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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	CS Docket No. 00-129
Competition in Markets for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF

WIDEOPENWEST HOLDINGS, LLC

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October 11, 2001

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Pursuant to the Notice of Inquiry ("NOI") released by the Commission in the above-captioned matter on June 25, 2001,[1] WideOpenWest Holdings, LLC ("WideOpenWest"), by the undersigned counsel, hereby submits this Reply to the Comments filed in the above-captioned proceeding.

I. INTRODUCTION

WideOpenWest submits its comments regarding the status of the competitive marketplace from a unique perspective--that of a competitive provider of cable and other telecommunication services. WideOpenWest is one of only a handful of companies in the United States that has sought to directly compete with incumbent cable operators for the same cable customers. As such, our perspective as a new, competitive provider of cable service is

much different than many other commentators in this proceeding, especially the incumbent cable operators with millions of subscribers and, in most cases, no direct cable competition. In all of the areas that WideOpenWest serves (and will serve as a result of its pending acquisition of the Ameritech New Media, Inc. cable systems), WideOpenWest will compete head-to-head with one of the largest 5 or 6 MSOs in the country.

In this proceeding and others, incumbent cable operators and their trade association have declared that competition has "eliminated any market power that cable operators may once have possessed."[2] Accordingly, "it is appropriate for the Commission to relax or eliminate existing cable regulations and avoid adopting new regulations."[3] WideOpenWest strongly disagrees.

At the same time, smaller competitive providers continue to plead with Congress and the Commission to strengthen or establish rules which will facilitate access to programming, pole attachments, MDU's and municipal rights of way and to scrutinize any practices of incumbents which may be deemed anti-competitive to help ensure that direct cable competition can take hold.[4]

The competitive cable marketplace is dominated by the top MSOs Because of their market dominance, they have the ability to restrict access to valuable programming, secure exclusive arrangements with other vendors and suppliers, restrict competitive access to MDUs,

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[1] *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 01-191, *rel.* June 25, 2001, 66 Fed. Reg. 35431 (2001).

[2] *In the Matter of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket N. 00-132, Reply Comments of Comcast Corporation (September 29, 2000).

[3] *In the Matter of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket N. 01-129, Comments of AT&T Corp. (August 3, 2001).

[4] *Id.*, Comments of RCN Corporation, August 3, 2001 ("RCN Corporation Comments"), and Comments of Utilicorp Communications Services, Everest Connections Corporation and EXOP of Missouri, Inc, August 2, 2001 ("Everest Connections Comments").

and, most importantly, engage in predatory pricing and discriminatory marketing programs designed to eliminate their competitor altogether and yield an ultimate return to their former monopoly status.

To suggest as the top MSOs do that competition has eliminated any market power that cable operators may once have possessed is both untrue and fosters the continuation of anti-competitive conditions. The competitive cable services industry is in its infancy. Only a fraction of all communities in the United States enjoy the demonstrated and undeniable consumer benefits provided by the presence of two cable companies. More importantly, the build-out of cable systems by competitive cable providers in new communities has come to a virtual halt – in large part because of the perceived market power of the top MSOs by the financial community.

We could agree with the top MSOs that, all other things being equal, restrained governmental regulation best fosters free market competition. Competition, especially direct cable company competition in the same market, results in improved customer service, better products and better prices. We also generally believe that the marketplace and the consumers, not regulatory authorities, should sort out the ultimate winners and losers. But we also know that the top MSOs remain in a vastly superior and clearly dominant position, that they are aggressively using that position to damage the prospects for competition, and that more, not less, regulatory oversight is required until these conditions subside.

WideOpenWest shares the concerns voiced by other competitive operators such as RCN Corporation and Everest Connections with respect to programming access issues, and pole, conduit, rights-of-way and MDU access. We focus our comments upon the urgent challenges

faced by "overbuilders" or "competitive providers" resulting from the dominant market-power position of the top MSOs.

