Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS AND THE ALLIANCE FOR COMMUNITY MEDIA

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In these reply comments, the National Association of Telecommunications Officers and Advisors (NATOA) and the Alliance for Community Media (ACM) review the points on which they and a number of other parties in this proceeding agree and respond to the main arguments and proposals with which they disagree.

I. THE COMMISSION SHOULD REJECT THE CABLE INDUSTRY'S EFFORTS TO ACHIEVE FORMAL OR EFFECTIVE DECONTROL AND SHOULD REVISE ITS "EFFECTIVE COMPETITION" STANDARDS TO COMPORT WITH MARKET REALITIES

The major incumbent multichannel video programming distributors ("MVPDs") insist that decontrol of the cable industry is appropriate at this time because Direct Broadcast Satellite (DBS) now provides "vigorous" competition on a national scale.[1] Comcast takes this argument a step further and offers a specific proposal – "Competition is sufficiently prevalent throughout the country that the Commission should presume that effective competition exists statewide in any state where DBS penetration is over 15%."[2] To be sure, DBS is becoming increasingly popular, but neither formal decontrol nor Comcast's proposed form of effective decontrol is warranted at this time.[3]

1 *See, e.g.,* Comments of Comcast at 5-11, 39-41; Comments of National Cable and Telecommunications Association (NCTA), at 5, *et seq.*

2 Comments of Comcast, at 41.

3 NCTA's Comments include a table indicating that, as of April 2004, DBS penetration was above 15% in fully 41 states. Comments of NCTA, at 11, Exhibit 3. Thus, Comcast's proposal would effectively decontrol the cable industry in at least 41 states. More accurately, it would decontrol incumbent cable operators in every single locality within each of these states, regardless of the actual state of competition in the locality.

As NATOA and ACM showed in their opening comments, DBS does not provide competition of the type or degree necessary to restrain the rates of incumbent MVPDs.[4] Thus, such competition should not result in a determination of "effective competition," which frees MVPDs from rate regulation, restrictions on anti-competitive targeted rate discrimination, constraints on tier buy-throughs (crucial during the transition to DTV), and other important consumer protections.[5] Several other parties to this proceeding have made the same point,[6] and the General Accounting Office (GAO) has confirmed it by finding that head-to-head competition from wireline providers of video programming lowers rates by 15-41% and competition from DBS alone has a negligible effect on rates.[7] No commenter has offered any concrete evidence to refute these findings, and even the DBS providers appear to concede them.[8] Thus, the availability of DBS in a particular locality does not justify a determination that "effective competition" exists even in that locality, much less that decontrol is appropriate nationwide.

Even if the factual premise underlying Comcast's proposal were correct – i.e., that DBS does indeed provide "effective competition" – Comcast's sweeping proposal would nevertheless be unlawful, irrational, unfair and contrary to the public interest. First, Comcast's proposal would be inconsistent with the Cable Act, which plainly requires that "effective competition"

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4 Comments of NATOA and ACM, at 12-18.

5 *Id*.

6 See, e.g., Comments of Broadband Service Providers Association (BSPA), at 7-11; Comments of SBC, at 1-2; Comments of RCN, at 11-14.

7 U.S. General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, at 9-11 (Oct. 2003); U.S. General Accounting Office, *Wire-Based Competition Benefited Consumers in Selected Markets*, at 12-17 (Feb. 2004).

8 See Comments of DirectTV, at 5-9; Comments of EchoStar, at 2-4.

determinations be performed at the "franchise area" level.[9] Comcast's proposal would also be inconsistent with the Commission's rules and long-standing practice, which similarly require that "effective competition" be determined at the franchise area level and that MVPDs bear the burden of proving that "effective competition" exists.[10]

Second, Comcast's proposal would often lead to bizarre results. For example, a high concentration of DBS subscribers in one or more sizable population centers in a state could result in deregulation of numerous rural or sparsely populated localities in which the incumbent MVPD had a total or near monopoly.

Third, a presumption that "effective competition" exists would be inequitable and contrary to the public interest, as it would shift the burden of proof to those least capable of bearing it, thus effectively leaving incumbent MVPDs with total or near monopolies in local markets unchallenged in most instances. As NATOA and ACM showed in their opening comments, the Commission's procedures in "effective competition" proceedings already impose undue burdens on localities.[11] The Commission should remove these burdens, not increase them as Comcast proposes.

