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BROADBAND SERVICE PROVIDERS ASSOCIATION

December 7, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Presentations by the Broadband Service Providers Association in CS Docket No. 95-184, WT Docket No. 99-217 and CS Docket No. 01-290

Dear Ms. Salas:

Pursuant to 47 C.F.R. § 1.1206 of the Commission's Rules, the Broadband Service Providers Association ("*BSPA*") submits this notice of *ex parte* presentations in the above-captioned proceedings.

On December 6, 2001, members of BSPA had the following meetings: Chairman Powell and legal advisors Susan M. Eid and Jon Cody; Commissioner Abernathy and legal advisor Stacey Robinson; Commissioner Copps and legal advisor Jordan Goldstein; and Commissioner Martin and legal advisors Catherine Crutcher Bohigian and Sam Feder. Attending one or more of these meetings for BSPA were the following individuals:

David Rozzelle, CEO	Altrio Communications
William Schuler, CEO	Carolina BroadBand
Michael Deggendorf, Senior Vice President	Everest/UtiliCorp
Haynes Griffin, CEO	Gemini Networks, Inc.
Richard Rowlenson, VP & General Counsel	Gemini Networks, Inc.
William Morrow, CEO	Grande Communications
Andy Kever, Sr. VP & General Counsel	Grande Communications
Rodger Johnson, President	Knology
Chad Wachter, VP & General Counsel	Knology
John Goodman, Vice President	Seren Innovations dba Astound Broadband
Deborah Royster, General Counsel	Starpower Communications, LLC (also on behalf of RCN Corp.)
Frank Harkins, General Counsel	Utilicom Networks
Bill Mahon, Vice President	WinFirst

At the meetings, BSPA was introduced as the organization of a new breed of last-mile service providers – companies that are building new, facilities-based, advanced last mile broadband networks for the delivery of compelling bundles of voice, multichannel/on demand video, and high-speed data/Internet services. BSPA discussed the importance of facilities-based competition to the public interest and consumer choice, and Commission policies that promote such competition. In particular, BSPA addressed immediate barriers to successful deployment involving access: (1) to poles, conduits, and rights-of-way; (2) multiple dwelling units ("MDUs"); and (3) programming. A presentation outline provided at each of the meetings, along with a summary of BSPA's position on each of the three issues, is attached hereto.

In order to meet the Commission's deadline for filing *ex parte* notices, a copy of this letter with a faxed signature and two additional copies, together with enclosures, are being filed today for inclusion in the public record for each of the above-referenced dockets. The original letter will be filed on Monday, December 10.

Respectfully submitted,

BROADBAND SERVICE PROVIDERS ASSOCIATION

By: Richard C. Rowlenson

Richard C. Rowlenson,
Chairman, Regulatory Committee

Enclosures
cc: FCC Attendees (w/out enclosures)

Broadband Service Provider Association (BSPA)

Rodger Johnson
CEO Knology
BSPA Chairman

FCC Meetings

December 6, 2001

PROPRIETARY AND CONFIDENTIAL

BSPA

- Introduce the BSPA
- Identify initial BSPA concerns and regulatory priorities
- Initiate ongoing discussions

BSPA

- Support Broadband Deployment as #1 FCC agenda Item.
- Promote facilities-based competition as ultimate solution to "One-Wire" problem.
- Seek vigorous enforcement of existing rules and policies.
- Address 3 immediate barriers to successful deployment:
  - Poles/Conduits/Rights-of-way
  - Fair access to MDU's
  - Non-discriminatory access to Programming
- Address clear need for redundant national broadband networks.

BSPA

Founding Members

- Altrio Communications
- Carolina Broadband
- ClearSource
- Everest / UtiliCorp United
- Gemini Networks
- Grande Communications
- Knology
- RCN
- Astound Broadband
- Starpower Communications
- Utilicom Networks LLC (d/b/a Sigecom and TOTALink)
- Wide Open West
- WinFirst

