rate of over 28 percent, with many systems still in their early stages of development. On a service category basis, BSPA members have in the aggregate over one million video subscribers, 543,000 telephone subscribers, and 452,000 HSD Internet subscribers. On average, 30 percent of BSPA member video subscribers have upgraded to a digital tier of service. Viewing each service category as a separate “revenue generating unit” (“RGU”), BSPA members have sold, in the aggregate, over two million RGUs, meaning that on average, BSPA member customers take two of the three services offered.⁷

⁶ BSPA members currently have operations in Alabama, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, D.C., and Wisconsin. A map highlighting the areas where BSPA member have operations is included as Attachment A, hereto.

⁷ These numbers represent the current membership of the BSPA. The actual industry total for BSPs is higher as not all BSPs are BSPA members.

Despite many continuing challenges, another significant way to understand the BSP segment is to recognize that every current BSPA member has seen increases in customer penetration and services sold from continuing operations from 2002 to 2003. The primary question, as discussed below, is whether a fair competitive environment exists so that these investments and customer benefits will continue to expand in the future.

B. Typical BSPA Member Network Topography

Systems built by member companies have several key common elements. Each of these systems is supported by a new headend facility that aggregates programming content and a telecommunications switching platform that connects customers to the public switched telephone network (“PSTN”) and Internet. These facilities support a new fiber optic distribution network that connects the headend to distribution nodes, which provide the final links to customers. A typical node will support from 100 to 500 potential customers, with some systems connecting as few as 20 to 30 customers. Member companies use different technologies for the final service connections from a node to customer premises, with a combination of coaxial cable and twisted copper pair as the most common configuration to customer locations. Other configurations include coaxial cable or fiber to the home (“FTTH”), exclusively. Many systems have been built with additional conduit so they will be more easily upgraded as new technology migrates into the industry. BSP systems have been successfully configured and deployed in rural communities as small as 225 residents up to the largest metropolitan areas in the U.S.

C. Typical BSPA Member Service Offerings

The business plans of BSPA member companies rely on the ability to offer a package of three basic services – multichannel video/media, telephone (local and long distance), and HSD Internet access. Consumers enjoy the convenience of a single communications provider and a

single bill. Members are able to tailor the package of services to match the true needs and desires of an individual customer. Significantly, customers also gain confidence when they have expanded competitive choice, leading to increased overall penetration in markets where competitive alternatives are present. In addition, the availability of next generation services is also appealing to many customers who did not have access to these alternatives prior to the construction of new, broadband networks.

The multichannel video/media component of member offerings includes next generation digital television, and typically includes over 180 channels of both video and music entertainment options. Customers can also order basic service, but BSPA member companies have achieved some of the highest penetration rates of enhanced digital television in the industry, with many systems producing 60 to 90 percent of video customers subscribing to a digital package. BSPA member companies have also been some of the first operators to offer next generation services such as video-on-demand (“VOD”), subscription video-on-demand (“SVOD”),⁸ and interactive television, made possible by their advanced system topography. The continuing development and successful offering of next generation services is also key to long-term plans of member companies.

The high-speed Internet access service of BSPA member companies is typically in a cable modem format with available speeds generally up to 3.0 Mbps. Many members are now offering multiple levels of service and speed to accommodate different levels of consumer

⁸ SVOD refers to services that allow a subscriber to access content from a particular library on a subscription fee basis, and provides typical VOD functionality, including the ability to select particular programming from the library on demand, and program control capabilities (*e.g.*, start/stop, pause, fast forward, rewind, etc.).

demand. In addition, most member systems are currently “open access,” typically with the ability to deal with multiple ISPs.

BSPA member telephone offerings typically include lifeline service offered under state PUC CLEC authority with full option functionality (voice mail, call waiting, call forwarding etc.). Some member telephone offerings, however, can also be a “second line” service offered in an Internet protocol (“IP”) telephony format. Several member companies have been actively testing both soft switch technologies and IP telephony systems.

D. Market Benefits of BSP Operations

As BSPA has advised the Commission in connection with prior year reports, there are numerous and significant competitive benefits that flow from entry by a BSP in local markets. Since a BSP brings new competition to all incumbent providers of video, telephone, and HSD Internet access services, BSP entry results in a powerful mix of market impacts not provided by any other single market entrant. These impacts include the following:

- ***Moderation of cable rate increases.*** In the *2002 Report on Cable Industry Prices*, released two months ago, the Commission reported that cable rates had increased 8.2% from July 2001 to June 2002 – nearly six times the rate of inflation.⁹ In markets where BSPs have entered, however, rates have risen at a much slower rate than cable rates generally. Thus, while some are urging re-regulation of cable rates in the face of rate hikes that have outpaced inflation, the BSP experience demonstrates that competition is the real solution. Significantly, one recent study has confirmed that *wireline* cable entry, as opposed to the existence of satellite service, is the critical competitive restraining force on incumbent cable rates.¹⁰ The study observed that data compiled by the

⁹ *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment, Report on Cable Industry Prices*, 18 FCC Rcd 13284 at ¶ 4 (2003)(“2002 Report on Cable Industry Prices”).

¹⁰ U.S. PIRG, *The Failure of Cable Deregulation: A Blueprint For Creating A Competitive, Pro-Consumer Cable Television Marketplace*, at 10, 32-34 (Aug. 2003)(“U.S. PIRG 2003”)(available at <<http://uspig.org/reports/failureofcabledereg.pdf>>).

Commission confirm that “DBS, while growing in subscribers, appeals primarily to limited subsets of consumers, and is unable to restrain cable’s prices charged to consumers at large. Wireline competitors have proven effective at forcing cable operators to restrain their prices”¹¹

- **Increased total penetration of HSD Internet.** Policymakers continue to express concern about the penetration and take rate for high-speed Internet service. BSPA has found, however, that where BSPs offer service they often have an HSD penetration rate that is equal to or slightly higher than the national average. Combining this penetration rate with HSD service sold by the other providers in the market provides a complete picture for HSD demand in BSP markets. BSPA believes that there are now markets where the total HSD Internet penetration is between 40 and 50 percent, which is significantly higher than the national average. This higher penetration rate is occurring with the same content and core pricing structure that exists in other markets, which have half this penetration. This overall impact on penetration appears to reflect consumer reaction to availability of competitive choice.
- **Increased penetration of enhanced Digital TV.** BSPA member penetration rates for Digital TV are over double the rate of incumbents.
- **Expanded next generation services.** With newer high-capacity systems, BSPs have actually been the first to provide many of the current next generation services such as VOD and SVOD, proving them from a technology and customer acceptance perspective.
- **Incumbent upgrade investments.** Many incumbents will make commitments to upgrade their systems. The fastest way to assure that they will follow through is if they face the competitive presence of a BSP. It is not untypical for incumbents to find ways to upgrade legacy systems as soon as a competitive franchise is awarded. Examples where BSPA members have seen this occur include: Canton, Madison, Watertown, and Yankton, South Dakota; Marshall, Pipestone, Worthington, and St. Cloud, Minnesota; Concord, California; Boston, Massachusetts; and Washington D.C.
- **Improved customer satisfaction rates.** Among the ways that BSPs differentiate themselves from incumbent providers is through the provision of bundled service offerings and best-of-breed customer service. For example, in a 2003 survey of customer satisfaction in Pasadena, California, a franchise area served by BSPA member Altrio Communications (“Altrio”), Altrio received a 94 percent rating, followed by satellite at 84 percent, antenna at 67 percent, and the incumbent cable

¹¹ *Id.* at 1.

operator at 58 percent.¹² This ultimately leads to competitive responses by incumbents, resulting in efforts to improve their own customer service where BSP competition is present.

- **Expanded PEG and other public service capabilities.** Many communities served by BSPs have benefited from expanded community channel services and support with increased ability to develop local content.
- **Small and large metro area entry.** BSPs have entered rural communities with as few as 181 households, with technology bringing that number down each year. Wireless or other technologies may well continue to expand the options of connecting even more remote rural households to the BSP networks as they expand into smaller communities.