Finally, as NATOA and ACM also demonstrated in their opening comments, the Commission's decisions and rulings under the "effective competition" standard have perversely

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9 Section 623(l) of the Communications Act, 47 U.S.C. § 543(l). *See* also Comments of National Rural Telecommunications Cooperative, at 7-8.

10 47 C.F.R. §§ 76.905(b), 906-907. *See also, e.g., In the Matter of: Kansas City Cable Partners; Petition for Determination of Effective Competition in Kansas City, MO*, 19 FCC Rcd 1445, 1445-46; 2004 FCC LEXIS 366 ("The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.")

11 NATOA AND ACM Opening Comments, at 17-19.

allowed incumbents to raise rates virtually at will in markets in which they do not face wireline competitors and, at the same time, lower rates discriminatorily to thwart competition in markets in which they do face wireline competitors – both of which are precisely the opposite of what Congress intended in enacting the "effective competition" standard.[12] Rather than weaken the "effective competition" standard even further, as the incumbent MVPDs suggest, the Commission should act vigorously to ensure that its determinations that are congruent with market realities.

II. THE COMMISSION SHOULD REJECT SBC'S AND VERIZON'S SUGGESTION THAT THEY BE ALLOWED TO PROVIDE CABLE SERVICES WITHOUT HAVING TO MEET THE REQUIREMENTS THAT APPLY TO ALL OTHER MVPDS

SBC and Verizon call for revisions to the local franchising process and for exemptions from local and federal requirements that would apply to any other MVPD. According to SBC,

> Given the LECs' position as new entrants in the video services market along with the substantial risk they must undertake in investing in networks capable of offering such services, requiring compliance with the full panoply of federal and local requirements designed for incumbent cable providers could turn an already risky economic proposition into an untenable one. ... SBC and other LECs cannot justify an investment in next-generation technologies *without* offering video over those technologies. But offering video could expose LECs to open-ended regulation with respect to those new facilities, which in turn could make the deployment financially infeasible.[13]

Neither SBC nor Verizon explains why local exchange carriers that elect to provide cable services cannot, or should not, be required comply with the same local or federal rules that all other MVPDs routinely meet. These requirements have been in place for many years, and they

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12 *Id*.

13 Comments of SBC at 6-7. *See also* Comments of Verizon at 12.

exist for three reasons – they are required by law, they make good sense, and they do not pose unreasonable barriers to entry.

Verizon suggests that the local franchise process is itself a barrier to entry, and it asks the Commission to "encourage" local authorities to hasten franchise awards.[14] Verizon does not, however, favor the Commission with an explanation of why, how, or under what authority the Commission should do this. Nor does Verizon's position make any sense.

As NATOA and ACM explained in their opening comments, local franchising authorities possess no incentive to block the entry of a competitor to serve their constituents. In fact, most localities are clamoring for competition, and the sooner they can award reasonable franchises to competitive cable operators, the better. While the process may take longer in some cases than in others – often because the franchisee's tactics cause or contribute to delays – the franchisee normally has the means and opportunity to voice its concerns with the local governing authority. In any event, issues surrounding awards of franchises are the responsibility of elected local officials and are reviewable by the courts, not to the Commission.

Verizon also suggests that local consumer protection rules are barriers to entry, that such rules are unnecessary in a competitive environment, and that the Commission should impose nationwide standards in this area.[15] NATOA and ACM strongly disagree.

The Cable Act expressly recognizes the authority of local governments to enact and enforce customer service standards for MVPDs.[16] In fact, the Act allows local governments to

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[14] Comments of Verizon, at 12.

[15] Comments of Verizon, at 14-16.

