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

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 04-227
Competition in the Market for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF BROADBAND SERVICE PROVIDERS ASSOCIATION

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SUMMARY

The Broadband Service Providers Association ("BSPA") hereby replies to comments filed in the Commission's *Annual Assessment of Competition in the Market for the Delivery of Video Programming* proceeding. The initial comments filed in this proceeding contain wide support for the view that wireline competition delivers increased service and lower prices to consumers. The commenters also overwhelmingly support the adoption of policies that promote the continued development of competition in the market for the delivery of video programming and eliminate artificial barriers to entry, such as predatory pricing and discrimination in the access to video programming. Together, these responses completely undermine assertions by incumbent cable operators that the market for the delivery of video programming is "fully competitive." Clearly, it is not. Cable operators continue to maintain and exercise significant market power that adversely affects consumer welfare and competition. The Commission must ensure that existing protections intended to facilitate competitive entry are not eliminated at the cable industry's behest, and must continue to curb conduct that impedes competition in the market for the delivery of video programming, such as discriminatory pricing, and access to video programming ("content"). The BSPA underscores its concern about access to content that is controlled by vertically-integrated content suppliers in this new digital era involving private networks and multiple content delivery mechanisms.

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The Broadband Service Providers Association ("BSPA") hereby replies to comments filed in the above-captioned proceeding.[1] As discussed below, the initial comments filed in this proceeding contain wide support for the view that wireline competition delivers increased service and lower prices to consumers. The commenters also overwhelmingly support the adoption of policies that promote the continued development of competition in the market for the delivery of video programming and eliminate artificial barriers to entry, such as predatory pricing and discrimination in the access to video programming. Together, these responses completely undermine assertions by incumbent cable operators that the market for the delivery of video programming is "fully competitive." Clearly, it is not. Cable operators continue to maintain and exercise significant market power that adversely affects consumer welfare and competition. The Commission must ensure that existing protections intended to facilitate competitive entry are not eliminated at the cable industry's behest, and must continue to curb conduct that impedes competition in the market for the delivery of video programming, including access to content in a new era of private networks and a multitude of delivery mechanisms.

[1] Notice of Inquiry, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 04-136, MB Docket No. 04-207 (rel. June 17, 2004) ("*Notice*").

I. COMMENTERS IN THIS PROCEEDING AGREE THAT THE MARKET FOR THE DELIVERY OF VIDEO PROGRAMMING IS NOT FULLY COMPETITIVE

In its initial comments, the BSPA demonstrated that competition among wire-based competitors, not between wire-based competitors and satellite providers, delivers the most significant competitive benefits to consumers.[2] As support for its position, the BSPA highlighted the results of a GAO study quantifying the lower prices and increased service offerings directly resulting from wireline competition.[3] The GAO Study also disclosed that wireline competition exists in only two percent of markets.[4] Yet satellite service is ubiquitously available throughout the country in each of the markets reviewed in the study—even those markets without a wireline competitor. Nonetheless, a significant disparity was identified in prices and services offered to customers in both those markets where a wireline competitor was present and as well as in those markets were there was no wireline competitor. The clear import of this disparity is that the observed differences in price and services could not have been caused by competition with a satellite provider. The record is legion with comments supporting this conclusion.

This phenomenon was summed up in the filing of the New Jersey Board of Public Utilities in this proceeding:

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[2] Comments of the Broadband Service Providers Association, *Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* at page 8, Docket No. 04-227 (filed July 23, 2004) ("Comments of the BSPA").

[3] General Accounting Office (GAO), *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, Feb. 2004 ("*GAO Wire-Based Competition Report*").

[4] *GAO Wire-Based Competition Report* at 7.

> Here in New Jersey, there is no effective competition in the CATV market. Although such competition is permitted, as a practical matter it does not occur. Choosing satellite or over-the-air broadcasts are alternatives; however, they do not offer competition.[5]

The Board concluded that while "cable and DBS have comparable programming, the existence of both in a town does not seem to produce downward pressure on rates."[6]

Like BSPA, the New Jersey Board is concerned that effective competition determinations have been dependent on satellite competition, when it is proven that such competition does not deliver lower prices and improved service. "The 'effective competition' rules set by the FCC govern whether or not DBS is deemed a competitor to the cable business." The Board states that this determination has the "greatest impact on New Jersey consumers," where four New Jersey towns are treated for regulatory purposes as if "effective competition" exists to curb cable prices, when in fact the FCC based these determinations on satellite penetration of over fifteen percent. Regulatory agencies and local franchising authorities with jurisdiction over cable rates are concerned with "effective competition" determinations because they effectively revoke basic rate regulation authority, including the authority to enforce the Uniform Rate provision requiring that all cable subscribers within a given franchise area be charged the same or uniform rates for cable services.[7] The intuitive policy concept behind this process is that rate regulation is unnecessary when market forces are at work.