BSPA

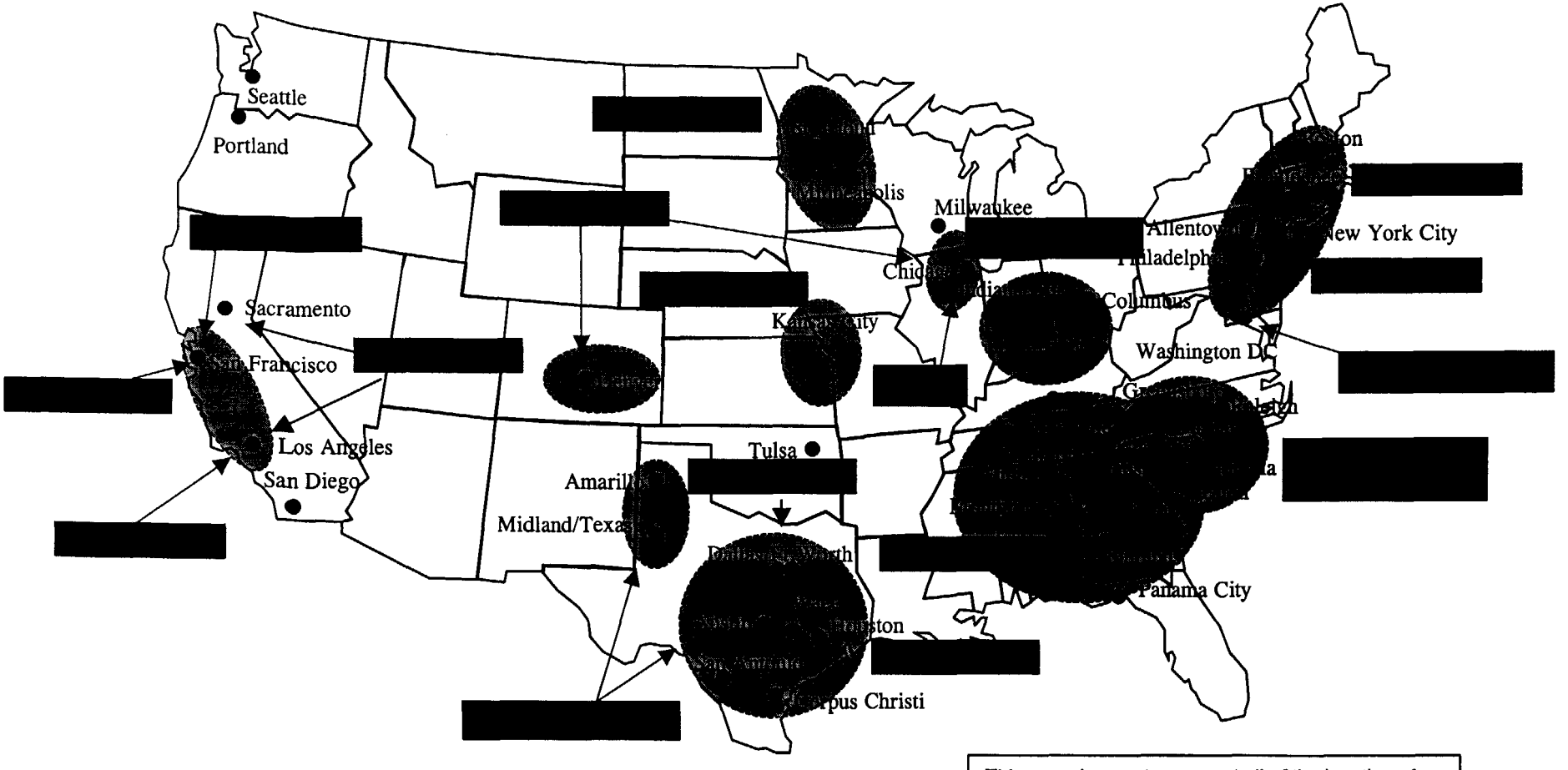
Member companies are a new breed of communication service providers -- building advanced "last-mile" broadband networks that deliver compelling bundles of voice, video and high-speed data/Internet services directly to homes and small businesses.

Cable TV (AT&T, Time Warner, Cox)
+
Telephony (Verizon, SBC, Bellsouth)
+
Data/Internet (AOL, Earthlink, MSN)
+
Savings & Better Service

= **Broadband Service Provider**

One-Wire, One-Call, One-Bill and More Products

BSPA [redacted]



This map does not represent all of the locations for the BSPs. It is a representative sample.

BSPA

We represent the largest untapped opportunity to meet consumer demand.

- **Total Households under franchise: > 24 million**
- **Homes passed: > 4 million**
- **Total current customers: > 1 million**
- **Total current RGU's: > 2 million**
- **Total existing capital investment: > $5 billion**
- **Miles of constructed network: > 29,000**

The stage is set. The time is right for competition.