II. WIDEOPENWEST'S STATUS AND ACTIVITIES

WideOpenWest was founded in November 1999, to pursue the opportunities presented by the exploding demand for residential broadband Internet usage, matched against the lack of competition for quality high-speed Internet connections and digital cable television services available to residential homes. Incorporating recent technological developments in fiber optic and Ethernet deployment, dense wave division multiplexing, video server performance and broadband Internet-based call routing, these newly available but tested and proven technologies can combine to produce networks of unprecedented capabilities at competitively lower costs.

Initially, WideOpenWest secured franchises to construct new competitive broadband systems throughout the metropolitan areas of Denver, Fort Worth, Tucson, St. Louis and Minneapolis/St. Paul. As a result of the downturn in the debt and equity markets beginning in the second quarter of 2000, however, WideOpenWest (along with all other competitive cable providers in the United States) was compelled to dramatically scale back its build-out plans in the markets for which it had obtained franchises. Presently, WideOpenWest is constructing systems in selected metropolitan Denver communities and has either withdrawn or suspended its build-out plans in other targeted markets. WideOpenWest's pull back is comparable to the experiences of virtually all other competitive cable providers.[5]

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[5] For example, RCN Corporation recently announced that it will abandon its planned Philadelphia overbuild. *Multichannel News*, "RCN Gives Up on Philly Overbuild," February 19, 2001 ("RCN in December said it planned to cut its 2001 capital spending in half, shelving plans to delve into markets beyond what was already on its plate, including Philadelphia.") TotaLINK

While the recent economic conditions have dramatically impacted the competitive cable industry, it does not explain the lack of true cable competition in this country. As we discuss below, we believe that a number of local franchising authorities have been misled or coerced by the top MSOs into imposing terms and conditions which at best deter and at worst prevent market entry, forcing many competitive providers to abandon competitive build-out plans.

III. BARRIERS TO ENTRY AND COMPETITION

A. Introduction

While incumbent cable companies may seek to assure the Commission that competition is thriving thereby obviating the necessity for regulatory oversight in the competitive video marketplace, some have openly (and others privately) declared "war" upon competitive providers such as WideOpenWest that dare to intrude upon their sole provider status. At investor conferences, some incumbents have warned that the "overbuilder threat" will be met "swiftly and forcibly".[6] Former Charter Communications, Inc. President Gerald Kent said it this way:

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a competitive provider in Ohio and Indianapolis, recently reported that "difficulty in raising capital for construction forced it to temporally shut down its plans to build broadband networks in [Dayton, Ohio and Indianapolis, Indiana]." *Multichannel News*, "Overbuilders Pull Back in Four States," July 30, 2001. American Broadband, Inc. announced in April of this year that it would not pursue its overbuild in the State of Rhode Island because "the influx of capital to the telecommunications competitors has 'virtually stopped'". *Multichannel News*, "Overbuild in Progress: Knology's Up, ABI's Down," April 2, 2001. ABI earlier announced that it would pull back from its plans to overbuild in the Buffalo, New York area. *Multichannel News*, "Overbuilders Feel Cash Crunch," January 29, 2001. More recently, McLeod USA shut down its overbuild of AT&T's system in Cedar Rapids, Iowa, attributing the shut down to the "economic pressures" that have battered over builders nationwide. *Multichannel News*, "Plug Pulled on Cedar Rapids Overbuild," July 23, 2001. And in March of this year "frozen lending markets" prompted Digital Access to go out of business altogether. *Broadcasting and Cable*, March 5, 2001.

[6] *Multichannel News*, Volume 22, Number 6, "Overbuilder Sounds Confident But Wary," (February 5, 2001), page 39.

> If someone wants to come and take us on, get ready for a war, because that's what it will be, a war . . . we are prepared. If Mark [Haverkate, of WideOpenWest] or somebody else wants to come in to our home market, God Bless him.[7]

In private, municipal representatives and others have shared with WideOpenWest the stated objective of some incumbents to put WideOpenWest "out of business."