Overall, the current performance of BSPs continue to demonstrate the compelling benefits of facilities-based, head-to-head competition as compared to competition from the DBS sector, or from shared network providers. Incumbents consistently press the sufficiency of DBS competition, yet the nature and intensity of competition between incumbents and local facilities-based providers, such as BSPs, stand in stark contrast to the nature of competitive response in markets where the only available alternative to incumbent services are those provided by DBS operators. Among other things, as discussed above, research has not documented a significant price impact of DBS entry. In addition, upgraded cable television systems are also moving aggressively to offer new services that are beyond the technical capabilities of DBS systems.

Since the impact of BSPs is limited to the communities where they serve, the impact can be lost in national statistics that blend all markets together. For example, while the General Accounting Office (“GAO”) has historically studied the market impacts from DBS competition, it has not focused on the competitive impacts of entry by local, facilities-based providers, such as

¹² See Press Release, Altrio Communications, *Altrio Communications Rated Best Television Provider* (Jul. 10, 2003) (available at <http://www.altrio.net/sub_main.asp?level1=1&level2=5&level3=16>).

BSPs. BSPA understands that the GAO is currently studying the impact of local entry, and is expected to be releasing a report assessing the impact of BSPs in markets where they have established a sustained presence shortly.

II. THE COMMISSION SHOULD DEVELOP A BROAD PERSPECTIVE ON ACCESS TO DIGITAL CONTENT

In the *Notice*, the Commission continues to recognize the critical importance of video programming content to the competitive distribution of multichannel video programming.¹³ Non-discriminatory access to such programming remains crucial to the continuing viability of BSPs and other non-incumbent distributors, such as DBS providers. As the Commission develops its *Tenth Annual Report*, it should broaden its perspective beyond satellite-delivered video programming and linear, multichannel services to market structure and incentives that can negatively affect consumer access to digital content, generally. Using the opportunity of its *Tenth Annual Report*, the Commission should begin to develop a vision of non-discriminatory access to all forms of digital content across all delivery platforms.

Artificial barriers to competition created by anticompetitive restrictions on consumer access to content as a result of vertical integration or the abuse of market power stand as current and potential future roadblocks to the rapid and efficient development of distribution platforms and end use applications. The guiding principle of consumer access to digital content should be the consumer's right to receive (1) the content of their choice (2) on the distribution/broadband access platform of their choice, regardless of the competitive structure of the market for content creation, content distribution, and broadband market access. The commercial development of

¹³ See, e.g., *Notice* at ¶ 18.

technology applications is best driven by market forces with consumer decisions regarding delivery platforms based on the inherent merits of the platform, such as availability, capability, reliability, and cost. The Commission should recognize this critical relationship between broadband deployment, the development of future distribution technologies, and access to digital content, and should take steps to maximize consumer choice by ensuring consumer access to digital content regardless of a consumer's choice of distribution platform.

In 1992, Congress recognized that the cable industry could use its control over access to video programming to stifle competition in satellite and other terrestrial distribution. To address this issue, it enacted as part of the 1992 Cable Act¹⁴ the statutory prohibition on exclusive cable distribution of vertically integrated programming and other discriminatory conduct involving access to programming –Section 628 of the Communications Act of 1934, as amended.¹⁵ Through Section 628, Congress sought to break the cable industry's "stranglehold" over programming, which had historically been enforced through exclusivity arrangements and other market power abuses exercised by cable operators and their affiliated programming suppliers. The satellite television industry's growth over the last ten years and the emergence of BSPs as a new breed of terrestrial competitors to incumbent cable operators, are in large part due to the pro-competitive impacts of Section 628. When the Commission extended the sunset date of the

¹⁴ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992)("1992 Cable Act").

¹⁵ 47 U.S.C. § 548.

current rules in 2002, it also acknowledged that the continuing threat to competitive distribution is real and likely.¹⁶

A. Incumbent Cable Operators Continue to Leverage Their Vertical Relationships to Maintain Barriers to Entry

The Commission continues to find pervasive vertical integration in the cable television industry. In its *Ninth Annual Report*, the Commission found that 92 of the 308 satellite-delivered national programming networks were vertically integrated with at least one incumbent multichannel video programming distributor (“MVPD”)¹⁷ and eight of the top 20 programming networks, ranked by subscribership, are affiliated with incumbent cable operators.¹⁸ In addition, four of the top six cable operators hold ownership interests in satellite-delivered national programming networks.¹⁹ One or more of these companies has an interest in 79 of the 92 vertically integrated national satellite-delivered programming networks.²⁰

The intent of incumbents to acquire exclusive programming is evident in a variety of recent circumstances. In one recent example, in an August 13, 2003 meeting between Comcast, Cox, TimeWarner/AOL, Adelphia, and Charter with Los Angeles County representatives, the

¹⁶ *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, Report and Order*, 17 FCC Rcd 12124, 12158 (2002) (“*Program Exclusivity Prohibition Extension Order*”) (“Failure 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.”).

¹⁷ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Ninth Annual Report*, 17 FCC Rcd 26901, 26959 (2002) (“*Ninth Annual Report*”).

¹⁸ *Id.* at 26960.

¹⁹ *Id.* at 26959.

²⁰ *Id.*

cable MSOs sought to have local county government programming made exclusive to cable MSO's and to be advertiser supported.

Another recent example involves access to content of Soap Network, an ABC/Disney video channel. As part of its retransmission requirement, Altrio, a BSPA member in Greater Los Angeles, was initially asked to carry Soap Network in the last round of retransmission consent negotiations. Altrio was then told it could not carry Soap Network in certain areas of the Los Angeles market because of an exclusive carriage agreement with an unnamed incumbent cable operator. A list of the zip codes in which carriage was prohibited corresponded to those in Pasadena where Charter has a franchise. This market-wide prohibition would also apply to zip codes in Los Angeles County and Temple City where Charter operates. The prohibition remains in effect today. Because ABC/Disney is not affiliated with a cable operator, the present program access regime does not apply, though this provides an additional example of the abuse of market power to deny access to content. A similar strategy has been used to deny access to Soap Network in other states. For example Soap Network has also been denied to PrairieWave Communications in Marshall, Minnesota.

Denying access to content has also extended into rural areas. RFD-TV is a channel positioned to meet the unique needs and interests of a more rural population. During its development process RFD-TV accepted the assistance of MediaCom Communications ("MediaCom"), which serves 23 states. In return, MediaCom obtained an exclusive broadcast right to RFD-TV in all of the territories it serves. BSPA understands that RFD-TV has now agreed to make its programming available to competitors as of December 2003. This provides, however, yet another example of how the cable industry uses its market power and vertical relationships to deny competitors access to content.

Everest Connections, a BSPA member operating in the Kansas City metropolitan area, currently has a complaint pending at the Commission concerning access to the University of Missouri men's basketball games.²¹ While a number of the Missouri men's games are available to viewers via the national broadcast networks and ESPN, games that are not available through either of those outlets are distributed via satellite by Mizzou Sports Properties and are available on the Fox Sports Net channel throughout the State of Missouri, except in the Kansas City metropolitan area, where the Time Warner affiliate, Kansas City Cable Partners ("KCCP"), has entered into an exclusive agreement with Mizzou Sports Properties. Fox Sports Net is forced to "black out" the games in Kansas City. In addition to providing the games to their own subscribers, KCCP delivers the games terrestrially to Comcast, which also operates franchises in the Kansas City metropolitan area. In the resulting structure, no other MVPDs (including BSPs and satellite) have access to the content.

In New York City, Cablevision has deprived RCN of access to key overflow sports programming by revising its distribution system from satellite to terrestrial so as to preclude RCN's carriage of this important tier of programming.²² This loss of critical sports programming has been a serious detriment in marketing RCN's services in New York City. RCN filed a complaint against Cablevision with the Commission, which the Commission ultimately dismissed on the grounds that RCN failed to show that Cablevision moved the programming from satellite to terrestrial distribution for the purpose of evading the program access rules. In so

²¹ CSR-6094-P.

²² Cablevision controls the programming rights for a majority of the local professional sports teams in New York, including the Yankees, Mets, Knicks and Rangers.

ruling, however, the Commission also denied, over the dissent of Commissioner Tristani, RCN's request for discovery to probe the issue of statutory evasion.²³

In the Boston market, Comcast has exclusive rights to carry the local news programming of New England Cable News. Comcast has refused to waive those exclusive rights and provide this critical programming to RCN, thereby denying RCN's existing and potential subscribers with access to this important local programming.

