Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
WideOpenWest Finance, LLC's	)	CSR-__________________
Request for Waiver of	)	
47 C.F.R. § 76.1204(a)(1)	)	
	)	

<u>REQUEST FOR WAIVER</u>
<u>OF THE SET-TOP BOX INTEGRATION BAN,</u>
<u>47 CFR §76.1204(a)(1)</u>

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SUMMARY

WideOpenWest Finance, LLC d/b/a WOW! Internet, Cable and Phone ("WOW"), on behalf of its operating affiliates, WideOpenWest Cleveland, LLC, WideOpenWest Illinois, LLC, WideOpenWest Michigan, LLC, WideOpenWest Ohio, LLC and Sigecom, LLC, and pursuant to Section 629(c) of the Telecommunications Act of 1996 and Sections 76.7 and 76.1207 of the Commission's rules,[1] respectfully requests that the Commission grant a waiver of the "Integration Ban" set forth in Section 76.1204(a)(1) of its rules until the development and industry-wide commercial deployment of downloadable conditional access.

WOW is a terrestrial based competitive provider of cable television and other broadband-related services primarily in the Chicago, Detroit, Cleveland and Columbus (OH) markets serving approximately 394,000 cable television subscribers throughout all of its markets. WOW competes directly with Comcast[2] in the Chicago and Detroit markets and Time Warner[3] in the Cleveland and Columbus markets. WOW is a relatively new entrant to these markets offering nascent MVPD services in contrast to the long-established incumbent presence of Comcast and Time Warner (and their predecessors). As the two largest cable operators in the country, Comcast and Time Warner enjoy substantial market dominance and purchasing power with respect to equipment and programming.

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[1] 47 U.S.C. § 549(c); 47 C.F.R. §§76.7, 76.1207.

[2] As of June 2005, Comcast had over 21 million basic cable customers. *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, MB Docket No. 05-255 (March 3, 2006)("*Twelfth Annual Report*"), ¶38.

[3] As of June 2005, Time Warner had nearly 11 million basic cable customers. *Twelfth Annual Report*, ¶38

Congress directed that the Commission "shall waive" regulations adopted to implement Section 629 where "necessary to assist the development or introduction of a new or improved multichannel video programming or other service".[4] The Media Bureau stated in the *2005 Integration Ban Order*[5] that, not only will it consider waivers for limited capability set-top boxes, [6] but will also consider waivers based upon the "necessary to assist" standard of Section 629(c) and the general "public interest" standard —standards within which the facts and circumstances surrounding WOW's waiver request precisely fall. Indeed, the *2005 Integration Ban Order's* stated protections of Congressional policy—that the prohibition on integrated navigation devices should "place as little of the cost burden resulting from the ban on the public" and "establishing

[4] 47 U.S.C. §549(c).

[5] See, *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices,* Second Report and Order, CS Docket No. 97-80 (Rel. March 17, 2005)("*2005 Integration Ban Order*"), *See also, Bend Waiver Order*; *In the Matter of Cablevision Systems Corporation's, Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices,* Memorandum Opinion and Order, CSR-7078-Z, CS Docket No. 97-80 (Re. January 10, 2007)("*Cablevision Waiver Order*"); and *In the Matter of Comcast Corporation, Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices,* Memorandum Opinion and Order, CSR-7012-Z, CS Docket No. 97-80 (Re. January 10, 2007)("*Comcast Waiver Order*"). In this Request, we refer to the three waiver Orders as the "*Media Bureau Waiver Orders*."

[6] WOW agrees with Comcast that the *Media Bureau Waiver Orders* inappropriately excluded low-cost, two-way functioning digital set-top boxes, and effectively adopted a wavier standard that is of no use to any cable operator in the country. *In the Matter of Comcast Corporation's Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, Application for Review (filed January 30, 2007)("*Comcast Application for Review*"), pp. 2-10. In that regard, WOW requests that should the Commission grant a limited waiver to deploy either the Chicago by Pace Micro or Explorer-940 by Scientific-Atlanta (SA), both of which are the lowest cost, most limited capability digital set-top boxes that are commercially available and operate in an SA environment, that such a waiver be extended to WOW. While a broader waiver is fully warranted for the reasons set forth herein, these low cost boxes would minimize the cost and, therefore, the attendant delay associated with converting our 200,000 plus subscribers from their current analog service to digital simulcast service. Moreover, WOW strongly agrees with Bresnan Communications that waivers, especially for small, competitive operators like WOW, should not be limited to certain low-cost boxes. "If the Commission granted only a low-cost waiver… but still required CableCARDs to be included in their HD and DVR leased boxes, it would be imposing an artificial regulatory disincentive for consumers to upgrade to HD and more advanced services—the antithesis of what federal policy demands." *In the Matter of Bresnan Communications, LLC's Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*(filed December 19, 2006)("*Bresnan Request for Waiver*"), p. 8.