B. Restrictive Franchising

In some of its initial attempts to secure competitive franchises, WideOpenWest was met with incumbent operators that publicly supported and welcomed competition. These same incumbent operators, however, insisted under the guise of "competitive neutrality" that local franchising authorities not permit competitive operators to contribute PEG capital and access funding fees which were proportionate to their relative market share; rather, they argued that the contributions must be identical in absolute dollar amounts. A number of communities yielded to this position despite the fact that until WideOpenWest's system was constructed and subscribers obtained, no revenue would be realized by WideOpenWest for a number of years. Additionally, these same incumbents insisted that the local franchising authorities require identical density thresholds even though these density threshold levels originally were negotiated by the incumbent and the community in the context of a monopoly environment.

Other competitive providers have apparently experienced similar barriers to entry.[8] While Congress has long prohibited exclusive franchises,[9] the Commission should adopt rules that allow local franchising authorities to promote and provide incentives for entry of competing

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[7] *Id.*

[8] *Id.*

[9] 47 U.S.C. § 541 ("a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.").

cable companies into the marketplace by providing for "parity" or "competitive neutrality" premised upon, *inter alia*, relative market share. Such an approach would recognize the fact that most cable television ordinances and franchises have been created in the context of, and through negotiations with, a sole cable provider and which is, therefore, divorced from the realities of a marketplace served by multiple cable operators. Local franchising authorities must be given reasonable guidance in this area so that they can negotiate reasonable franchise terms and conditions with competitive cable operators without the intimidation, risk and fear of being sued by a top MSO.

C. Exclusive Programming Arrangements

Programming is the cornerstone of the cable business. Without reasonable access to quality programming, competitive video providers cannot survive. The top MSOs have the ability to use their market power to the disadvantage of competitive providers. As pointed out by RCN Corporation, this is particularly true in the case of local sports programming, and particularly dangerous if large MSOs are permitted to own professional sports teams.[10]

The programming access rules embodied in federal law are inadequate. When adopted, "Congress was concerned that an increase in concentration and vertical integration in the cable industry could result in anti-competitive behavior by cable operators toward programming suppliers, as well as toward potential new entrants."[11] Congress was right, but the existing rules have many holes, and simply do not apply in many circumstances. MSOs can under the existing rules simply use their immense market power to gain exclusive contracts for nonaffiliated or

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[10] RCN Corporation Comments, pp. 9-16.

[11] *In re Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 199,* CS Docket No. 98-82 (Rel. September 21, 2001), ¶5.

terrestrially delivered programming. For example, WideOpenWest was informed by a significant programmer that its programming was unavailable to WideOpenWest in any market that competes with a specified incumbent MSO. This same programming is, however, available to competing DBS providers.

The Commission has over the years been presented with other examples of MSO programming access abuses[12]. When confronted, the MSOs assert an ineffectual law that does not specifically prohibit certain practices, and then, when they require specific Commission approval of yet another merger or consolidation, they promise to be fair.[13] For example, during proceedings relating to the AT&T-MediaOne merger, competitive provider Seren Innovations described the concerns that it raised in the earlier AT&T-TCI merger regarding AT&T's exclusive contract for lucrative sports programming in Minnesota. During that earlier merger proceeding, AT&T testified that it would act reasonably and responsibly in the area of exclusivity. After the merger was approved, however, AT&T simply reasserted its exclusivity rights to this programming.[14]

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[12] *See*, *e.g.*, RCN Corporation Comments, pp. 9-16.

[13] *In Re Application of: Cable Services Bureau for AT&T-MediaOne Public Forum*, MM CS Docket No. 99-251 (February 4, 2000). Mr. Peter M. Glass, counsel to Seren Innovations, testified: "When Seren raised [the issue regarding TCI's exclusive right to air valuable local sports programming in Minnesota] in the AT&T-TCI merger proceedings, AT&T-TCI claimed that, quote, it had been entirely reasonable with its competitors in voluntarily relinquishing exclusivity in certain cases. Even though it was under no obligation to do so under the program access rules. And that it would act reasonable and responsibly in this area."