The desire by vertically-integrated incumbent operators to distribute sports programming on an exclusive basis is well-documented by the Commission. Yet, by migrating sports and other critical regional programming to terrestrial-based distribution, incumbent cable-affiliated regional programmers continue to avoid application of the Commission's program access rules, which are only applicable to satellite-based delivery of video programming to MVPDs. These circumstances allow them to refuse to make such programming available to competitors.

Congress has recognized the importance of sports programming in the past, such as when it directed the Commission as part of the 1992 Cable Act to investigate "the economic and social consequences" of migration of sports programming away from over-the-air distribution to subscription cable and pay-per-view.²⁴ The eventual 1994 Commission report ultimately found little, if any, such migration.²⁵ Ten years have passed since the Commission developed the record for its sports programming migration report. Non-broadcast coverage of sporting events has certainly increased dramatically, at least to some degree at the expense of broadcast

²³ *RCN Telecom Serv. of N.Y., Inc. v. Cablevision Sys. Corp.*, 16 FCC Rcd 12048 (2001).

²⁴ 1992 Cable Act, Sec. 26(a).

²⁵ *Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992; Inquiry into Sports Programming Migration, Final Report*, 9 FCC Rcd 3440, 3510-12 (1994).

coverage.²⁶ Tactics such as the incumbent cable operator exploitation of the terrestrial delivery loophole in Section 628 serve to exacerbate this problem by making certain sports programming available only over certain distribution platforms and only through certain distributors, such as incumbent cable operators.

The threat of mass programming migration to terrestrial delivery is significant. Not only do incumbent MSOs have the motive, but they are being supplied the opportunity. For example, the recent purchaser of the national fiberoptic footprint of Broadwing Communications Services, Inc. touted the availability of its network to the cable industry to move programming off satellites and thereby end-run the program access regime.²⁷ As explained by Jerald L. Kent, Chief Executive Officer of Cequel III, one of the new co-owners of the Broadwing facilities and founder and former Chief Executive Officer of Charter Communications, Inc.:

The cable industry can develop its own programming and deliver it via our Broadwing network and take programming exclusivity.²⁸

The continuing trend toward clustering provides further opportunities for incumbent cable operators to avoid the satellite program delivery structure on which the program access rules are based.

The Commission has repeatedly and conclusively acknowledged the critical nature of this issue.²⁹ At the same time, however, the Commission continues to believe that Section 628(c) of

²⁶ See, e.g., Frank Beacham, *TV Milestones – Connecting the Dots*, TV TECHNOLOGY, Feb. 20, 2002 (available at <<http://www.tvtechnology.com/features/Big-picture/f-fb-milestones.shtml>>); Kim McAvoy, *Yanks, Others Get in the Game*, BROADCASTING & CABLE, Apr. 1, 2002.

²⁷ Ted Hearn, *Kent Touts a Program-Access End Run*, MULTICHANNEL NEWS, Apr. 14, 2003, at 14.

²⁸ *Id.*

²⁹ See, e.g., *Ninth Annual Report*, 17 FCC Rcd at 26908; *Program Exclusivity Prohibition Extension Order*, 17 FCC Rcd at 12138.

the Act does not provide it with the authority to promulgate rules prohibiting exclusive contracts regarding cable-affiliated, terrestrially-delivered programming.³⁰ It is time for the Commission to take action on this issue. In its *Tenth Annual Report*, the Commission should explicitly request that Congress amend Section 628(c) to apply to terrestrially-delivered programming.

B. A Blueprint For a Digital Future: Maintaining Consumer Access to Content in the Digital Age

Progress in the transmission and compression of broadband content means that video, audio, and data can be transmitted in a cost-effective manner to more consumers by more means for a greater variety of end use devices. The same digital content can be potentially used by a television, computer, wireless device, or yet-to-be-invented digital appliance. Even today, broadband content can be delivered with varying degrees of effectiveness by wire (telephone, cable, and electrical), terrestrial broadcast, terrestrial wireless networks, and satellite.

The distinctions between the types of content that will be delivered over what platforms will continue to blur; video programming, including movies, already have limited availability over the Internet. Broadband capacity and distribution techniques will continue to improve. Once any video content has been converted to a secure digital delivery format, it is relatively easy to deliver it over any high-capacity digital delivery system. Content that is stored at a head-end facility can be made available for multiple types of delivery services hosted on the same network structure. Ultimately, many of these means of transmitting content will become technically and financially substitutable – consumers will be able to receive high-quality video programming on an expanding array of end user devices depending on the desired final use of

³⁰ See *id.*

the content. The most visible current example is video content that can be delivered on either an MVPD channel or on an HSD Internet connection as either streaming video or for store and replay. For market forces to determine the most efficient development of various distribution platforms and end use applications, however, access to critical content cannot serve as an artificial distinction between technologies. Consumers should be able to access such important content no matter what technological platform, transmission technology, or end user device they choose.

This emerging digital structure means that any content strategies and related issues that have previously been limited to the MVPD segment of the industry can now be used potentially to control access to that content delivered over an HSD Internet system. The same types of content-based market distortions that have occurred in the current MVPD market will occur in the HSD Internet market if access to content is not protected as it was for cable-affiliated, satellite-delivered video programming. Therefore, ensuring consumer access to digital content needs to extend beyond MVPD platforms to encompass broadband Internet platforms as well.

It is also important that the Commission recognize and consider the implications of the distribution structures that are emerging. A network system that connects end users to a head-end facility is essentially a private shared local access network ("LAN") hosting users for a fee. Content that is stored at the headend facility is not on the "public Internet" as commonly considered by the public. End user that access content stored at the head-end with their PC or other internet device will tend to think of the connection as being on the "Internet," although they are not on the traditional Internet until they are released through a portal that takes them outside the headend facility.

Content that is delivered to a head-end facility by any means other than satellite is not subject to any existing rules for MVPD distribution, or to commitments related to assuring open access to content that is available on the Internet. If a content producer chose to enter into an exclusive contract with a distributor, it could transfer that content to the head-end facility, store it there, and then deliver it via any number of services provided on the network, multichannel video distribution, HSD Internet or other type of digital distribution service. There are many potential benefits to this structure. The issue is whether this emerging structure is used to restrict distribution competition or if content delivered through this structure will be fairly available to all distributors capable of hosting and delivering it.

Televisions are no longer the sole means by which video content is viewed. PCs are becoming increasingly important in the access of video (as well as audio) programming content, particularly content delivered over HSD platforms. Data suggests that U.S. residents 13 years old and above consider computers to be more important for home entertainment than CD players, stereos, and DVD players.³¹ According to a Harris Interactive Survey conducted in March 2003, 63 percent of survey respondents currently use a PC in a group living area.³² Both the hardware and software segments of the PC industry (*e.g.*, HP and Microsoft) are already urging the Commission in other proceedings to consider the importance of PCs to entertainment consumption in crafting various video service and equipment rules.³³ Incumbent cable operators,

³¹ Letter from Paula H. Boyd and Andrew Moss, Microsoft Corp., and David Isaacs, Director, Government Affairs, Hewlett-Packard Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, filed in CS Docket No. 97-80 and PP Docket No. 00-67 (filed Aug. 8, 2003).

³² *Id.* at 2

³³ *Id.*

beginning to view Internet delivery of video programming as a competitive threat, have already begun to leverage their market power in the distribution market to demand that program suppliers not distribute their content over the Internet and to place conditions on their own broadband services to prevent competitive video programming delivery.³⁴

BSPA believes that vertical integration or the abuse of market power to create exclusionary contracts are the market conditions that would create this use of exclusive access to content to thwart the growth of competition. These are the conditions that were addressed through Section 628 of the Act for multichannel video, and these are the conditions that should be addressed for emerging digital technologies.

C. Current Industry Segments and Policy Implications for Each

The structure of the broadband HSD Internet industry presents its own unique issues and concerns. This emerging structure has four major segments, each with varying degrees of integration, that serve as layers in the creation and distribution of content and services to consumers: primary broadband access providers, ISPs, Internet content providers (“ICPs” – websites), and original content producers (such as movie studios). Ensuring consumer access to digital content has implications for each.