a competitive market should not displace a low-cost set-top box option for MVPD subscribers"—will be rendered meaningless when the consumer and financial impact of the Integration Ban on a competitive wireline provider such as WOW is considered. Among other consequences, the Integration Ban will impede WOW's ability to timely transition to a digital solution to effectively compete with Comcast and Time Warner, the established incumbent operators in its markets, and to sustain and expand upon WOW's competitive position within its markets by diverting resources away from introducing new products and delivering exemplary service to its customers.

WOW is a small competitive cable operator introducing "new multichannel video programming [and] other service" into a hitherto non-competitive market dominated by entrenched incumbent operators. As set forth in this petition, a waiver of the Integration Ban for the set-top boxes used by WOW is appropriate for the reasons that it: (i) will serve the "public interest" by ensuring the continued viability of a facilities based competitive cable operator competing directly in its markets with Comcast and Time Warner; and (ii) is "necessary to assist" WOW in the deployment of new and improved services to its customers in order to maintain competitive parity with Comcast and Time Warner. These same factors were cited by the Commission in previously exempting DBS providers from the requirements of Section 76.1204, and by Verizon, who is currently seeking a waiver on substantially the same grounds as WOW. As a wireline cable competitor, WOW is an even more recent entrant to the competitive MVPD marketplace than DBS providers, and one on whom the impact of incumbent cable competition is far more pronounced than with DBS. And WOW has only a minute fraction of the resources that Verizon can deploy in competing with Comcast and Time Warner.

Grant of the requested waiver is essential to the existence and growth of facilities-based MVPD competition and to further the deployment of nascent MVPD offerings from new competitors.

INTRODUCTION

Terrestrial-based competitive operators like WOW face challenges far different than the vast majority of incumbent cable operators in the country, challenges that have been well documented by the Commission.[7] As a competitive provider of cable services competing head to head in its markets with the nation's two largest cable operators, Comcast and Time Warner[8], WOW cannot simply pass through to its customers increased capital and operational costs such as those that will be occasioned by application of the Commission's *2005 Integration Ban Order* in the absence of a waiver. The initial capital cost to WOW of compliance with the Commission's *2005 Integration Ban Order* will exceed $20,000,000, not to mention the delay in (and attendant lost revenue from) deploying digital simulcast and other consumer services that are essential to our continued competitive viability.[9] Recoupment of these huge costs will be considerably constrained by the marketplace presence (and dominance) of WOW's

[7] See, e.g., *Twelfth Annual Report*, ¶¶ 87, 90, 91 ("BSPs continue to face considerable challenges" and "financial difficulties", including "difficulties competing [with incumbent operators], such as access to programming and Multiple Dwelling Units (MDUs), and franchise requirements imposed by localities.") See also, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, ¶¶ 203-209 (Rel. January 14, 2002)("*Eighth Annual Competition Report*")("The allegations made in the comments of Scottsboro and Knology highlight the difficulties of new entrants that, for whatever reason, are capable of competing only within a confined geographic region. *The vast resources of a large MSO may simply prove too much if brought to bear in a targeted fashion against a single system entrant. Moreover, we are concerned about the signal such targeting may send others who would compete in the MVPD market, and particularly to the financial markets to which a new entrant may well be dependent for resources*." (Emphasis added.))

[8] In its annual competition reports, the Commission separately identifies "Broadband Service Providers" or "BSPs", most of which are "BSP Overbuilders" (like WOW) that have "overbuilt" a second cable network where one already exists. *Twelfth Annual Report,* ¶¶87, 89.

[9] In the absence of a waiver, the cost of each set top box will increase by at least $100.

terrestrial based competitors and the fact that its satellite-based competitors have been exempted by the Commission from the Integration Ban.

Furthermore, the absence of a waiver will serve to frustrate not only WOW's strategic goals as a competitive cable provider, but also the longstanding goals of Congress and the Commission to advance competition, lower cable prices and further the deployment of digital services. Specifically, denial of this waiver will result in:

- significant price increases for WOW subscribers receiving basic digital services including important features like parental controls, interactive channel guides and video-on-demand ("VOD") programming ; and
- diversion of resources away from WOW's deliberate, market-driven, transition to digital simulcast and fully digital services intended to free up capacity for additional high definition ("HD"), VOD, and other digital programming.