[16] Section 632 of the Communications Act, 47 U.S.C. § 552.

act unilaterally to adopt standards that are more rigorous than the Commission's.[17] These provisions reflect Congress's understanding that local customer service standards are essential to protect consumers from poor service. They are particularly important for the cable industry, which chronically has the worst customer service record of any industry in the United States. As the American Customer Satisfaction Index (ACSI) recently noted in its cross-industry report on customer satisfaction (with emphasis added):

> Cable television was added to ACSI in 2000. Since that time, customer satisfaction has gone from bad to worse, and there is no improvement in sight. Among cable providers, Time Warner has the highest score of 60. Both Comcast and Charter Communications register at 56. For the private as well as public sector, including the IRS, this is the lowest level of customer satisfaction of any organization in ACSI. Consumer complaints are also much more common relative to any other measured industry. Almost half of all cable customers have registered complaints about one thing or another. When buyers have meaningful choice alternatives, this level of customer (dis)satisfaction is neither competitive nor sustainable. Cable is the only industry to score below 60 in ACSI. With the satellite companies removed, the weighted average for the cable industry is 59. *Under normal competitive conditions, there would be mass customer defections. The reason this is not the case for the cable industry is due to local monopoly power, which means that in most markets, the dissatisfied customer has nowhere to go.*[18]

To be sure, rigorous head-to-head competition may someday significantly improve the quality of customer service in the cable industry, but that day has not arrived.[19] If and when it does, Congress may find it appropriate to change the law. In the meanwhile, the Commission has neither the authority nor any rational basis for interfering with the ability of local governments to establish and enforce customer service standards for all MVPDs.

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17 *Id*.

18 http://www.theacsi.org/scores_commentaries/commentaries/Q1_04_comm.htm.

19 The low quality of cable service is itself compelling proof that DBS does not provide "effective competition" in the cable industry.

Customer service rules do not occur out of some desire by the local government to control or restrict who may enter the market: no party appears to dispute the fact that localities will go to great lengths to encourage a competitive environment, including the provision of infrastructure and services themselves (and be subject to the same customer service regulations). For that reason alone, customer service regulations cannot reasonably be characterized as a barrier to entry. They are simply Congress's recognition of the public's longstanding dissatisfaction with the cable industry's service, and local officials are simply representing the desires and frustrations of their citizens. Verizon has it backwards – the way to avoid customer service requirements is not to attempt to invalidate them as a barrier to entry or to impose a cookie-cutter set of requirements; rather, it is to provide high quality customer service to the citizens of the local franchise area, rendering formal standards unnecessary.

III. ANTICOMPETITIVE CONDUCT BY INCUMBENTS IS A SERIOUS PROBLEM TODAY AND WILL BE AN EVEN GREATER PROBLEM IN THE FUTURE UNLESS THE COMMISSION ACTS VIGOROUSLY TO CURB IT

As NATOA and ACM showed in their opening comments and attachments, incumbent operators have engaged, and are engaging, in a variety of anticompetitive tactics to thwart competition from both public and private wireline overbuilders. Several other parties have provided additional evidence that such practices are a significant and growing problem.[20] This evidence lends weight to NATOA's and ACM's suggestion that the Commission should launch a comprehensive inquiry to determine the extent, causes, and solutions to this problem and should act to the full extent of its authority to eliminate it.

With regard to one form of anticompetitive conduct – using exclusive contracts to deny competitors access to essential content – NATOA and ACM showed, and several other parties

[20] Comments of BSPA at 14-18; Comments of RCN at 14.

have confirmed,[21] that this is a significant problem that will increasingly threaten competition unless the Commission – or Congress – acts promptly and decisively to curb this practice.[22]

In particular, like NATOA and ACM, a number of other parties have described problems relating to the "terrestrial loophole" in the Cable Act's program access provisions and the Commission's rules.[23] NATOA and ACM agree with these comments, and believe that, if the Commission finds that it has insufficient authority to functionally close the loophole, it should make a clear statement of the need to do so in a recommendation to Congress.

IV. "LEVEL PLAYING FIELD" STATUTES ARE A BARRIER TO ENTRY IF THEY REQUIRE ITEM-BY-ITEM COMPARISON AND IGNORE THE VAST ADVANTAGES OF INCUMBENCY

Verizon complains that state "level playing field" (LPF) statutes can create barriers to entry:

> At least 11 states have these statutes which can inhibit competitive video entry by requiring new entrants to undertake franchising obligations at least as burdensome as those imposed on the incumbent. The negative effects of these statutes on competition may not at first be apparent because, as a general rule, creating a level economic playing field makes eminent sense. The problem is that, as an economic matter, the ostensibly equal burdens required under these laws in fact

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21 Comments of American Cable Association, at 3-6; Comments of BSPA, at 12-14; Comments of EchoStar, at 10-13; Comments of National Telecommunications Cooperative Association, at 3; Comments of RCN, at 14.