1. Primary Broadband Access Providers

Primary broadband access providers or primary broadband distributors are the firms that provide last-mile high-speed connections to end-users. These include upgraded incumbent cable television systems providing cable modem service, BSPs, DSL providers, FTTH systems, wireless, and satellite. This layer of the industry provides the physical connection from the

³⁴ See *U.S. PIRG 2003*, at 51.

consumer to a headend, central office, or other provider aggregation point, where traffic is backhauled to the Internet, typically through a direct connection with an ISP or other third party provider. A significant portion of the recent broadband debate and proposed legislation has focused on the expansion of true broadband network availability to the entire population of the U.S., (that is, digital divide and rural broadband deployment issues), and the development of healthy sustainable distribution competition. The ultimate form of competition most desired is facilities-based as opposed to forms of forced shared network strategies. While investment and growth in this segment of the industry is considered vital for the recovery of the telecommunication economic sector and the future competitiveness of the U.S. economy, access to and use of broadband technology in the U.S. now lags behind that of several countries. The quantity and diversity of Internet content offerings will be constrained until a larger percentage of consumers have broadband access, that is, subscribe to a primary broadband access provider. Given the large and long-term capital requirements of facilities-based last-mile networks, investors require a certain degree of assurance, such as that provided to MVPDs by the 1992 Cable Act – that these networks will be able deliver the digital content demanded by potential subscribers.

The same market structures of vertical integration and market power that have existed in the MVPD industry will naturally extend into the next generation of higher capacity digital networks that also host broadband Internet. Incumbent cable operators that today are significantly integrated with program suppliers are upgrading their legacy systems to provide broadband access through cable modem service. The same preferential or exclusive access to content that has been demonstrated in the MVPD industry can be extended to broadband Internet. Fair access to content will become as critical an issue for the development of

competitive distribution platforms hosting broadband Internet as it was for the initial development of MVPD distribution competition.

While primary broadband access providers and their subscribers should be assured access to all available digital content, providers of last mile networks should also not erect artificial barriers to their customers' access to Internet content. Consistent with the level of service purchased by a customer, each customer, once connected to the Internet, should have the same freedom to connect with any website or other resource they have historically enjoyed access to with dial-up service. That being said, once the consumer has been connected to the Internet, the primary broadband distributor can no longer assure the speed or capacity of the complete end-to-end connection. Thus, in the future, digital content/service providers may seek to bypass the Internet and establish direct connections between their operations and broadband distributors. The terms and conditions of these types of connections should be driven by market forces that are subject to negotiations between broadband distributors and digital content/service providers.

2. Internet Service Providers

ISPs have historically provided both the connection to the customer through the provision of modem pools and associated DIDs allowing dial-up services, and a backhaul connection to the Internet. In addition to these connection services, ISPs also have historically provided hosting services for websites, e-mail, and other content. In addition, ISPs have provided value-added software services both to simplify and enhance a usage of Internet-based resources. The dial-up portion of historical ISP service is being slowly replaced by broadband connections they are not in a position to offer directly to subscribers, except through the resale and bundling of broadband access offerings of an existing broadband distributor. While this reduces some ISPs' service opportunities related to physical access to consumers, true broadband connection also expands

the types of value-added services that ISPs can potentially offer. While primary broadband distributors may offer their own ISP services, many consumers continue to want access to different ISP resources, since a typical primary broadband access provider is not in a position to duplicate the types of support and services available through AOL, MSN, or more specialized ISPs.

The Time Warner/AOL merger caused significant discussion regarding the concept of ISP “open access” to new primary HSD Internet systems. A key to this discussion is whether this open access is voluntary and market-driven or whether it is forced. It is neither technically feasible nor economic for a primary HSD distributor physically to host at their facilities either direct connections or the placement of ISP-owned equipment for all potential ISPs. On the other hand, it is reasonable that primary broadband distributors assure customers they can access any ISP portal they wish to use through their Internet connection. ISPs should also ensure that their subscribers are not blocked from reaching sites of their choosing through the imposition of artificial restrictions by the ISP. Certain ISPs may also eventually seek to establish direct links to primary broadband distributors, thus establishing a more direct connection to their subscribers. Terms and conditions for these types of connections should be based on arms-length negotiations and driven by market forces.

3. Internet Content Providers

ICPs include all parties providing information, e-commerce, entertainment, or other services through Internet connections and include all types of public and private websites. The continuing development of new and or competitive web-based video and other services would be greatly benefited by assuring fair and open consumer access to all content providers available through the web. Once a consumer chooses a particular combination of primary HSD distributor

and ISP, the ICPs and the consumer become dependent on that selected resource to assure fair access to ICPs. Because it is not economically or technically practical for any consumer to choose and provision more than one primary HSD distributor and one primary ISP service, all consumer-selected combinations of core broadband services must be given fair access to all ICPs and those selected services must not restrict a consumer from reaching any ICP of a consumer's choice.

4. Original Content Producers

Original content producers have the unique concerns of content protection. Original content producers include movie studios, broadcast networks, cable networks, artists, concert producers, libraries (public and private), government agencies, sports teams, colleges, medical resources, etc. This category includes any party that has content that can be put into a digital format that can be stored and/or delivered over a broadband network. Original content producers have legitimate and critical concerns regarding security as it may relate to copyright protection, personal privacy, or secure financial transactions. The means by which copyrights or other security on content are enforced, however, may also have anticompetitive affects on downstream content distribution. While the prevention of piracy is a critical concern of copyright holders with respect to the technologies through which their content is distributed, addressing such concerns need not foreclose competition, such as through requiring use of particular anti-piracy technology available only through a particular platform or licensed only to a particular distributor. Although a content creator or middleman seller of content to distributors (such as programming networks) should not be required to deal with parties that are unable or unwilling to protect against piracy, at the same time, the availability of anti-piracy technology to

competitors should not provide an excuse for refusing to make digital content available to non-incumbent distributors.

D. Current Examples of Emerging Access Issues

VOD, the next generation of video programming technology, is a prime example of how the digitization of content, which should benefit consumers with expanded choice, may actually harm consumers by constraining choice if VOD is provided in an anticompetitive manner – a matter on which the Commission seeks comment in the *Notice*.³⁵ VOD is widely expected to become a dominant segment of the video industry over the next ten years and, like terrestrially-delivered programming, is expected to fall outside the scope of the program access rules, as non-satellite delivered programming.

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. Due to these advantages, 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 such as the ability to access libraries of previously broadcast network programming, allowing consumers to watch at their leisure network programming that they missed when originally televised. VOD technology can become much more than movies for entertainment. VOD can ultimately provide consumer access to any digitally stored content that could be available from library resources or public agencies and it could support the re-broadcast of political debates or significant speeches. The real possibilities of VOD have yet to unfold.

³⁵ See *Notice* at ¶ 18.

It is also technically possible to support the VOD platforms on today's MVPD systems or on tomorrow's broadband systems. The emerging high-capacity broadband Internet systems are also capable of hosting a VOD-type of content delivery. Streaming video on a broadband Internet connection can deliver the same digital content to a personal computer that historically has been concentrated in the MVPD industry. Upgraded cable systems, BSP hybrid systems, and FTTH systems are today's examples of how these formerly distinct technologies, MVPD and Internet, are now hosted on integrated distribution platforms. These integrated systems facilitate the relatively easy transfer of digital content from one distribution technology to another.

The history of VOD highlights the detrimental influence that a lack of access to content can have on technological development. In 2000 and 2001, significant efforts were made by several BSPs including RCN and Astound Broadband to bring VOD to the market. These efforts were supported by service companies including Demand Video, Intertainer, and Diva. Although early efforts demonstrated that the technology worked and was understood and desired by consumers, such efforts were thwarted by a lack of access to relevant content. This lack of content contributed to the bankruptcies of these early VOD service companies.

During the last few years, major incumbents determined that this technology and new service would be a major part of their offerings and that they would acquire access to VOD content through their wholly-owned operation iN Demand. iN DEMAND represents a current example of how the support of VOD and the access to relevant content for VOD-based distribution could distort the application of VOD in the emerging world of digital platforms. iN DEMAND, a company owned by Comcast, Time Warner, and Cox, is the overwhelmingly dominant provider of PPV and can be expected to be a dominant provider of VOD. While there are still many open issues regarding copyright protection, with their established market position

and the endorsement of the incumbent MSO's, iN Demand has found access to content that was originally denied to other operators.

