Broadband Service Providers Association (BSPA)
Written Comments Pursuant to:

DOJ Antitrust Division
Telecommunications Symposium
November 29, 2007

Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers.

Respectfully Submitted By:

John Goodman, Executive Director, BSPA

1601 K Street, Washington DC, 20006
202-661-3945

Broadband Service Providers Association (BSPA)
Written Comments Pursuant to:
DOJ Antitrust Division
Telecommunications Symposium – November 29, 2007
Voice, Video and Broadband: The Changing Competitive
Landscape and Its Impact on Consumers.

Members of the Broadband Service Providers Association (BSPA) deploy and operate facilities-based, advanced, last-mile broadband networks for the delivery of innovative bundles of voice, multichannel/on-demand video, and high-speed data/Internet services directly to homes and small businesses across the country.[1] The BSPA's mission is to promote and support the development of a competitive, facilities-based, broadband industry that will increase infrastructure investment, create customer choice, lower prices, and provide critical network diversity.

I. The Competitive Position of Wireline Networks Delivering Bundled Voice, Video and Data Services.

In the last twelve years, particularly since passage of the Telecommunications Act of 1996,[2] new competitors, such as Broadband Service Providers (BSPs), have established a sustained and unique position in the multichannel video programming distribution market. As providers of state-of-the-art cable, telephone, and Internet service over advanced local networks in many urban, suburban and rural areas throughout the country, BSPs are key examples of the entry of new, facilities-based competitors envisioned by the 1996 Act. The interconnection provisions of the 1996 Act created the opportunity for new entrants, like BSPs, to offer telephone service. With the advent of

[1] The current members of BSPA, all of which are last-mile, facilities-based providers, are: Everest Connections, Hiawatha Broadband, Knology, PrairieWave Communications, RCN, and SureWest Communications.

[2] Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §151 *et seq.* ("1996 Act").

cable modems, allowing the delivery of broadband access services, along with the deployment of hybrid fiber coax, fiber-to-the-curb, and fiber-to-the-home network technologies, BSPs have emerged as multi-faceted competitors offering significant price and service options to consumers for video, voice, and broadband access.[3] This technology and business model to offer bundled services has now become a model for many wireline network upgrades or new construction that are being pursued by incumbent cable operators, incumbent telephone companies or other new technology entrants. BSPs are also leaders in migrating video to all-digital platforms, consistent with mandates added by the 1996 Act and the Commission's digital broadcast television transition. BSPs are building high-capacity digital networks needed to host the current and next generation services emerging in today's digital environment.

The BSP competitive business strategy has been historically unique in philosophy and infrastructure. Other wireline service providers, either incumbent cable, incumbent telephone, or other new wireline entrants, have only offered the full bundled triple play in recent years. However, the offering of video, voice, and high-speed data services over a unified network – the so-called "bundled triple play" – has always been central to the BSP business model. By creating three potential revenue streams from each customer served, BSPs are able to amortize the cost of their fiber-rich networks (which are capable of delivering all digital or a mix of digital and analog signals) over customers purchasing multiple services. BSPs deliver these advanced service options to rural, suburban and urban areas, advancing a fundamental purpose of the 1996 Act to provide advanced services to all Americans.

[3] The late 1980's and early 1990's business model of cable overbuilders differs dramatically from today's BSPs in that the business model of the previous generation relied exclusively on a single revenue stream from cable television services as the basis for building new networks.

II. The Profile of BSP Networks and Delivered Services.

Each BSP system has a state of the art headend facility, which aggregates programming content and a telecommunications switching platform, and connects customers to the public switched telephone network ("PSTN") and Internet. A fiber optic distribution network connects the headend to distribution nodes. Distribution nodes serve from 20 to 500 potential customers. Member companies use different technologies for linking nodes to customer premises, using combinations of coaxial cable and twisted copper pair, exclusively coaxial cable to the home, or fiber to the premise ("FTTP"). Many systems include dark fiber, which will facilitate capacity expansion, and system upgrades as new technologies emerge.

