Testimony of

Mr. Rodger Johnson

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Written Statement of Rodger Johnson
President and CEO of Knology, Inc.
and
Chairman, Broadband Service Providers Association

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Good morning. I want to express my appreciation to Senators Kohl and DeWine for sponsoring the GAO Study that has just been released. I also want to thank you for the opportunity to participate in this hearing and provide additional testimony regarding competition in the MVPD market. I am pleased to represent both Knology and the Broadband Service Providers Association (BSPA), a trade association that represents most of the companies that the GAO referred to as wire-based competitors to incumbent cable operators in its most recent study on cable rates and competition. The facilities-based, last mile systems that Knology and my fellow BSPA members build today provide residential and small business customers with what we refer to as a "triple play" -- cable television, voice telephony, and high-speed Internet access to the Internet, all over a single, integrated broadband network.

Knology and other BSPs have been constructing competitive broadband networks and providing bundled video, voice and data services since the mid 1990s. To date, members of the BSPA have raised and invested over $6 billion in new, state-of-the art broadband networks providing competitive video, voice and data offerings to over one million customers around the country. Knology and its fellow BSPA members currently provide over two million units of service, known as revenue generating units or RGUs, to their one million customers.

Consumers are reaping the benefits of this capital investment in competitive networks. This new GAO Report again documents that customers in communities served by Broadband Service Providers, or BSPs, realize up to 15% lower cable television rates than consumers in communities where there are no wire-based competitors.

The BSPs have shown that they not only provide consumers with a demonstrable benefit on pricing and services, but they are proving the economic strength of their business model. When ranked against other cable providers, for example, Knology is number one in telephone penetration of basic cable subscribers and number one in high-speed data penetration of basic cable subscribers. At the same time, Knology has a lower net debt to EBITDA ratio than some other incumbent cable providers such as Insight and Charter.

These BSP systems are models for the type of competition envisioned by Congress in passing the Telecommunications Act of 1996. They are one of the examples of networks that provide true facilities-based competition to residential customers for voice, video and high-speed data services. The key issue for policy makers today is whether the legislation and its implementation, as it currently exists, supports the development of competition for cable services.

Knology and the BSPA are primarily concerned with three issues that, if not addressed, could slow the deployment of competitive broadband networks in communities around the country.

First, regulators must not mistake competition between cable and DBS with wire-based head-to-head competition between incumbent cable operators and BSPs. We are concerned with incumbent cable providers using DBS competition as an excuse to argue for elimination of competitive safeguards added by the 1992 Cable Act that help constrain incumbent conduct that would otherwise inhibit the rollout of competitive broadband networks. It can be misleading to talk about whether video competition exists locally by using national averages.

While it is true that Satellite now has about 22% of the total MVPD market, our experience is that the market share of DBS varies from over 90% to under 5% depending on the type of competition they face in specific markets. There are at least 4 different market structures worth evaluating:

1. Areas where Satellite has no cable competition
2. Areas where Satellite competes with Analog Only Cable
3. Areas where Satellite competes with Digital Cable
4. Areas where Satellite competes with Enhanced Digital Cable bundled with high-speed data, and voice.

We believe the data will show that in markets where an incumbent cable provider has fully upgraded its network to provide digital video and high-speed internet service, satellite penetration will fall well below the national average. In our experience, a fully upgraded cable provider often maintains a cable market share of 90% or greater when they are only competing against a satellite provider. We do not believe that a market with 90% or more of the market concentrated with one provider should be declared fully competitive. Such a finding would rob large numbers of consumers of the benefit of competitive video services.

We ask for your support to publicly document the state of competition in local markets through an additional GAO study. We are requesting a study of the state of competition in local markets with a variety of market conditions. We believe such a study would show why, even with the presence of a national satellite service, the cable television industry is not yet fully competitive, despite the industry's public rhetoric to the contrary. We would then request that this market analysis become part of the FCC's annual assessment of competition. Remember the GAO and the FCC studies only noted the consumer pricing advantage where BSP competition exists and not where only satellite competition exists.