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[5]New Jersey Board of Public Utilities, *The Status of Multi-Channel Video Competition in New Jersey,* at 16 (April 14, 2004) (quoting the League of Municipalities) ("Comments of New Jersey Board").

[6] Comments of New Jersey Board at 10.

[7] 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." Section 623(b)(1), provides, however, that such a uniform rates structure is not required in geographic areas in which the cable operator faces "effective

Three-dozen similar applications for "effective competition" determinations for other New Jersey localities are pending and these applications similarly rely on the existence of fifteen percent satellite penetration. The New Jersey Board perceives the potential unregulated rates in these areas as a threat to consumers because it agrees with the findings of the GAO Study, and the position of the BSPA, that competition from satellite does not curb rates. Moreover, "the success of DBS under the FCC rules plays a huge role in how cable competition is perceived and the application of the definition [of 'effective competition'] may create a gap between consumer expectation and market reality."[8]

EchoStar agrees, "Truly effective competition is yet to be achieved."[9] EchoStar concludes that the market for the delivery of video programming is not fully competitive because a fully competitive market would not reflect rising cable prices: "cable's runaway price hikes demonstrate that its competitors are still not disciplining cable prices regardless of whether these competitors are experiencing healthy growth."[10] EchoStar also recognizes that the existence of barriers to entry hamstrings the development of a fully competitive market. "Cable has maintained its advantage in the MVPD market through consolidation, clustering and bundling, *as well as its ability to leverage access to popular programming*."[11] EchoStar also highlights technical barriers that prevent DBS providers from competing with the full range of services provided by upgraded cable systems. For example, as EchoStar notes "Cable systems . . . have a

competition," as defined in Section 623(l)(1) of the Act, which includes markets where a total of 15 percent of households take satellite service.

[8] Comments of New Jersey Board at 15-16.

[9] Comments of EchoStar Satellite LLC, *Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* at 1, Docket No. 04-227 (filed July 23, 2004) ("Comments of EchoStar").

[10] *Id.* at Summary.

[11] *Id.* (Emphasis added).

return link allowing them to offer interactive video as well as a package of video and broadband Internet access that DBS cannot match because its spectrum is still one way for consumers."

Despite the amount of space Comcast devotes to describing other types of providers offering the delivery of video programming to consumers,[12] it fails to acknowledge that the number of subscribers served by the combination of these other providers pales in comparison to the total 94.1 million households subscribed to MVPDs as of June 2003.[13] As documented in the GAO Study and previous competition reports, wireline competition from BSPs, municipal overbuilders and other fiber providers represents less than two percent of the national market.[14]

As in previous years, in describing competition in the market for the delivery of video programming, Comcast relies on national satellite statistics.[15] As BSPA explained in its initial comments,[16] using these national satellite statistics to profile competition is highly misleading. The satellite statistics offered by Comcast are grossly overstated in that they include DBS subscribers that are in areas where cable service in unavailable. The relevant question is the number of customers that have taken an alternative MVPD service within the specific operating footprint (Homes Passed Territory) of an incumbent cable operator. For instance, a DBS customer that resides on the edge of a cable network or in another part of the state that does not have access to cable service, should not be included in statistics that purport to show competition

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[12] Comments of Comcast Corporation, *Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* at 14, Docket No. 04-227 (filed July 23, 2004) ("Comments of Comcast").

[13] Tenth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd 1606 (2004) ("*Tenth Annual Report*").

[14] *Supra* n.4.

[15] Comments of Comcast Corporation at 6 ("Together, DirecTV and EchoStar's 22.6 million subscribers represent 25% of all MVD consumers").

[16] In its comments filed in this proceeding, the BSPA explains why national statistics are not an accurate way of validating the existence of competition in the market for the delivery of video programming. Comments of the BSPA at 11.

between cable and DBS. A comparison of relative subscriber statistics, on a national basis between the two distribution technologies is simply not a relevant measure of competition.

Thus, multiple commenters in this proceeding agree, whether looking at some overall measure of competition or a measure of effective competition on a market-by-market basis, the market for the delivery of video programming is not fully competitive. The Commission should ignore the assertions by Comcast and the NCTA that various provisions added by the 1992 Cable Act are no longer justified given the supposed presence of effective competition.[17] Satellite competition is overstated by cable industry statistics generally, and the presence of satellite competition is not sufficient to trigger the "effective competition" provisions because customers are not receiving the lower rates and improved service offerings that were an intended prerequisite to the elimination of the rate authority of local franchising authorities. BSPA supports NATOA's request that the Commission re-examine the criteria it uses to determine when and where "effective competition" exists because the current criteria fails to result in meaningful determinations.[18] The BSPA underscores that the forthcoming GAO Study referenced in its initial comments, which is intended to provide a more comprehensive analysis of the impact of satellite competition, should highlight the lack of impact of satellite competition on fully upgraded incumbent cable systems.[19]

[17] See Comments of Comcast at 40-41 (also recommending that petitions for "effective competition" determinations be automatically granted, absent opposition).