These advanced networks enable BSPs to distinguish themselves in the marketplace by offering technically advanced services bundled in packages responsive to customer demand. 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. BSP 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"),[4] and interactive television, made possible by their advanced system topology. The telephone service includes both local and long distance primary line basic telephone service plus enhanced services, *e.g.*, voice

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

mail,[5] and high-speed Internet access mostly via a cable modem at speeds up to 10.0 Mbps, typically with the option for customers to choose their Internet Service Provider ("ISP").

The BSP model has expanded the deployment of advanced services to average consumers. Because BSPs provide a combination of voice, video and Internet services over a single network, they can maintain healthy operations without attaining the highest market share in any one service. The existence of a BSP in a market increases competition by adding consumer choice, which places downward pressure on prices. The BSP business model makes advanced services affordable to a wider array of customers, cutting across market demographics, and increasing overall penetration rates. As a result, BSP wireline entry expands the number of consumers with access to advanced services at affordable prices. It is no surprise that in local markets throughout the country, consumers and local officials are enthusiastically endorsing wireline competition and BSPs have evolved to become a significant competitive force in the markets they serve.

III. The Competitive Impact of Bundled Wireline Service.

The BSPA continues to see compelling evidence that facilities based wireline competition brings unique market benefits that are not created by satellite networks or other competitive service options. The U.S. Government Accountability Office (GAO) first identified the unique market impact of wireline market entry by BSPs on incumbent cable company conduct and on consumer prices for cable and telecommunications

[5] BSPs provide telephony using circuit-switched or IP-enabled networks. Most current telephony offerings are equivalent to primary line service that is fully network powered with access to enhanced 911. The expectation is that future telephone offerings and service enhancements will focus on VOIP technology.

services in 2004.[6] The GAO concluded in its *Wire-Based Competition Report* that a second cable company's "entry into a market benefited consumers in the form of lower prices for subscription television, high-speed Internet access, and local telephone services. Incumbent cable operators often responded to BSP entry by lowering prices, enhancing the services that they provide, and improving customer service."[7] This Report offered a review of actual competition created by BSP entry in select markets. The GAO concluded that rates for cable services were 15 to 41 percent lower in markets where a BSP offered services in competition with an incumbent cable provider. It is also significant that the GAO report documented lower prices for telephone and high-speed Internet service due to the presence of BSP competition. These pricing impacts are always in addition to any impact created by satellite competition that already existed in all markets studied. Significantly, current BSP operations continue to document lower prices in markets served by BSPs as compared to adjacent or similar markets where equivalent competition does not exist.

This market impact demonstrates the importance of BSP or other wireline entry into the market for delivery of video programming to offer consumers competitive services and prices, as well as the fallacy of the view that competition from the DBS industry alone sufficiently constrains the market power of incumbent cable operators. Significantly, in addition to having a constraining effect on price, wireline competitors, such as BSPs, achieve video market shares in the territories they serve of 30 to 50% of MVPD subscribers. The incumbent cable industry has historically urged the Commission

[6] Government Accountability Office (GAO), *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241 (Feb. 2004) ("*GAO Wire-Based Competition Report*").

[7] *Id.* at 4.

to find that "the market for the delivery of video programming is fully competitive and that cable cannot be considered dominant given the availability of fully substitutable alternative multichannel services (DBS) and other video programming options."[8] As the basis for this assertion, incumbent operators typically offer the national market share of DBS providers, and urge that the most recent annual reports released by the Commission demonstrate that prohibitions on exclusive contracts in the Cable Television Consumer Protection and Competition Act of 1992[9] can sunset. BSPs have always challenged this notion, urging that DBS has not created a comparable pricing and service impact as wireline competition. While these wireline competitive markets represent less than 5% of the total, they are still the best examples of fully competitive markets that foster better service and lower prices.

BSPs assert that the best way to assess the existence of real competition is to look at individual markets. Our hypothesis is that the type of market and the type of wireline competition DBS faces significantly impacts the market share of DBS providers. This hypothesis is based on the experience of BSPs in their own markets, where it has been observed that DBS market share is significantly impacted by the presence of a fully upgraded wireline network offering bundled service.