22 Again relying entirely on the presence of DBS, and ignoring the ramifications of increasing vertical integration in the cable industry, Comcast recommends that the Commission eliminate the prohibition on exclusive contracts for satellite cable or broadcast programming between vertically integrated programming vendors and cable operators. Comments of Comcast, at 42. The Commission should reject Comcast's baseless suggestion and should instead vigorously enforce the prohibition at least until October 5, 2007.

23 Comments of DirecTV, at 18-23; Comments of EchoStar, at 11; Comments of RCN, at 15; Comments of Verizon, at 16.

impose a heavier burden on new entrants than on incumbents, and thus create barriers to entry.[24]

As a general matter, NATOA and ACM agree with Verizon on this point. State LPF statutes may sound fair and reasonable in principle, but, as Hazlett and Ford have demonstrated, such statutes often tip the balance decisively in favor of incumbents because they are predicated on the "fallacy of regulatory symmetry" – the false notion that new entrants should be subjected to the same requirements as incumbents, despite the fact that incumbents have vast advantages over new entrants in the market.[25]

At their worst, LPF statutes specify the particular item(s) on which a new franchise must be compared to an incumbent's franchise.[26] Problems often arise, however, even under LPF provisions that merely prohibit local governments from granting new franchises on terms "more favorable or less restrictive" than an incumbent's franchise. Although courts have uniformly said that such provisions render item-by-item comparisons inappropriate and require only

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24 Comments of Verizon, at 13.

25 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*, www.manhattan-institute.org/hazlett/the_fallacy_of_regulatory_symm.pdf. Mr. Hazlett is a former chief economist of the Federal Communications Commission.

26 For example, Minnesota Statutes Section 238.08(b) provides that "[n]o municipality shall grant an additional franchise for cable service for an area included in an existing franchise on terms and conditions more favorable or less burdensome than those in the existing franchise pertaining to: (1) the area served; (2) public, educational, or governmental access requirements; or (3) franchise fees. The provisions of this paragraph shall not apply when the area in which the additional franchise is being sought is not actually being served by any existing cable communications company holding a franchise for the area. Nothing in this paragraph prevents a municipality from imposing additional terms and conditions on any additional franchises."

substantial similarity between new and incumbent franchises, compared as entire packages,[27] the result is often complex, time-consuming and expensive litigation that thwarts or delays competitive entry. The Commission, in implementing the open video system requirements of the Telecommunications Act of 1996 recognized the difficulties and addressed many of these same concerns.[28] NATOA and ACM therefore suggest that the Commission to express its disapproval of state LPF statutes and to encourage states to remove or refrain from adopting them.

VI. CONCLUSION

NATOA and ACM urge the Commission to adopt the recommendations in their opening comments and in these reply comments. If the Commission has questions or would like additional information, NATOA and ACM would gladly respond.

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27 *See, e.g., United Cable Television Services Corp. v. Dep't of Public Utility Control*, 235 Conn. 334, 663 A.2d 1011 (1995); *Cable Systems of Southern Connecticut, Ltd. v. Connecticut DPUC*, 1996 WL 661818 (Conn. Super.); *Comcast Cablevision of New Haven, Inc. v. Connecticut DPUC,* 1996 WL 6611805 (Conn. Super); *New England Cable Television Ass'n, Inc. v. Department of Public Utility Control*, 27 Conn. 95, 717 A.2d 1276 (1998); *Cable TV Fund 14-A, Ltd. v. City of Naperville*, 1997 WL 209692 (ND. Ill).

28 See, e.g., *Implementation of Section 302 of the Telecommunications Act of 1996: Open Video Systems,* 11 FCC Rcd 14639 (1996); 11 FCC Rcd 18223 (1996)*;* 11 FCC Rcd 6776 (1996); 11 FCC Rcd 19081 (1996); 11 FCC Rcd 20227 (1996); 12 FCC Rcd 6258 (1997); 12 FCC Rcd 7545 (1997); 13 FCC Rcd 14553 (1998). See also, *CTC Telcom, Inc. v. City of Rice Lake, Wisconsin,* 19 FCC Rcd 13767 (2002).

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