[18] *See* Comments of the National Association of Telecommunications Officers and Advisors, *Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* at Introduction and 12-14, Docket No. 04-227 (filed July 23, 2004) ("Comments of NATOA").

[19] The BSPA reiterates its position that the Commission should use this report as the basis to reexamine its view of effective competition in the industry, and the impact of that view on a broad range of regulations that protect consumer welfare and competition.

II. COMMENTERS IN THIS PROCEEDING UNDERSCORE THE BARRIERS TO ENTRY FACED BY COMPETITORS TO CABLE MSOS

In its initial comments filed in this proceeding, the BSPA emphasized the significant barriers to entry faced by new entrants to the market for delivery of video programming, including discriminatory access to video programming, the practice of incumbent cable operators offering services at discriminatory and below-cost prices, and the pole attachment practices of certain utilities.

NATOA, which represents local governments among others, details anticompetitive conduct of incumbent cable operators with regard to pricing of cable service. After highlighting specific examples of predatory pricing, including MediaCom's pricing of its services offered in Laurens, Iowa,[20] NATOA demonstrates how cable operators routinely engage in targeted rate discrimination, making deeply discounted offers only to those subscribers who have transferred, or are threatening to transfer, their business to a wireline competitor.[21] There are now numerous examples of targeted rate discrimination and below-cost pricing in the record. Given this evidence, BSPA strongly supports NATOA's request that the Commission, at a minimum, reevaluate its current effective competition rules, including the uniform rate provision.[22]

In addition, multiple commenters emphatically agree that wireline competitors face substantial barriers with respect to access to content. In its initial comments, the BSPA commented extensively on the general topic of its members' abilities to acquire programming.[23]

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[20] *See* Comments of NATOA at 8.

[21] *Id.*

[22] *See* supra n.7. The BSPA supports its member, RCN's, request that the Commission promulgate regulations and/or seek legislation to prevent incumbent cable operators from engaging in discriminatory and predatory pricing and other acts of anti-competitive behavior aimed at driving competitors out of the market. *See* Comments of RCN Corporation, *Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Docket No. 04-227 (filed July 23, 2004) ("Comments of RCN").

[23] *See* Comments of the BSPA at 12-14.

NATOA, however, focuses more narrowly on its desire for the Commission to close what has come to be known as the "terrestrial loophole."[24] NATOA states that the terrestrial loophole is foreclosing more access to content now more than ever because of the expansion of MSOs through the acquisition of additional cable plant in those regions where they already have a substantial presence.[25]

DirecTV agrees that the terrestrial loophole threatens "the march toward video competition"[26] and states that the Commission "should as it has promised in the past, monitor this situation very closely and be prepared to redress any distortion in competition."[27] EchoStar agrees that the terrestrial loophole poses a pervasive market distortion: "The 'terrestrial loophole' continues to be used by cable-affiliated programmers to foreclose non-cable MVPD's access to popular programming such as regional network sports . . . ." EchoStar states that the market penetration of DBS providers in areas where such programming is withheld is significantly below the national average.[28] This is consistent with the experience of BSPA members,[29] and provides further support for what competitors have been telling the Commission since the *First*

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[24] The terrestrial loophole refers to the construction of Section 628 as only applying to satellite-delivered video programming, allowing cable MSO affiliated terrestrial programming services, such as regional sports and news channels, to discriminate in their dealings with non-incumbent and non-affiliated providers. Report and Order, *Implementation of the Cable Television Consumer Protection Act of 1992; Development of Competition and Diversity in Video Programming Distribution; Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd 12124, 12157 (2002).

[25] *See* Comments of NATOA at 19-20.

[26] *See* Comments of The DirectTV Group, Inc., *Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* at 4, Docket No. 04-227 (filed July 23, 2004) ("Comments of DirecTV").

[27] *Id.* at 5.

[28] *See* Comments of EchoStar at 11.

[29] *See* Comments of the Broadband Service Provider Association, *Matter of Implementation of the Cable Television Consumer Protection Act of 1992; Development of Competition and Diversity in Video Programming Distribution; Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition* at 8, Docket No. 01-290 (December 3, 2001).

Annual Report – that the denial of access to regional programming creates a severe competitive barrier that must be addressed.