The GAO conducted an additional study released in April 2005 that explored this hypothesis on a more systematic basis.[10] This study confirmed that the levels of market share and competition achieved by DBS vary widely by local market characteristics, and

---

[8] *See, e.g., Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* Reply Comments of NCTA, MB Docket No. 03-172, at 19 (filed Sept. 26, 2003).

[9] Pub. L. No. 102-385, 106 Stat. 1460 (1992), codified in scattered sections of 47 U.S.C. §§ 521-611.

[10] GAO, *Direct Broadcast Satellite Subscribership Has Grown Rapidly, but Varies across Different Types of Markets*, GAO 05-257 (Apr. 2005).

the numbers continue to underscore the market dominance of major MSOs in urban and suburban markets:

2004 DBS Penetration Rates

Geographic Comparisons			Cable Competition Comparisons		
Rural	Suburban	Urban	Not upgraded	Partial upgrade	Fully Upgraded
29%	18%	13%	36%	16%	14%

Significantly, the slowest DBS growth rates have occurred in markets characterized by a fully upgraded, digital cable system, offering bundled services. DBS penetration is highest, 68%, in markets where there is no cable service. By comparison, in markets where the incumbent MSO and a BSP compete with fully upgraded networks, the DBS share is 8% or less. The study also documented that the aggregate DBS growth rate in fully upgraded cable markets was only moderate when compared to other market segments.

This pattern of market share continues to underscore the critical importance of access to programming. Wherever DBS has the advantage of offering more programming than the cable competitor they achieve a higher market share. It is far more common for a DBS provider to compete with a smaller capacity analog only cable system in rural markets than in suburban or metro markets. DBS share in a given market is also generally split between the two primary DBS service providers. Therefore individual DBS competitors in the primary markets for MSOs (upgraded suburban and urban markets) will likely have less than 10% market share versus the incumbent cable share of 65 to 85% share.

IV. The Profile of BSP Presence and Market Performance.

In an effort to more accurately depict the BSP segment of the industry, the following information consolidates statistics for BSP operations. BSPs, all of whom have entered the market since the 1996 Act, have operations in nearly half the states in the country, including all major regions.[11] As documented in the 2006 FCC Cable Competition Report BSPs have over 10 million households under active franchises. Constructed systems now operate over 42 headend facilities and pass approximately 4.1 million homes, representing 40,000 miles of fiber distribution network. In the aggregate, BSP Commenters have over 1.2 million customers.[12]

BSPs continue to have an average residential customer penetration rate of over 30 percent. Among existing BSP customers, BSPs have an average service penetration rate of 89% for video, 50% for voice telephone, and 65% for high-speed data. Equally important, over 37 percent of BSP customers have upgraded to a digital tier of video service. Several BSPs have sold over 50% of their video customers a digital service. Viewing each service category as a separate "Revenue Generating Unit" ("RGU"), on average, BSPs have sold over 2 RGU's or primary services per customer over their networks.

The BSP business model is designed to sell multiple services to each customer. On average over 32% of BSP customers buy all three core services: video, voice and data. Several network operators sell over 50% of their customers all three services. The

---

[11] BSPs 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, and Washington DC.

[12] These statistics include data for several BSPs that are not active members in the BSPA including: Champion Broadband, Graceba, Grande, Wave Broadband, and Wide Open West.

second most common bundled sale is video and data representing an average of 26% of all BSP customers. Video and voice represent 8% while the combination of voice and data is only 4%. The average mix of sales of individual services is video 22%, data 4%, and voice 5%.

These statistics document the essential nature of the "bundle" in the success of the wireline competitive model. Video is the most frequently sold service and therefore essential to any successful investment. At the same time a video only strategy also financially fails without the added revenues of voice and data.

V. The Linkage Between Video and Broadband Policy Objectives.

While we do not know the specific statistics of data services sold by competition, the BSP data also suggest that the total penetration of broadband services appears to be significantly higher in markets served by multiple wireline providers. Therefore, bundled wireline competition also contributes to our national goals for expanded broadband deployment as specified in section 706 of the communications act.