As with traditional programming services, competitive MVPDs do not have the economies of scale to support their own version of iN DEMAND and will therefore be dependent on this type of resource for fair access to VOD content. Historically, iN DEMAND has provided service to all MVPD operators. However, early in 2003, iN DEMAND, wholly owned by major MSO incumbents, made a policy change deciding it would not provide VOD services to non-member/owner companies. At the time, several other potential VOD content suppliers had gone bankrupt. BSPA understands that after meeting with Senate Judiciary Committee staff regarding this matter, iN DEMAND subsequently changed its operating policy and now serves several BSPs. While iN DEMAND ultimately relented, this provides another clear example of the strategy and intent of incumbents to use vertical integration and market power to deny content to competition, in the absence of clear access rules or governmental scrutiny. The only real solution is to assure the fair access to content and service that would be present in the absence of any abuse of market power or vertical integration.

This type of open structure needs to be assured for all forms of future content and extended to all types of distribution platforms capable of hosting that digital content. VOD technology can be terrestrially distributed and is therefore not protected under the current provisions of Section 628. Unless VOD technology and VOD-delivered content is fairly available to all MVPD and HSD Internet competitors capable of delivering it, it will become a tool to protect and strengthen the monopoly position of incumbent cable operators in the multichannel program distribution market and in the broadband Internet market they are

upgrading their systems to serve. Such a circumstance means that large incumbents in a particular technological niche can exclude other distributors from the market.

Another development with regard to VOD highlights a further problem in the current and, if left unchecked, future marketplace – the link further up the supply chain between the original content producers of programming content and those who wish to distribute it – either the “middlemen” programming vendors or sometimes the cable operators. Major cable operators have actively pursued broadcasters for the exclusive right to deliver video-on-demand versions of broadcast programming within their territories, which would deny critical content to other distributors of video programming that are also investing in VOD technology. The same exclusive or preferential access to content for MVPD VOD-based delivery can be applied to the equivalent streaming video delivery of the same content on a broadband Internet platform where there is no business precedent or access regulations to restrain anticompetitive strategies. The evening news is an example of content that a consumer might want to watch on either a television or a computer. Exclusive rebroadcast rights for either cable television or the Internet could have material impact on the perceived value and development of competitive distribution networks.

Sports programming is another example of historical and potential issues related to fair access. Access to the broadcast of local sports can be critical for the successful deployment of new MVPD or HSD Internet services. The broadcast or rebroadcast of sporting events will become increasingly common on broadband Internet platforms. Terrestrial distribution of regional sports has taken this critical content outside of the current program access regime. This historical MVPD issue will be extended into HSD Internet, where preferential or exclusive

access to sports events will be potentially used to distort competition in the primary broadband distributor or ISP segments of the industry.

E. Now is the Time for the Commission to Begin Developing a Technologically-Neutral View of Content Access

Any digital content that is currently available on an MVPD platform will be potentially available on an HSD Internet platform. However, video and audio content, along with any accompanying interactive data enhancements, is not the only content critical to the continuing development of HSD Internet and delivering the full benefits of the digital information age to consumers. Policies must be established to prevent suppliers of digital content packages, particularly those affiliated with incumbent cable operators and other primary broadband distributors, from distorting the market for broadband access through denying fair access to any digital content. This goes beyond traditional MVPD program access protection. It also entails preventing primary HSD distributors from blocking or otherwise impairing access to any Internet hosted content sought by their subscribers on the basis of that content provider competing with an affiliated provider of similar content. A foundation for the historical growth of the Internet has been the open and unrestricted ability of consumers to access all of the Internet sites and content vendors. Distributors should be allowed to configure and charge for the digital capacity they provide. Once that capacity has been provisioned, however, the customer should have unrestricted use of that capacity to access content available on today's Internet or any future high-capacity digital distribution network.

In a truly competitive content creation and delivery market, firms would act in accordance with the principles that would ensure consumer access to digital content. Content creators would be interested in maximizing their customer base and would wish to have the

largest audience possible. Thus, they generally would not enter into exclusive distribution relationships with content distributors – both affiliated distributors and unaffiliated distributors. Similarly, content distributors and HSD access providers would seek to distribute the widest array of content available that is desired by their customer base.

There could be instances, of course, in which a primary broadband distributor might wish to internally create or sponsor discrete programs exclusively for their own use, which they would choose not to make available for sale to any other provider, whether a competitor or not. Under that limited circumstance, the local provider creating the program should generally not be required to sell such program to third party distributors. This exception, however, should not extend to channels, programming services or networks, as opposed to individual programs. Moreover, regional sports are typically so important to local competition that such programming requires special treatment.

Program package exclusivity may also be appropriate, so long as those packagers are available regardless of retail distribution platform. Therefore, a program supplier such as HBO, Showtime, or a future similar supplier, could have an exclusive relationship with a movie studio or broadcast library, so long as those packages are made available to all potential primary distributors.

The guiding principle of consumer access to digital content should be that the competitive structure of the market for content creation, content distribution, and high-speed-data market access should not affect consumers' ability to receive the content of their choice on the distribution/HSD access platform of their choice. Primary HSD distributors and ISPs should not be able to use their vertical relationships and buying power to prevent competitive primary HSD distributors, such as local telephone companies, BSPs, or wireless alternatives from

distributing critical programming to their customers. Similarly, neither should primary broadband distributors nor ISPs be permitted to prevent the development and availability of HSD content by unfairly blocking or otherwise artificially limiting consumer access to such content.

Now is a unique moment in history when content distribution networks are beginning to offer the same services and consumers, through their purchasing choices, are directing critical decisions regarding the development of access to information – whether it be video, audio, or otherwise. The Commission, as discussed above, currently remains convinced that it lacks the authority to establish and enforce, at least for as long as necessary, principles that would ensure consumer access to all digital content. Before doors are closed by the current incumbents through their influence in the market for content creation and distribution, policymakers need to establish the legal principles that will ensure consumer access to digital content. Thus, Congress needs to step in and enact proactive legislation that will allow the Commission, and ultimately the market, to ensure that market power over content is not used to distort and thwart consumer choice.

III. BEYOND OBSTRUCTING THE FLOW OF PROGRAMMING CONTENT, INCUMBENT CABLE OPERATORS ALSO CONTINUE TO USE OTHER MEANS TO INHIBIT COMPETITIVE ENTRY

As discussed earlier, BSPs have continued to find ways to grow and increase penetration. As a result of their early success, however, BSPs are often targeted by incumbent cable operators, who leverage their market power through the imposition of artificial barriers to further sustained growth. BSPA discussed the role played by incumbent cable operators in obstructing the flow of digital content above. In this section, BSPA discusses other means by which incumbent cable operators attempt to leverage their dominance in the multichannel video

programming distribution market – predatory and discriminatory pricing, preventing competitive provision of service to MDUs, and manipulation of the regulatory process.

A. BSPs Have Been Targets of Incumbent Cable Operator Discriminatory Pricing Campaigns

While the average incumbent cable rates continues to outpace inflation, incumbent cable operators have offered significant targeted discounts to current and potential BSP customers in an effort to forestall competition. In a perfectly competitive market with low barriers to entry and perfect information, discounts are good for competition and good for consumers. BSPA does not argue otherwise. In the face of BSP entry, however, some incumbents are now pursuing targeted, discriminatory pricing strategies that have become more aggressive in the last 18 months, to where current offers in many cases are below any estimate of variable cost. For example, one Midwest incumbent has been so aggressive as to offer Expanded Basic Cable for \$5.00 per month for a year. Data related to this and many other examples of pricing below \$15.00 per month is also available.