[14] In the AT&T-MediaOne merger proceeding, Mr. Glass further testified that "after the [AT&T-TCI] merger was approved, when Seren contacted TCI to ask that it make good on its representations to the Commission, Seren was told that neither TCI nor Bresen [sic], TCI's affiliate, was willing to waive this exclusivity and Seren was denied access to MSC. To this day, we still have not been able to carry that programming."

The bottom line: MSOs have the power to deny essential programming to competitive providers in ways that are often allowed by law. If competition is to be effectively promoted, the programming access rules must be revisited and reinforced.

D. Exclusive Arrangements with Other Vendors

WideOpenWest seeks as part of its business plan to introduce enhanced products and services to its customers, including video-on-demand. In recent discussions with two of the few manufacturers of video-on-demand servers, WideOpenWest was informed that the manufacturers' products were unavailable in any market where WideOpenWest competes with a named incumbent MSO. Everest Connections similarly reports that incumbent operators have secured exclusive relationships with iNDEMAND, Diva and Concurrent.[15]

Likewise, when WideOpenWest sought to utilize a particular interactive programming guide, it was informed that the product may be unavailable in any market where WideOpenWest competes with a specified incumbent MSO.

Everest Connections also reports that it cannot purchase Scientific-Atlanta or Pioneer set top converters, due to restrictions demanded by incumbents.[16]

Where the incumbents do not have exclusive deals with vendors, they may still use their dominance in the marketplace to dissuade vendors from offering services to competitive providers. For example, it was recently alleged that AT&T fired a local installations vendor in Utah that apparently agreed to perform services for a small competitive cable system owned by the City of Provo, forcing the vendor to layoff two thirds of its workforce. The contractor

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[15] Everest Connections Comments, p. 8.

[16] *Id.*

"believes AT&T made an example of his firm in order to intimidate other contractors the city will need if it proceeds with a proposed $40 million overbuild."[17]

E. Predatory Pricing and Marketing Discrimination

While we believe the practices noted above are both anti-competitive and routinely practiced by the large cable MSOs with the intent and goal of discouraging the start-up of a competitor, the most egregious actions occur once a competitor gains a share of the market. Without exception to our knowledge, it is our opinion that the top MSOs (perhaps independently, perhaps in collusion) have rallied around a single strategy to kill off competition – predatory pricing combined with marketing discrimination. This is how we believe it works:

Once a new competitor has attracted a share of the customer base, and begins to approach a sustainable size in its operation, the top MSOs devise a distinctly two-pronged pricing and marketing policy. The first prong is the deal for their existing base of customers--full published rates, regular rate increases, and business as usual. This prong is what the "market" sees, what they broadly advertise, and is the only offer available to all their current customers.

The second prong gets more interesting, and great lengths are taken to keep it low profile. Current customers are never notified, mass advertising is not used, customer service representatives are ordered not to tell existing customers about it, or even respond to requests about it. The second prong is marketed via door-to-door contact, and tightly targeted mail and telephone solicitations to a distinctly unique set of customers--those of the new competitor.

The MSO leadership, and their marketing departments, are free to come up with whatever offers they believe to be especially compelling, without regard to cost, or the impact such a pricing plan would have on the cable business. Why? Because they go to great lengths to

[17] *Multichannel News*, Volume 22, Number 6, "Overbuild Deal Costs an AT&T Vendor,"

discriminate these offers from their monopoly-acquired customer base, even to next-door neighbors with identical services. The profitability, or sustainability of these super-offers is far from their concern, because that's also far from the point. The point being – to make it impossible for a competitor to grow or even survive, and to leverage the MSO's cash flow from their huge base of customers obtained from decades of monopoly operations and M & A consolidations in an obvious strategy to eliminate the competitor, and reclaim their original 100% market share.

To guard against the occurrence of this type of marketing activity, WideOpenWest submits that all top MSOs should be required to adhere to the following:

1. Any and all special discount offers on a system be advertised publicly and made available to all customers within the system's market area on an equal, non-discriminatory basis.