BSPA

Broadband deployment and expanded fair competition are still unmet needs with high priority!

- *"The widespread deployment of broadband infrastructure has probably become the central communications policy objective today."* – FCC Chairman Michael Powell 10/23/2001

- *"[The FCC should remove disincentives for competitors to invest in networks and should craft]...adequate rules to protect competitors that build facilities"* -FCC Commissioner Kevin J. Martin 10/2001

- *"Facilities-based competition is the ultimate objective...Competition in the digital broadband world should come from many platforms."* --FCC Chairman Michael Powell 10/23/2001

- *"[Enforcement of government rules affecting broadband services]...must have teeth...[and penalties should be sufficient to deter noncompliance]"*–Nancy Victory, NTIA Administrator 10/2001

- *If at all possible we should work to keep multiple platforms androutes to the home open and viable in the broadband world."* --FCC Chairman Michael Powell 10/25/2001

BSPA

Our primary regulatory purpose:

To tear down barriers to market entry

- **Consumers want broadband service and choice**
- **Incumbents control bottlenecks in the market**
  - Poles, conduit, and rights-of-way
  - Access to MDUs
  - Access to programming

Success requires a pro-competitive regulatory environment

Necessary FCC Actions:

1. **Aggressive enforcement of existing FCC rules and policies, including pre-complaint damages and substantial, "punitive" forfeitures for repetitive non-compliance.**
2. **"Rocket Docket" treatment of pole attachment complaints.**
3. **Joinder of Parent Companies to FCC orders to ensure subsidiary compliance.**

BSPA

Federal law requires the FCC to "promote competition in cable communications"

Necessary FCC actions:

1. **Complete open dockets addressing MDU access.**
2. **Allow new broadband providers immediate access to MDU residents.**
3. **Establish rules that protect all consumer's right to choose among competing providers of cable TV services.**

Necessary FCC actions:

1. **Extend sunset provisions of 628(c) to continue current restrictions on satellite based exclusivity.**
2. **Reconsider historical FCC position on terrestrial distribution as is relates to the primary intent of 628.**
   a. **Expand regulations to include terrestrial distribution and eliminate current loophole.**

   or

   b. **Recommend congress amend legislation to expand authority to include terrestrial distribution.**

BSPA

- Reduced barriers to entry and fair competition will bring success and needed investment.
- Unmet demand grows each month.
- The last mile is the missing link in delivering high speed data/internet services to the residential and small business markets.
- We provide a solution with the benefits of competition in voice, video, and data/internet service offerings.

BROADBAND SERVICE PROVIDERS ASSOCIATION
POSITION SUMMARY – PROGRAM ACCESS

ASSURING MVPD'S FAIR ACCESS TO COMPETITIVE PROGRAMMING.

What is the problem?

- Although highly desired, broadband deployment and facilities-based competition have yet to reach ubiquitous levels. One factor that continues to slow competitive entry is ongoing impediments to acquiring programming content that subscribers deem important to multichannel video offerings, despite the program access provision of the Communications Act of 1934, as amended.
- The provision of high quality content is the cornerstone of successful bundled, multichannel video offerings. Without such content, any multichannel provider, broadband or otherwise, would be unable to effectively compete.
- Through Section 628, Congress sought to break the cable industry's "stranglehold" over programming, which had historically been enforced through exclusivity arrangements and other market power abuses exercised by cable operators and their affiliated programming suppliers that denied programming to competitive technologies, or made programming available on discriminatory terms and conditions.
- Even though competitors have made some in-roads, local programming distribution markets remain highly concentrated, and the vertical relationships that dominated the market in 1992 have become further entrenched.

What can the FCC do to help?

- Extend sunset provisions of 628(c) to continue current restrictions on satellite based exclusivity.
- Reconsider historical FCC position on terrestrial distribution as it relates to the primary intent of 628.
    - Expand regulations to include terrestrial distribution and eliminate current loophole.

      <u>or</u>
    - Recommend congress amend legislation to expand authority to include terrestrial distribution.

Please reference the BSPA comments filed in response to CS Docket No. 01-290, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition.

BROADBAND SERVICE PROVIDERS ASSOCIATION
POSITION SUMMARY – POLE ATTACHMENTS/CONDUITS/ROW

ASSURING BROADBAND SERVICE PROVIDERS FAIR ACCESS TO POLES/CONDUITS/ROWs

What is the problem?

