

Testimony of
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Good morning Chairman Specter and members of the Judiciary Committee. I appreciate your invitation to testify, and I am honored to be here today.

Since 1992, I have provided legal services to dozens of public and private providers of competitive communications services. I have also assisted several national and state associations that support such endeavors, including the American Public Power Association, the National Association of Telecommunications Officers and Advisers (NATOA), and the Fiber to the Home Council.

Over the years, I have seen at first hand a wide range of practices through which incumbent cable operators have sought to thwart competition from my clients and similarly-situated entities. At a hearing in this room held on February 11, 2004, NATOA presented to this Committee an extensive report documenting dozens of examples of such practices.¹ Many of these anticompetitive practices are still occurring today, and they need to be curbed, once and for all. I applaud Chairman Specter for focusing on programming access in this hearing, and I hope that the Committee will address the other problems next year.

¹ The report is available online at http://www.baller.com/pdfs/bh_anticomp_report.pdf.

In my testimony today, I would like to make three main points. The first point is that it is critically important not to treat programming access as just a cable entertainment issue, but to treat it as well as an infrastructure issue that is essential to America's local, regional, and global competitiveness.

As the Committee is aware, America's international ranking in broadband deployment has fallen precipitously in the last decade, from 1st in the world in the mid-1990s to as low as 21st today in some studies. The United States is also falling increasingly behind the leading nations in access to high-capacity Next Generation Networks and in cost-per-unit of bandwidth, in which we now rank 6th, according to the International Telecommunications Union. These are alarming trends, because virtually everything that we do at home, at work, and at play will increasingly be done through broadband platforms. As a result, the nations that lead the way in developing Next Generation Networks will be the ones that are most successful in the emerging knowledge-based global economy. Please see my first handout for much more information on this.

A century ago, when electricity was the must-have technology of the day, the private sector could not alone electrify America fast enough to meet demand, particularly in rural areas. Recognizing that electrification would significantly enhance economic development and quality of life, thousands of unserved or underserved communities stepped forward to form their own electric utilities. Most of those that did thrive, while many that waited for the private sector to serve them did not.

Today, the history of electrification is repeating itself in the communications area, and many communities across the United States, are ready, willing, and able to do their part to help America develop high-bandwidth Next Generation Networks as rapidly as possible. In this, they

want to stay abreast of the most progressive municipalities in the leading nations, as you will observe from my second handout.

If we are to succeed as a Nation in developing Next Generations Networks as rapidly as possible, we must ensure that they can be economically viable. Such networks are highly capital intensive, and they are affordable only if used to provide all major products and services, including voice, video and broadband data. Denial of access to critical video programming, particularly sports programming, is thus not just harmful to competition in the market for cable television, but it can destroy the economics of Next Generation Networks and impair America's ability to stay competitive in the global marketplace.

Second, as the Federal Communications Commission has repeatedly found since Congress included programming access safeguards in the Cable Act Amendments of 1992, these safeguards have played an essential role in creating and maintaining a competitive environment in the cable industry. If Congress is serious about preserving this competitive environment, it must update the programming access provisions to keep pace with the significant technological and other changes that have occurred in the marketplace since 1992.

Specifically, it is crucial for Congress to remove the so-called "terrestrial loophole" that allows cable operators, by delivering video content through fiber optic cables, to escape the Cable Act's current satellite-oriented programming access requirements. I do not agree with the testimony claiming that this is a solution in search of a problem. I can cite many examples of public communications utilities that have encountered programming access problems, including several in just the last three years - e.g., Braintree, Massachusetts; Kutztown, Pennsylvania; Wadsworth, Ohio. This is not a problem that Congress should allow incumbent cable operators to create or remove at will. Given the huge capital investments that Next Generation Networks require, current and potential providers, investors, and the public need, and are entitled to, certainty about access to critical video programming.

Third, when faced with anticompetitive practices by incumbent cable operators, small to medium-sized entities, such as my clients, can take little, if any comfort, from the antitrust laws. For such entities, the time, cost, burden, and uncertainty of pursuing antitrust remedies render such remedies all but worthless. What we need are clear and objective statutory safeguards that are easy to understand, that lend themselves to prompt and effective enforcement, and that provide sufficiently onerous multiple damages, penalties, and attorneys fees to deter non-compliance. Congress should also ensure that the Department of Justice, the Federal Trade Commission, and the Federal Communications Commission have clear jurisdiction and a mandate to protect small competitors from anticompetitive practices, including denial of access to critical content.

Thank you very much. I would be glad to answer any questions that you may have.