2. To comply with the universal service requirements in their franchise agreements, and therefore meet the requirement that service offerings and pricing be equally applied, marketed and available to all addresses within a municipality.

3. To submit to the local franchising authority, no less than quarterly, the details of all marketing campaigns, and the accompanying evidence that all customers and potential customers have been fairly advised of the terms and had equal access to the offer.

4. To respond via public hearing, and be subject to franchise authority penalties and violation remedies, if a credible claim of violations is raised by the franchise authority, the cable competitor, or a customer.

(Feburary 5, 2001), p. 20.

If this type of two-pronged pricing and discriminatory pricing strategy is permitted, the result will be a complete victory by the top MSOs and a return to monopoly status in the local residential market.

WideOpenWest can provide clear, documented and compelling evidence in support of our beliefs described above, and would welcome the opportunity to share them with the Commission in whatever forum deemed appropriate.

F. "Citizen Groups" and Reports of False Claims by MSO Salespeople

In Michigan, a group ironically named the "Coalition for Complete Cable Competition" was formed September 19, 2001, by a Michigan lawyer (who also serves as its executive director and represents himself in the Martindale-Hubbell Law Directory as a toxic torts, products liability and environmental law attorney) who is affiliated with a Michigan based firm, and immediately established a website (www.4cable.org) devoted to discouraging competitive cable television systems in general and the WideOpenWest transaction in particular. The website lists individual members of the organization, but fails to mention that most of those persons work for the same law firm as the executive director.

The group then ran an ad in local newspapers warning local cable subscribers of the impending transfer of the Ameritech New Media, Inc. systems to WideOpenWest. We attach a copy of that advertisement as Appendix A. All of this appears to be an elaborate and expensive attempt to block the transfer of the Ameritech systems to WideOpenWest and ultimately to eliminate the competitive system altogether.

While we have not confirmed the financial backing or source of information of this organization, none of the more prominent telecommunications attorneys and consultants representing Ameritech New Media, Inc. communities is familiar with this group. Furthermore,

the Coalition's web-site provides a link on its "Issues" page to "the Washington, D.C. law firm web site" which, in turn, is the web-site for the law firm of Miller & Van Eaton, P.L.L.C., a nationally known telecommunications firm specializing in the representation of municipalities. Until asked by WideOpenWest about the Coalition, a named senior partner of the firm stated that he had never heard of the Coalition for Complete Cable Competition.

Ameritech New Media, Inc. customers have recently reported to Ameritech New Media, Inc. during the pendancy of the transaction with WideOpenWest sales tactics being used by top MSOs that we believe to be outrageous. For example, Ameritech New Media, Inc. customers have reported that door-to-door sales representatives from two different top MSOs have represented to them that the MSO, not WideOpenWest, had recently purchased Ameritech New Media, Inc. and, consequently, the Ameritech New Media, Inc. customer needed to sign a new contract with the MSO.

IV. CONCLUSION

WideOpenWest does not oppose aggressive competition; we wholly support it. However, the Commission should be aware of the tactics being used by the top MSOs that have vowed to use their massive market power and resources to destroy competitive cable system operators. They will continue to engage in practices that we believe are designed to discourage or destroy competition, and will again come back to this Commission at the signing of the next mega-merger deal to tell the Commission that the public is served well by the further consolidation. If it remains the policy of Congress and this Commission to encourage and foster competition, the Commission must promptly reexamine its positions under existing laws and, where needed, encourage Congress to expand and reinforce those laws that simply do not protect competitors against MSO abuses.

Respectfully submitted,

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October 11, 2001.

APPENDIX A

CERTIFICATE OF SERVICE

I, Carol Fillenworth, hereby certify that on this 11th day of October, 2001, a copy of the foregoing Reply Comments of WideOpenWest Holdings, LLC, was served on the following parties listed below via messenger or by first class postage-paid U.S. mail:

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