- Pole Custodians, particularly electric utilities and ILECs, are deliberately and flagrantly ignoring FCC policies and case decisions mandating timely, fairly priced access to utility poles, conduits and rights-of-way ("ROW").

- Many of these pole custodians are competing directly against broadband service providers ("BSPs") and have strong motives to employ unreasonable practices to hinder deployment of BSP networks.

What can the FCC do to help?

- Issue a Public Notice describing the following strong pole attachment enforcement tools available to it and announcing the FCC's intention to use those tools aggressively in appropriate circumstances.

  STRICT ENFORCEMENT AND SUBSTANTIVE FORFEITURES

  - *Pre-Complaint Damages*: Upon a finding of violation of Section 224(e)(1) of the Communications Act or of FCC case precedent, award actual damages incurred prior to the filing of the pole attachment complaint. This is particularly warranted in the context of make-ready given that the misconduct of the pole custodian (*i.e.*, unreasonable practices and charges) often cannot be known until the pole custodian submits an invoice, well after it is incurred.

  - *Joinder of Parent Company*: Typically, the electric utilities/ILECs subject to Section 224 are operating subsidiaries of a larger parent corporation. If the utility's parent company can be joined in a complaint and any order is effective as to that parent and its subsidiaries, then the unreasonable practices of *all* subsidiaries of that parent can be halted through the issuance of a single decision.

  - *Rocket Docket Complaints*: The FCC should put all pole attachment complaints on a rocket docket timetable to make clear to pole custodians that anti-competitive tactics will not gain them a competitive time advantage

  - *Punitive Forfeitures*: In appropriate circumstances, issues a notice of apparent liability for forfeiture that is large enough to have the effect of punitive damages for a pole custodian's flagrant disregard of the Communications Act and/or the FCC's rules and policies. The FCC must send a message that it will not condone "guerrilla warfare" tactics by monopolist pole custodians seeking to block or economically damage legitimate pole attachers. Some pole custodians see forfeitures as a cost of doing business. The FCC should work with industry groups and Congress to encourage legislation to materially increase forfeiture limits.

  - *Encourage State PUC Action*: The FCC should (a) adopt a strong policy statement recognizing the requirements of Section 224(e)(1) of the Communications Act to make available just and reasonable rates, terms and conditions and non-discriminatory access to poles and (b) encouraging PUCs that regulate pole attachments to take all possible steps to enforce this national policy.

BROADBAND SERVICE PROVIDERS ASSOCIATION
POSITION SUMMARY – MDU ACCESS

ALLOWING EVERY AMERICAN CONSUMER THE RIGHT TO CHOOSE A BROADBAND SERVICE PROVIDER

What is the problem?

- Up to 40% of the residents in a given area, those who live in multi-family dwelling units ("MDUs"), are being denied the right to choose a broadband service provider
- As a result, incumbent cable TV companies have a de facto monopoly in vast portions of nearly every urban/suburban market
- This has a chilling effect on competition - new competitive broadband service providers are simply denied access to a major portion of the market

Why can't all American consumers freely choose among competing Cable TV providers?

- Incumbent cable TV providers have found that they can prevent competitors from serving major portions of urban/suburban markets by simply offering building owners lucrative exclusive contracts
- These exclusive contracts can affect 25% to 40% of the households in a given area and many small to medium-sized businesses
- Even though Federal law prohibits municipalities from awarding exclusive franchises to cable TV companies, these companies have found a loophole – exclusive contracts with MDU owners give the cable companies a de facto exclusive franchise with a large percentage of a city's residents

What can the FCC do to help?

- There is an easy solution – Provide all residential and business consumers with "Broadband Equal Access"
- FCC may enact rules in one of several open dockets addressing this issue
- These new rules can simply expand the rules prohibiting exclusive franchises [47 U.S.C. 541] to include any contract that prevents an end user from choosing the cable TV provider of their choice, when a choice exists

What is Broadband Equal Access?

- Broadband Equal Access is a new concept based on the principle that every American has the right to select the Broadband Service Provider (BSP) of their choice
- Simply stated, Broadband Equal Access would require that every consumer have the option of choosing among competing vendors of broadband service whenever multiple choices are available. Exclusive contracts that would limit end-user choice would be prohibited
- Broadband Equal Access will open as much as 40% of the addressable market to new competitive choices