As the Commission has recognized, broadband deployment and video entry are inextricably linked. This linkage between video and broadband was clearly affirmed in the *Local Franchising Report and Order.*[13] The Commission has found repeatedly over the last 10 years, that there is no question that the ability to successfully offer video programming would promote the goal of Section 706 to facilitate broadband deployment. Video services sold on bundled networks, that will be a significant driver to also expand

[13] *See, e.g., Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and FNPRM, 22 FCC Rcd 5101, 5132 (2007) ("*Local Franchising Report and Order")* (the statute "directs the Commission to encourage broadband deployment by utilizing measures that promote competition . . .or other regulating methods that remove barriers to infrastructure investment").

broadband deployment, represent from 35 to 50% of total revenues. A successful video service is therefore essential to network financial viability.

The Commission has repeatedly emphasized that it must take Congress's desire to remove barriers to broadband deployment into account when interpreting other provisions of the Act and designing its regulations. As the Commission noted in the *Local Franchising Report and Order,*

> We note our previous conclusion that the ability to offer a viable video service is "linked intrinsically" to broadband deployment.[14]

The rapid deployment of broadband facilities is a paramount federal objective. Congress has embodied this policy in Section 706 of the Communications Act, the President has specifically established an aggressive policy of encouraging widespread deployment of broadband networks by 2007,[15] and the Commission has repeatedly reiterated its priority to eliminate regulatory impediments to broadband infrastructure deployment.[16] Section 706 of the Telecommunications Act of 1996, charges the

---

[14] *See Local Franchising Report and Order*, 22 FCC Rcd at 5132-33 ("The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.") (footnote omitted).

[15] *See* Speech of President Bush, Mar. 26, 2004, available at http://www.whitehouse.gov/infocus/technology/economic_policy200404/chap4.html ("We ought to have . . . universal, affordable access for broadband technology by the year 2007, and then we ought to make sure as soon as possible thereafter, consumers have got plenty of choices when it comes to [their] broadband carrier").

[16] *See, e.g., Matter of IP-Enabled Servs.*, NPRM, 19 FCC Rcd 4863, 4865 (2004) ("*IP-Enabled Services NPRM*") ("we have recognized the paramount importance of encouraging deployment of broadband infrastructure to the American people"); *Matter of Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Sys.*, Report and Order, 19 FCC Rcd 21265, 21271 (2004) ("The deployment of broadband delivery capabilities to provide all Americans with access to affordable high speed Internet and data services is one of the most important challenges currently facing the Commission and the communications industry"); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and NPRM, 20 FCC Rcd 14853, 14900-901 (2005) ("[o]ur primary goal in this proceeding is to facilitate broadband deployment in the manner that best promotes wireline broadband investment and innovation, and maximizes the incentives of all providers to deploy broadband").

Commission to "encourage the deployment of . . . advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience and necessity, . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157 nt.

Significant recent emphasis has been placed on the further need for rural broadband deployment. The link between broadband penetration and video services has been demonstrated for both urban and in particular rural markets. When bundled together, customers tend to buy more of both, making broadband deployment economically more feasible in more areas. Denied access to "must have" video content that is controlled by incumbent cable operators will thus have a direct and adverse effect on broadband deployment. Policies that support the investment and successful deployment of next generation networks will positively effect the development of both video competition and broadband deployment.

The competitive value of wireline competition and the essential part that bundled primary services play in the business model are at this point well documented. The recent focus has been on what policies need to be addressed to further support and encourage additional investment in these competitive networks and service offerings. One of the primary conclusions is that policy decisions are not longer isolated to the more narrow impact they may have on the specific service they address. With respect to a bundled service network a policy decision that positively affects the ability to offer video services has a direct impact on the related deployment of broadband on the same network.

VI. The Current Policies that Are Most Relevant to BSP Wireline Competition.

While BSPs provide one of the most compelling profiles of desired competition, they also have the most established history of offering bundled services to compete with incumbent cable. BSPs have been the industry pioneers now being followed by many new facilities based network investments and related technologies to deliver similar bundled primary services (voice, video and data) that will bring both video competition and expanded broadband services. Over the past ten years BSPs have been the target of various strategies used by incumbent cable operators in an effort to preserve their dominant market positions. Therefore BSPs offer a unique insight into the status of competition in the market for delivery of video programming. The issues that the BSPs have historically identified as most relevant to sustaining and developing bundled wireline competition include:

1. Assured access to video programming.
2. Video franchise reform related to process, requirements, and cost.
3. Access to MDUs as a significant market segment.