RCN has encountered several instances of discriminatory pricing by incumbents in its markets. For example, in Montgomery County, Maryland, Comcast has engaged in deep discount pricing (*e.g.*, 64 movie channels for six months at no charge) targeted directly at RCN's existing and potential customers. These discounts were not offered to other customers in Comcast's service area, in potential violation of the County's uniform cable rate ordinance. In Philadelphia, Pennsylvania, Comcast currently is offering potential and existing RCN customers an exclusive package of bundled digital cable programming and cable modem services for \$50, which is a significant discount given that the industry's average rate for digital cable service alone is \$53-

55.³⁶ In essence, these customers are receiving their cable modem service at no charge. This offer is not available outside the RCN territories in the Philadelphia market.

To date these incumbent pricing strategies have had mixed levels of negative impact. Some of these recent offers have been implemented against systems that already had some established presence in an effort to winback lost customers or block future growth. In these situations, consumers have experienced the added value of subscribing to a BSP and the level of lost business has been mixed. To the extent that these strategies are fully exercised against a new BSP build or significant expansion where access to the initial customer base is denied with these anti-competitive strategies, however, such strategies may meet with greater success.

The Commission has recognized these concerns. In the context of the AT&T Broadband/Comcast merger, for example, the Commission found that the “representations [of AT&T Broadband and Comcast] leave open the substantial possibility that the Applicants may well have engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition and that these practices ultimately may harm consumers”³⁷ and that “[n]otwithstanding the merger, AT&T and Comcast already have the incentive and ability to target pricing in an anticompetitive manner, as evidenced by the RCN’s and BSPA’s allegations and Applicants’ responses to those allegations.”³⁸ The Commission continued:

We also disagree with Applicants’ claim that targeted discounts merely reflect healthy competition; in fact, although targeted pricing between and among

³⁶ *2002 Report on Cable Industry Prices*, 18 FCC Rcd at Tables 3 and 10.

³⁷ *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, Memorandum Opinion and Order*, 17 FCC Rcd 23246, 23292-93 (2002).

³⁸ *Id.* at 23293.

established competitors of relatively equal market power may be procompetitive, targeted pricing discounts by an established incumbent with dominant market power may be used to eliminate nascent competitors and stifle competitive entry. . . . [T]argeted pricing may keep prices artificially high for consumers who do not have overbuilders operating in their areas because of the overbuilder's inability to compete against an incumbent who uses such strategies.³⁹

The Commission went on to state that regulatory action may be warranted: "Mounting consumer frustration regarding secretive pricing practices and the threat that such practices pose to competition in this market suggest, however, that regulatory intervention may be required either at the local, state, or federal level."⁴⁰

In one sense, targeted low cost discounts are a relatively low cost strategy to the incumbent because such discounts are only offered to customers that have access to competitive BSP service. In addition, these aggressive discounts are only offered to a very limited customer group and are subsidized by rates in areas where the incumbents do not face similar competition.

As a general matter, the Act prohibits targeted discounting of cable services. For example, Section 623(b) states that "[a] cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system." The Act goes on to state in Section 623(b)(1), however, that such a uniform rates structure is not required in geographic areas in which the cable operator faces "effective competition," as defined in Section 623(l)(1) of the Act.

Section 623 requires the Commission to find there to be effective competition in a market in which, among other possible independent justifications, a competitive MVPD offers service to

³⁹ *Id.* at 23292-93.

⁴⁰ *Id.* at 23293.

at least 50 percent of the households in the franchise area and at least 15 percent of households in the area actually subscribe to any competitive MVPD.⁴¹ Because satellite providers are considered to be MVPDs,⁴² an effective competition showing usually merely requires that a total of 15 percent of households in a franchise area take satellite service.

Unfortunately, the current effective competition triggers, by themselves, do not sufficiently protect consumers and new entrants from discriminatory pricing practices of dominant incumbent cable operators, and ironically allows incumbents to pursue targeting pricing strategies intended to thwart competition.

Rather than rate regulation, the solution to this problem is full and fair disclosure of all rates offered within a local franchise area so that all potential customers in the same franchise area and the local franchise authority can take advantage of the offers and monitor the equity of rate availability. BSPA suggests that the Commission require all incumbent cable operators to notify all customers in their local franchise areas and the relevant local franchising authorities 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 30 days after any such rate is offered to such customer.⁴³ Such a requirement, BSPA believes, would create an appropriate environment of required disclosure for all potentially affected geographic markets.

⁴¹ See 47 U.S.C. § 543(l)(1)(B).

⁴² 47 U.S.C. § 522(13).

⁴³ As a condition to approving the AT&T Broadband/Comcast merger, the Montgomery County Council required AT&T-Comcast to post immediately on the company's website all promotions and discounts offered to any subscriber within the franchise area, so that all consumers in the County may see the discounts and promotions being offered. Montgomery County also has in place a local ordinance requiring uniformity of cable rates throughout a franchisee's franchise area.

BSPA member WideOpenWest has argued that Section 76.1601 of the Commission's rules *already* require incumbent cable operators to disclose promotions and discounts.⁴⁴ Moreover, even if the Commission were to conclude that Section 76.1601 does not already require some form of notice (or a form substantially less than that proposed above), BSPA believes that the Commission nevertheless possesses sufficient statutory authority to promulgate such a rule. Section 623(b)(3) of the Act unequivocally permits the Commission to establish customer service standards governing "communications between the cable operator and the subscriber (including standards governing bills and refunds)."⁴⁵ Further, in initially implementing Section 623(b), the Commission expressly concluded that an incumbent cable operator facing "effective competition" for rate regulation purposes nevertheless should be subject to customer service rules, including providing advance notice of changes in service and rates.⁴⁶

This proposed disclosure requirement is not intended to serve as rate regulation or a tariffing requirement. Instead, BSPA intends it to serve as a means to provide sufficient information to customers and to bring to light arbitrary, discriminatory, and anti-consumer pricing practices. In addition, in areas not yet found by the Commission to have "effective competition," such a disclosure requirement provides essential data to ensure that incumbent cable operators are, indeed, complying with their statutory uniform rate obligations.

⁴⁴ See *Complaint Against Comcast Corporation For Systemic Abuse of Customer Service Standards Established by the Federal Communications Commission Pursuant to Section 632(b) of the Communications Act of 1934, as Amended*, EB-01-MD-0333 (filed May 22, 2002).

⁴⁵ 47 U.S.C. § 552(b).

⁴⁶ *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Report and Order*, 14 FCC Rcd 5296, 5365 (1999).

**B. The Incumbent Cable Operator Stranglehold on MDU Access Limits
Competitive Provision of Video, Voice, and Data Services to Consumers**

BSPA believes that the Commission missed a critical opportunity to foster competitive provision of video, voice, and data services to consumers in MDUs when it chose not to address issues relating to exclusive MDU contracts in the *Cable Home Wiring Second Report and Order*, leaving the issue open for later consideration.⁴⁷ Having a state of the art network does a telecommunications, video, or data provider little good if it cannot be connected to end users. While the Commission has begun to address the issue of exclusive contracts between local exchange carriers (“LECs”) and MDU owners for the provision of local exchange services in the Competitive Networks proceeding,⁴⁸ the Commission has yet to address exclusive contracts between MDU owners and MVPDs (including private cable operators) for the provision of multichannel video services.

As video service is a critical component of BSP offerings, BSP service to many MDUs is precluded by such exclusive contracts, particularly those that are long term, include automatic renewal (“evergreen”) provisions, or are written as perpetual contracts. Many of these long-term exclusive agreements were negotiated when the options for competition were not apparent in a given community – landlords had few if any options, so the risks of term length and exclusivity were not evident. Thus, these exclusive MDU deals not only block competitive entry, but lock tenants and building owners into outdated networks and services.

⁴⁷ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring, Second Report and Order*, 18 FCC Rcd 1342 (2003)(“*Cable Home Wiring Second Report and Order*”).

⁴⁸ *See, e.g., Promotion of Competitive Networks in Local Telecommunications Markets, First Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22983 (2000); 47 C.F.R. §§ 64.2500-02.

These long-term MDU video contracts are capable of blocking or deterring BSP investment. Carolina Broadband was a BSP that had encountered this problem. Carolina Broadband determined that at least 90 percent of all MDU residents living in Charlotte and Raleigh, North Carolina were prohibited from choosing a competitive MVPD due to exclusive agreements between incumbents and MDU owners. Their research also found that these agreements tended to be very long term – typically 10 to 15 years in length. These MDUs represented over 25 percent of the total market as well as the more densely concentrated households that logically prove to be the most efficient to build out with network. The market potential was reduced with the inability to build out this market segment. This constraint along with other market uncertainties, led to the ultimate demise of Carolina Broadband and the abandonment of their markets.