BSPA supports RCN's and other's request for strict enforcement of the Commission's program access rules. As we have said before, the Commission should recommend to Congress legislative changes that will ensure competitors non-discriminatory access to critical programming under reasonable rates, terms and conditions.[30]

III. THE COMMISSION SHOULD ADDRESS PROGRAM ACCESS CONCERNS OVER THE NEW SERVICES EVOLVING FROM THE TRANSITION TO DIGITAL TELEVISION

In addition to the historic issues surrounding program access, new services and technologies are creating new concerns over program access. In responding to the Notice, Comcast reiterated its commitment to provide video on demand ("VOD") service to all of its markets.[31] The NCTA, in its comments, refers to the commitment of its members to VOD as means to gain market share.[32] The BSPA, whose members were pioneers in the initial deployment of this service, agree that VOD is a key new service that is important to the competitive landscape.

Nonetheless, this new technology and content distribution structure fall outside any current regulation that assures fair access to content for competing distributors. The new technology falls outside the current program access regime because the content is stored and transmitted over private networks, such as local area networks, or LANs. The distribution

[30] *See* Comments of RCN.

[31] *See* Comments of Comcast at 29.

[32] Comments of The National Cable and Telecommunications Association, *Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* at 8-9, Docket No. 04-227 (filed July 23, 2004) ("Comments of NCTA").

structure of delivering content over the Internet poses additional competitive concerns because even if wireline competitors, such as BSPs gain access to the content, they may be restricted from delivering the content in the same manner as their competitors. Given the checkered history of competitor access to content controlled by cable-affiliated programmers, the BSPA continues to be concerned about the development of VOD, which exists outside of the current program access regime.

VOD services offer not only a new means of movie distribution, but facilitate the storage and improved delivery of digitized files in addition to other video content transmitted over a cable TV channel or the Internet.[33] Therefore, incentives exist for incumbent cable operators to expand and create exclusive access to their VOD content outside the parameters of Section 628. Even now, major industry players like Comcast are vying for market dominance by expanding their offering of video content over the Internet. Comcast's offer to purchase Disney was unsuccessful, but did ultimately result in the companies' joint venture to offer Disney programming over the Internet. "For Comcast, the hope is that the Disney name will attract customers to its high-speed Internet services. Disney Connection will be free to Comcast broadband customers and offer links with limited free access to online subscription services such as Disney's Toontown Online."[34]

In sum, the same justifications for the regulation of the current program access regime should apply to access to content over VOD or High-Speed-Data networks. Thus, the BSPA requests that the Commission consider the need for protection for fair access to content between

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[33] As a recent example, SBC is developing a Set-Top box in conjunction with Echostar that will link the Internet with TV. The box will allow "viewers to pick from many movies and other programs that are stored on a distant computer and watch them any time…" and will also "allow customers to record shows on a hard drive…" *SBC, EchoStar Plot Online Movie Venture*, Wall St. J., Aug. 19, 2004, at B1.

[34] *Comcast, Disney Find a Way to Deal*, *Los Angeles Times,* July 21, 2004, at C1

competing distributors that exist outside of current legislation or related regulation so as to promote a competitive environment.

In their comments, Verizon and SBC emphasize fiber-to-the-home and other new networks that will deliver additional competitive offerings to the market for the delivery of video programming.[35] These new networks have the capability on deployment, to offer all-digital programming and provide further evidence of the rapid progress being made towards the migration from analog to all-digital platforms. BSPA's members, who have some of the most advanced networks in the industry, fully support the Commission's leadership on the migration to all digital platforms thought the Transition to Digital Television and related proceedings.[36]

The migration toward all digital platforms should be viewed by the Commission as an opportunity to continue to develop policies concerning, in addition to the critical program access issues addressed in the previous section, other important policy issues including consumer choice, niche/minority programming and indecency, against a backdrop of the additional channel capacity and flexibility resulting from digital rather than analog transmissions. As detailed in its comments in this proceeding, the BSPA reiterates that its Voluntary A La Carte proposal provides a unique test case upon which the Commission can rely in resolving some of these important policy goals.[37] The Commission should not overlook how uniquely positioned the BSPs are to conduct such tests, given that these systems were designed with the transition to

[35] *See* Comments of the Verizon Telephone Companies, *Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* at 1, Docket No. 04-227 (filed July 23, 2004). *See also* SBC Comments at 4 ("both Verizon and SBC have announced plans to deploy fiber-based network deployments that should make possible the provision of advanced and robust wire-based video services.")

[36] *See, e.g.*, *Matter of Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 03-15.

[37] See Comments of the BSPA at 22-23; *see also* Comments of the Broadband Service Provider Association, *Matter of Comments requested on A La Carte and Themed Tier Programming Distribution on Cable Television and Direct Broadcast Satellite Systems*, at 11 (filed July 13, 2004).

digital television in mind. EchoStar, in its comments filed in this proceeding, supports the BSPA's Voluntary A LA Carte proposal.[38] The proposed market test will also have the benefit of providing insight into the issues related to migrating to the all digital platform that must be first established in order to support the proposed structure of Voluntary A La Carte.

Respectfully submitted,

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[38] *See* Comments of EchoStar at 7.