The ultimate driver to wireline network expansion and upgrades is sustained access to significant capital. Policies that impact issues related to programming, video franchise requirements, and access to significant customer segments all potentially impact access to the capital markets.

The conclusion of all BSPs is that program access strategies are the most powerful and potentially effective tactic that incumbent operators could employ in an effort to block or otherwise contain wireline competition, and that key among these are the use of exclusive contracts where they are not legally constrained. If every other issue that has been historically identified as a potential barrier to competitive video entry (franchising, predatory pricing, MDU access, technical standards, etc.) were fully resolved without assured access to content, thus allowing competitors to pursue foreclosure strategies related to content, competition would indeed be impaired.

Congress and the FCC have long recognized the direct linkage between access to programming and additional video competition. In 1992, as part of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[17] Congress enacted the original program access provision, Section 628 of the Communications Act, which required that satellite delivered video programming owned by cable operator-affiliated programmers be made available to competitors on fair and non-discriminatory terms and conditions. A primary focus of this original legislation was the development of new competition in the MVPD market – particularly from satellite providers.

Access to content is as critical to competition today as it was in 1992. The FCC reviewed the application of the rules prohibiting exclusive contracts in 2002 and, concluding that they remained essential to competition, extended their application for an additional five years.[18] Regulators reviewing media mergers and acquisitions have reached the same conclusion, most recently imposing program access conditions on the acquisition by Comcast and Time Warner of Adelphia's cable systems.[19]

---

[17] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[18] *See Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution; Sunset of Exclusive Contract Prohibition,* Report and Order, 17 FCC Rcd 12124 (2002). ("*2002 Extension Order"*). .

[19] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006)("*Adelphia Order"*).

The BSPA fully supported the Commission's recent decision to extend the sunset of the current prohibition on exclusive contracts for satellite delivered, cable affiliated programming for another 5 years. We were also encouraged by the unanimous decision and strong statements of support for these effective pro-competition rules that continue to be needed. As stated in the Report and Order:

> We find that the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming, and accordingly, retain it again for five years. [20]
>
> * * * * *
>
> [W]e conclude that there are no close substitutes for some satellite-delivered vertically integrated programming and that such programming is necessary for viable competition in the video distribution market. Having made this determination, we further conclude that vertically integrated programmers continue to have the ability to favor their affiliated cable operators over competitive MVPDs such that competition and diversity in the distribution of video programming would not be preserved and protected.[21]

In addition to extending the current prohibitions on exclusives for 5 years we also concur with the following conclusions by the Commission:

1. Access to "must have" programming is essential for healthy competition.[22]
2. Vertically integrated cable programmers still have the incentive and ability to withhold must have programming.[23]
3. The current rules have caused no harm to program development.[24]
4. Expanding regional clusters and further horizontal cable consolidation increase the ability and incentive to withhold programming.[25]

---

[20] *Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution; Sunset of Exclusive Contract Prohibition*, Report and Order and NPRM, MB Docket 07-29, FCC 07-169, ¶ 1 (rel. Oct. 1, 2007). ("Sunset Report and Order").

[21] Sunset Report and Order, ¶ 42.

[22] Sunset Report and Order, ¶ 41.

[23] Sunset Report and Order, ¶ 29.

[24] Sunset Report and Order, ¶ 64

[25] Sunset Report and Order, ¶ 29, 52, 53.

5. Examples of denied access to key programming where current rules do not apply are clear evidence of what cable will do if allowed.[26]

The immediate program access issue is whether the same prohibitions against vertically integrated satellite delivered content will be equally applied to terrestrially delivered content. Today these rules do not apply to terrestrially delivered content and this is commonly referred to as the "Terrestrial Loophole". All of the Commission's conclusions are as relevant in today's market for terrestrially delivered content as they have been and continue to be for satellite delivered content. From a competitive policy perspective the same analysis that justifies the further extension of the current prohibition on exclusives for satellite delivered content and the continued vitality of the program access rules generally, has direct application to cable affiliated programming that is delivered terrestrially. The Commission has endorsed this view in the recent Adelphia merger decision by closing the terrestrial loophole for regional sports networks controlled by the parties to the transaction.[27]

The Commission has now opened a new proceeding, 07-198, with the potential that the Commission will at this point close the terrestrial loophole. Our expectation is that the primary debate within this proceeding will not be whether it would be good pro-competitive policy to close the terrestrial loophole but whether the Commission has the regulatory authority to take this action.