Typical cable franchises require new entrants to extend their system to the entire footprint of the incumbent cable operator. When a significant portion of the value of this required investment is denied to a BSP through exclusive long-term MDU contracts, entry may become potentially uneconomic and therefore never attempted in a particular geographic market as was concluded by Carolina Broadband.

The existing home wiring rules have, however, proven useful in at least limited circumstances. For example, the U.S. District Court for the District of Kansas held that Time Warner only had the right to control access to a property's wiring when the individual unit is

using the provider's service, permitting Everest to purchase wires from the utility closet to the demarcation point.⁴⁹

BSPA is pleased that the Commission continues to seek information on these critical issues.⁵⁰ As discussed above, the Commission left open the issue of exclusive MVPD MDU access in the *Cable Home Wiring Second Report and Order*. BSPA urges the Commission to develop what it considers to be a sufficient record so that it may take action on this important issue in the near future.

C. Through Manipulation of the Local Regulatory Process, Incumbent Cable Operators Have Attempted to Protect Themselves From Competition

Incumbent cable operators have also attempted to thwart entry by BSPs through manipulation of the local franchising process. The means employed for this purpose include challenging the “fitness” of competitors to provide service in their markets, and advocating to local officials that additional and onerous franchise conditions be imposed on competitors in the name of maintaining a “level playing field” (“LPF”).⁵¹

Even where such claims are rejected as frivolous, they still require the attention, time and resources of the competitor – which is precisely their object. As former Commission Chief Economist Thomas Hazlett has observed, “[t]he administrative process whereby the playing field

⁴⁹ *Time Warner Entm’t Co., L.P. v. Atriums Partners, L.P.*, 232 F. Supp. 2d 1257 (D. Kan. 2002), *appeal docketed*, No. 03-3005 (10th Cir. Jan. 7, 2003).

⁵⁰ *See Notice* at ¶ 8.

⁵¹ *See New England Cable Television Ass’n, Inc. v. Department of Pub. Util. Control*, 717 A.2d 1276, 1291-93 (Conn. 1998); *United Cable Television Serv. Corp. v. DPUC*, 663 A.2d 1011, 1025 (Conn. 1995); *Cable Sys. of S. Conn., Ltd. v. Connecticut DPUC*, 1996 WL 661818, at *4 (Conn. Super. Ct. 1996); *Comcast Cablevision of New Haven, Inc. v. Connecticut DPUC*, 1996 WL 661805, at *3-4 (Conn. Super. Ct. 1996); *Cable TV Fund 14-A, Ltd. v. City of Naperville*, 1997 WL 280692, at *12 (N.D. Ill. 1997); *In re Application of Dakota Telecomm. Group*, 590 N.W.2d 644, 647-48 (Minn. Ct. App. 1999); *see also* M. Larson, *Lincoln’s Cable Firm Threatens Suit Over Competition*, SACRAMENTO BUSINESS JOURNAL (Aug. 25, 2003).

is ostensibly ‘leveled’ is biased in favor of a monopolistic equilibrium. The inherent vagueness of the LPF standard, the entrant’s de facto burden of proof, the front-loaded nature of the costs incurred by the entrant and the incumbent’s ability to delay preemptive investments until credible entrants actually materialize invite strategic use of administrative process to thwart entry.”⁵²

One egregious example of the manipulation of the local franchising process involves the actions of Insight Communications in Louisville, Kentucky. In 1998, when its franchise in Louisville was renewed, Insight not only insisted that it include a “level playing field” provision, but further demanded that it include an “automatic suspension” right as well. Under that right, if a franchise were granted to a competitor, and Insight claimed it was not “substantially similar” to its own franchise, and if Insight then filed suit challenging its terms, the competitor’s franchise would automatically be suspended until Insight’s suit was litigated to a “final and nonappealable” conclusion. This procedure provided Insight with a simple and effective means of blocking competition for years: filing “level playing field” cases and pressing them through successive levels of appeal.⁵³

Insight’s use of this provision demonstrates how effective it has been in preserving Insight’s monopoly in Louisville. In 2000 Insight invoked the provision to bar entry by two different broadband competitors – Knology and Siegemcom – each of which had been granted cable franchises by the City of Louisville. In both cases, Insight filed suit in state court alleging

⁵² Thomas W. Hazlett and George S. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the “Level Playing Field” in Cable TV Franchising Statutes*, BUSINESS AND POLITICS, Vol. 3, No. 1, at 43 (2001) (available at <http://www.manhattan-institute.org/hazlett/the_fallacy_of_regulatory_symm.pdf>).

⁵³ See Ordinance No. 76, Series 1998, § 38 (City of Louisville, Bd. of Aldermen).

that the new franchises were not “substantially similar” to its own. Despite the baseless nature of Insight’s claims – including the assertion that since Insight’s franchise required Insight to finish a partially completed system upgrade in 15 months, the new entrants should have been required to build their entire systems from scratch in the same period – Insight was automatically able to block entry by these competitors.

A short time later, faced with years of litigation on these claims, Siegecom asked the City of Louisville to cancel its franchise. Knology might have done the same, but chose instead to countersue Insight in federal court. In June 2003, the district court judge entered partial summary judgment in Knology’s favor, ruling that, among other things, the “automatic suspension” provision was preempted by the Supremacy Clause of the U.S. Constitution, and that Insight’s actions violated Knology’s rights under the First Amendment.⁵⁴ The court further held that Knology’s claims against Insight under the Sherman Act could proceed to trial.⁵⁵

Another current example of incumbents’ efforts to block competition involves Telecommunications Services of Puerto Rico, a new BSP that has applied for a competitive license in Puerto Rico. The incumbents, Liberty and Adelphia have been aggressively arguing to the local regulatory authorities that a competitive franchise would be inherently wrong, result in a failed business, and weaken the incumbent operations ability to upgrade their own systems. After early local testimony, these incumbents hired two U.S.-based consultants to give testimony

⁵⁴ *Knology, Inc. v. Insight Communications Co., L.P.*, No. 3:00 CV-723-R (W.D. Ky. June 2, 2003).

⁵⁵ *Id.*

supporting the incumbent position that a competitive franchise should be denied.⁵⁶ These tactics are intended to block competition before it has been given any opportunity to exist. Trying to block the issuance of competitive franchises is in direct opposition to the goals of the 1996 Act. BSPA urges the Commission to begin an inquiry into these tactics, and review the testimony presented in Puerto Rico in order to understand fully the anti-competitive tactics being used by the incumbents to block entry at its inception.

IV. ADDITIONAL BARRIERS TO DEPLOYMENT REMAIN

A. Access to ILEC and Utility Poles, Conduits, and Rights-of-Way

Telecommunications and cable service providers are granted certain rights concerning access to the poles, conduits, and rights-of-way of electric utilities and ILECs through Section 224 of the Act.⁵⁷ The practical administration of these rights, however, remain problematic, particularly in two respects.

First, although Commission rules provide for complaint procedures regarding access to poles, conduits, and rights-of-way, they do not ensure prompt resolution of issues. Pole attachment “make-ready” complaints, for example, have been known to linger for more than 2.5

⁵⁶ BSPA understands that during the hearing proceedings for TSPR’s franchise petition to the Puerto Rico Telecommunications Regulatory Board (“Board”), all of the incumbent cable operators (Adelphia, Centennial Cable, and Liberty Cable) requested that they be allowed to: (1) examine TSPR’s business and financial plans; (2) cross-examine all of TSPR’s witnesses; (3) present their own general managers as witnesses to criticize TSPR’s business and financial plans; (4) present a financial expert witness to criticize TSPR’s business and financial plans; and (5) present a Washington, D.C. attorney as an expert in cable television competition to testify about the anti-competitive effects of wireline cable competitors in the U.S. All of these requests were based on the premise that they were supposedly necessary to assess the basis for and necessity and impact of competitive entry. The incumbents’ procedural requests were, in fact, granted, with the incumbents signing a non-disclosure agreement regarding the confidential and proprietary details of TSPR’s business and financial model. The Board’s final resolution and order on TSPR’s franchise petition, however, has not been issued yet pending post-hearing briefs by TSPR as well as by the incumbents.