The second key issue to the success of the deployment of competitive broadband networks is ensuring continued access to the content necessary to compete. Specifically, while the 1992 Cable Act recognized that assured access to programming networks is critical to competitive entry of competing distributors to incumbent cable operators, the protections of the 1992 Cable Act were limited to satellite-delivered programming. Programming delivered by land-based facilities does not enjoy the protection of the 1992 Cable Act. This has become to be known as the "terrestrial loophole."

Incumbent cable providers have evaded application of the program access protections in the Cable Act by migrating regional sports programming and other critical regional programming services to terrestrial-based distribution. As a result of this terrestrial loophole in the Cable Act, BSPs and other competitors are often denied access to vital regional sports and news programming that consumers demand because the access to the programming is controlled by incumbent cable operators. Incumbent cable providers use access to programming to limit the expansion of BSP service offerings. Examples of incumbent cable operators denying access to their programming to BSPs include:
? SportsNet in Philadelphia, PA.
? Regional sports in St. Cloud, MN.
? New England News in Boston, MA.
? Regional news in Concord, CA.
? Overflow sports programming in New York, NY.
? NESN HDTV (Bruins & Red Sox) in Boston, MA.
? SoapNet in Los Angeles, CA.
? SoapNet in Marshall, MN.
? RFD-TV in all MediaCom Communities.
? University of Missouri Sports in Kansas City, MO.

The FCC has repeatedly and conclusively acknowledged the critical nature of this issue, finding that continuing program access issues are real, abuse of vertical integration or market power is likely, and fair access to essential content is critical for the development of distribution competition. The Commission has concluded, however, that existing legislation does not provide it with the authority to promulgate rules prohibiting exclusive arrangements involving terrestrially-delivered programming. It is now time for Congress to step in and close the terrestrial loophole and address the expanding issues of fair access to content created by new technologies and distribution platforms.

Third, the BSP industry is threatened by other types of anti-competitive actions by incumbent operators, such as targeted predatory pricing campaigns and related predatory conduct designed to prevent entrants from getting a foothold in a particular market. In the face of BSP entry some incumbents are now pursuing targeted, discriminatory pricing strategies that have become more aggressive in the last 18 months, to the point 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. Predatory pricing strategies are frequently accompanied by substantial price increases in surrounding markets that do not yet have the benefit of facilities-based competition. The communities in these surrounding areas, in effect, subsidize the economic cost of the predatory pricing behavior of the incumbent cable provider. While the success of predatory pricing has been mixed for the incumbent cable providers, such behavior punishes consumers in the non-competitive areas and it can stop or slow the BSPs ability to attract capital for network expansion.

The FCC has recognized the public harm inherent in predatory pricing and similar anti-competitive conduct. In the context of the AT&T Broadband/Comcast merger, for example, the FCC found that the representations of AT&T Broadband and Comcast "leave open the substantial possibility" that AT&T Broadband and Comcast "may well have engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition and that these practices ultimately may harm consumers." The Commission also disagreed that targeted discounts merely reflect healthy competition:

In fact, although targeted pricing between and among 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.

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."

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 Communications 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 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. Because satellite providers are considered to be MVPDs, an effective competition showing usually merely requires that a total of 15 percent of households in a franchise area take satellite service.

In addition, a finding of effective competition can result when a cable provider with an ILEC affiliate enters any market. Knology has a subsidiary that is a rural ILEC providing telephone service to a small community on the Alabama/Georgia border. Cable incumbents have used this subsidiary to receive findings of "effective competition" from the FCC before Knology has an opportunity to market its services in any of its markets.

The irony is that 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 allows incumbents to pursue targeting pricing strategies intended to thwart competition. The legal test for effective competition should be adjusted to promote the development of competition in the local market instead of hindering local competition.

In closing, Broadband Service Providers have shown that in markets they serve, consumers enjoy the benefits of lower prices for broadband services. In order to continue to expand the availability of competitive broadband services, broadband service providers need policymakers to recognize that the market for cable television is not fully competitive and care must be taken to prevent incumbents from erecting artificial entry barriers and engaging in predatory pricing behavior. Moreover, access to content is a threshold issue that needs to be addressed in the upcoming session. I want to again thank you for this opportunity to be with you this morning and look forward to your questions.