The BSPA asserts that there is no question as to the need to take action and the Commission's authority to close the terrestrial loophole. Since the foundations for these

[26] Sunset Report and Order, ¶ 51.

[27] *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses: Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006)("*Adelphia Order").*

rules lie in anti-trust principles we would request support from DOJ, the Judiciary Committees, and other members of congress for the Commission to take this action at this time. We believe that closing the terrestrial loophole is both consistent with the intent of Congress on this issue and the authority of the Commission to act as provided for in 628 (b) of the Communications Act.

The recent Commission actions related to franchising have also created a better environment for the development of competition. The original franchising order created a stronger clearer foundation for new competitive entry and the additional order further extended the new franchising rules and related costs to incumbent franchises at the time of renewal for these existing franchises. This additional action was needed to assure that the Commission had not created any permanent regulatory imbalance between competing wireline competitors. The critical immediate issue is whether these new franchising rules will be overturned in court.

In addition to program access and franchising, the Commission has also provided new assured access to Multiple Dwelling Units (MDUs) by making current and future exclusive contracts for service unenforceable. This action has provided additional assurance that competitive providers will have a fair opportunity to compete for business from all potential customers where they build networks and offer service. These rules are under further consideration for potential application to DBS providers and whether similar rules should be enacted for exclusive marketing agreements or other similar business arrangements that have the same impact as exclusive service or access contracts.

While these recent actions related to Program Access, Franchising, and MDU Access are all needed pro-competitive policies we are still facing a market structure where the benefits of wireline Bundled service providers reach less than 5% of the population and the Commission has recognized the overwhelming market dominance of incumbent cable for video services. As the Commission concluded in the *Report,* regional market shares that are significantly higher than the national averages create additional incentive to withhold programming or pursue additional anti competitive strategies that would not be possible absent such market dominance. These regional clusters also create a more significant opportunity to use terrestrially delivered regional programming that has unique value to the specific regional market to thwart competition. As stated by the Commission in the Sunset Report and Order:

> Moreover, because the share of MVPD subscribers held by cable operators is above or near 78 percent in many DMAs, there is no reduction in potential subscribership or viewership in many regional areas from that which we observed in the *2002 Extension Order*. As the Commission did in the *2002 Extension Order,* we find that the costs (*i.e*., foregone revenues) incurred by a cable-affiliated programmer by refusing to sell to competitive MVPDs would be offset by (i) revenues from increased subscriptions to the services of its affiliated cable operator resulting from subscribers that switch to cable to obtain access to the cable-exclusive programming; (ii) revenues from increased rates charged by the affiliated cable operator in response to increased demand for its services resulting from its ability to offer exclusive programming; and (iii) revenues resulting from the ability of the cable-affiliated programmer to raise the price it charges for programming to other cable operators in return for exclusivity. Thus, particularly where competitive MVPDs are limited in their market share, a cable-affiliated programmer will be able to recoup a substantial amount, if not all, of the revenues foregone by pursuing a withholding strategy. In the long term, a withholding strategy may result in a reduction in competition in the video distribution market, thereby allowing the affiliated cable operator to raise rates.[28]

This assessment of continuing or expanding regional strength of major incumbent cable was discussed in the context of their potential use of program access strategies to thwart competition. However this regional market power is not limited in its potential application to a program access strategy. As we resolve the current visible competitive issues of Program Access, Franchising and MDU access we will need to continue to

[28] Sunset Report and Order, ¶ 52.

assess whether market dominance and related anti-trust issues are migrating to new strategies to unfairly impair wireline competition and diminish consumer welfare.

Respectfully submitted for: The Broadband Service Providers Association (BSPA)

By: John Goodman
Executive Director, BSPA
1601 K Street, Washington DC, 20006
202-661-3945