⁵⁷ 47 U.S.C. § 224.

years – long enough to make entry ultimately infeasible. Cable operators (incumbent and competitive) are forced to endure such lengthy proceedings to invalidate sometimes a dozen unreasonable utility demands.⁵⁸ Second, the Commission’s rules do not apply to municipally-owned utilities or to cooperatives, serving as a significant barrier to entry in many areas, particularly rural areas in which cooperatives are prevalent.

B. Access to Public Rights-of-Way

The process of gaining access to local rights-of-way, and obtaining the numerous permits and authorizations necessary to build local broadband networks can be unreasonably difficult and costly. In building out their networks, for example, BSPA members continue to find that the rights-of-way practices of a particular governmental entity has delayed construction, increased the cost of deployment, and in certain cases led the provider to abandon the deployment in a particular community, altogether.

There is an increasing awareness of the importance of this issue. For example, in December 2002, the President’s Council of Advisors on Science and Technology (“PCAST”) issued its “Report on Building Out Broadband” in which it observed that “[i]f ROW access is unfairly denied, delayed, or burdened with unjustified costs, broadband deployment is slowed, and our citizens are deprived of access to vital communications facilities.”⁵⁹ To this extent, it concluded that:

⁵⁸ See, e.g., *Cable Television Ass’n of Ga. v. Georgia Power Co.*, DA 03-2613, File No. PA-01-002, *Order* (rel. Aug. 8, 2003).

⁵⁹ Executive Office of the President, President’s Council of Advisors on Science and Technology, *Report on Building Out Broadband*, at 9 (2002)(available at <<http://www.ostp.gov/PCAST/FINAL%20Broadband%20Report%20With%20Letters.pdf>>).

It should be a priority of this Administration to ensure that ROW issues are dealt with in a balanced manner that facilitates prompt ROW access for broadband networks while preserving legitimate government interests to protect public health, safety and welfare, and ensuring that government entities are fairly compensated for the costs of managing their rights-of-way and that disruption of rights-of-way is minimal.⁶⁰

NTIA has begun the process of collecting rights-of-way regulation best practices for sharing among state and local governments. In doing so, NTIA found that “the examples [collected] illustrate different mechanisms that can improve the involvement of the stakeholders, streamline the collection of information, improve the timeliness of the application process, ensure that fees are reasonable, and/or improve remediation or maintenance procedures.”⁶¹

The National Association of Regulatory Utility Commissioners (“NARUC”) has begun to take a proactive role in ensuring that local regulation of rights-of-way does not stand as a barrier to competitive entry and broadband buildout. In a report last year, NARUC observed:

In the 6 years since passage of the 1996 Act, rights-of-way (ROW) issues have emerged as a potential barrier to the deployment of next generation telecommunications networks. While Section 253 of the Communications Act, added by the 1996 Act, was intended to prevent state and local barriers to entry, ambiguities in the law and inconsistent court rulings have caused increased costs, delays, or in some cases, prevented the deployment of advanced telecommunication facilities.⁶²

The report went on to recognize:

[W]hile governmental entities have a legitimate and important role in managing their rights-of-way and public lands, the rights-of-way practices of certain governmental entities have emerged as a barrier to the deployment of advanced

⁶⁰ *Id.* at 9.

⁶¹ National Telecommunications and Information Administration, U.S. Department of Commerce, *State and Local Rights-of-Way Success Stories* (available at <<http://www.ntia.doc.gov/ntiahome/staterow/ROWstatestories.htm>>).

⁶² National Association of State Utility Regulatory Commissioners, *Promoting Broadband Access Through Public Rights-of-Way and Public Lands*, at 32 (2002).

telecommunications and broadband networks. NARUC believes that it has a key public policy role to support a pro-deployment, pro-consumer policy that ensures timely and cost-based access to rights-of-way.⁶³

TechNet, a bipartisan technology network of CEOs, concluded that unreasonable local and municipal right-of-way regulation serves as such a critical barrier to broadband deployment that it considered state policies curtailing unreasonable local and municipal right-of-way regulation as the most important factor in rating state broadband deployment policies.⁶⁴ TechNet cites, in particular, excessive fees, extremely disparate requirements, and delayed bureaucratic processes.⁶⁵

BSPA asks that the Commission continue to focus on this growing concern and remain vigilant in limiting unreasonable state, local, and municipal regulation of access to public rights-of-way through public statements, rulemakings, and Section 253 petitions.

C. Open Video System Regime

In the *Notice*, the Commission asks for information on the deployment of OVS.⁶⁶ As discussed above, BSPA members typically provide service under traditional cable franchises, although several BSPA members are using OVS for a relatively few number of systems, and others may explore doing so in the future. To stimulate the development of alternatives to traditional monopoly cable service, Congress created the OVS framework in the 1996 Act, and intentionally reduced the regulatory burdens of OVS operators to facilitate their entry into and otherwise promote competition in the video services market.

⁶³ *Id.*

⁶⁴ TechNet, *The State Broadband Index* (2003)(available at <http://www.technet.org/resources/State_Broadband_Index.pdf>).

⁶⁵ *Id.* at 11-13.

⁶⁶ *See Notice*, ¶ 44-45.

To date, since the inception of the OVS regime, the Commission has granted OVS certification to approximately 30 entities, including RCN, one of the first providers of OVS services. As BSPA has explained in its comments on notices of inquiry concerning previous annual reports on MVPD competition, competitors and consumers have not been able to realize the full potential of OVS as a competitive alternative to the incumbent cable operator due in part to the *City of Dallas, Tex. v. FCC* decision,⁶⁷ in which the court held that municipalities can require OVS operators to obtain a local franchise. This decision has created ambiguity regarding the scope of the regulatory streamlining that the OVS concept was intended to achieve. Moreover, certain local franchising authorities have been reluctant to adopt the OVS concept, preferring instead the more traditional cable franchise. In those markets, however, where local franchising authorities embrace the OVS concept as a means to facilitate market entry for competitors and introduce competition and its benefits to consumers, entities continue to consider OVS as a regulatory alternative to the traditional cable franchise, and have employed the OVS model with some success.

It remains to be seen, however, whether the full benefits of OVS will ever be realized. BSPA believes that OVS as a market entry strategy will continue to be limited so long as the regulatory treatment of OVS remains uncertain. On this point, BSPA encourages the Commission to actively participate in proceedings, whether in the courts or on the local level, that challenge the OVS regulatory regime or the proper interpretation of the OVS statutes. The Commission can play a vital role in clarifying the regulatory distinctions between cable and OVS, and the pro-competitive relief from traditional monopoly cable regulation that Congress intended OVS providers to enjoy. By weighing in on this subject, the Commission can promote

⁶⁷ 165 F.3d 341 (5th Cir. 1999).

SERVICE LIST

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Kathleen Q. Abernathy
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Michael J. Copps
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Kevin J. Martin
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

The Honorable Jonathan S. Adelstein
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Paul F. Gallant
Office of the Chairman
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Matthew Brill
Office of Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Stacy R. Robinson
Office of Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Jordan B. Goldstein
Office of Commissioner Michael J. Copps
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Anthony J. Dale
Office of Commissioner Kevin J. Martin
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Johanna Mikes
Office of Commissioner Jonathan Adelstein
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

W. Kenneth Ferree, Chief
Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

William H. Johnson, Deputy Chief
Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Rick C. Chessen, Assistant Bureau Chief
Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Mary Beth Murphy, Chief
Policy Division, Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Michael S. Perko, Chief
Office of Communications & Industry
Information
Media Bureau
Federal Communications Commission
445 Twelfth St., S.W.
Washington, DC 20554

Steven A. Broeckaert, Deputy Chief
Policy Division, Media Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Andrew Wise
Media Bureau
Federal Communications Commission
445 Twelfth St., S.W.
Washington, DC 20554

Linda A. Senecal
Media Bureau
Federal Communications Commission
445 Twelfth St., S.W.
Washington, DC 20554

Simon J. Wilkie
Chief Economist
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Qualex International
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554