I. THE SIGNIFICANT PUBLIC INTEREST BENEFIT OF PRESERVING AND ADVANCING COMPETITION IN THE MVPD MARKETPLACE IS SUFFICIENT REASON TO GRANT WAIVER TO WOW

Congress intended the 1996 Act to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition"[10] and to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."[11]

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[10] Joint Explanatory Statement of the Committee of Conference, House of Representatives, 104th Congress, 2nd Session, Report 104-458 (January 31, 1996).

[11] 47 U.S.C. § 521(6). The Commission described its focus on creating a pro-competitive framework for telecommunications services in this way: "Section 706 states, among other things, that "the Commission… shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans… by utilizing… price cap regulation, regulatory

Chairman Martin recently emphasized that:

> "[T]he Commission has tried to make decisions based on a fundamental belief that a robust, competitive marketplace, not regulation, is ultimately the greatest protector of the public interest. Competition is the best method of delivering the benefits of choice, innovation, and affordability to American consumers. Competition drives prices down and spurs providers to improve service and create new products. Competition and choice in the video services market will benefit the consumer by resulting in lower prices, higher quality of services, and generally enhancing the consumers' experience by giving them greater control over the purchased video programming. We need to continue our efforts to create a regulatory environment that encourages entry into this market and more choice for consumers."[12]

In its *Petition for Waiver*, Verizon echoes the Chairman's emphasis on the importance of competition and clearly shows why a waiver of the integration ban for new entrants is necessary to achieving his goal when it stated that "both Congress and the FCC have made clear that the rules designed to implement Section 629 of the 1996 Telecommunications Act … must not be permitted to trump the larger policy imperative of promoting competition and innovation in the provision of video services…. Thus, both the statutory and regulatory scheme make plain that the set-top box rules must not become the tail that wags the dog of competition; for without competition in the market

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forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." In order to meet this requirement, the Commission has implemented a wide range of actions aimed at encouraging the growth and development of the advanced services market. More recently, we have turned our focus to establishing the appropriate comprehensive regulatory framework that will promote investment in infrastructure and increase access to advanced telecommunications capability for all Americans. In keeping with our belief that robust competition, minimal regulation, and regulatory certainty create the best environment for increased availability for advanced telecommunications capability, we have taken actions to advance these goals." *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146 (February 6, 2002)("*Advanced Services Report*"), at ¶135.

[12] Written Statement of the Honorable Kevin J. Martin, Chairman, Federal Communications Commission, Before the Senate Committee on Commerce, Science and Transportation, U.S. Senate (February 1, 2007).

for video services themselves, the availability of set-top boxes at retail would mean little to consumers."[13]

Recognizing that the Commission is authorized to grant waivers for any portion of its rules if the public interest would be served[14] and, in particular, to provide a waiver of its rules in order to preserve and foster competition[15], WOW's Request for Waiver is warranted for the following reasons:

A. **WOW Epitomizes the Nascent Competitive Cable Services Promoted by the Telecommunications Act**

In the late 1990s and early 2000s, start up companies like WOW (and some established telecommunications companies like Ameritech) determined to spend enormous capital resources to build from scratch cable systems that would compete head to head with large, incumbent cable providers who had the luxury of building their networks, deploying their services, and obtaining large (on average 60%) customer bases in a monopoly environment. Over the ensuing several years, this nascent competitive MVPD industry has demonstrated that the introduction of direct competition for the same customers dramatically changes the economic models and marketplace dynamics associated with MVPD services by increasing service levels and decreasing prices. As Congress and the FCC have long foreseen (though have been frustrated in achieving), where competition exists, there is a fundamentally different market dynamic than that enjoyed by monopoly providers.

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[13] *Verizon Petition for Waiver of Set-top Box Integration Ban dated July 10, 2006* at p. 2.

[14] 47 C.F.R. §§1.3, 76.7. *See also, Media Bureau Waiver Orders.*

[15] The Media Bureau has specifically found that preservation of viable MVPD competition is an appropriate basis for waiver of the Integration Ban. *See, BellSouth Waiver Order,* ¶8.

Indeed, WOW is exactly the kind of company that Congress and the Commission envisioned would emerge as a result of the 1996 Act. Nevertheless, the benefit to consumers from a competitive market exacts a material cost on competitive providers such as WOW due to a combination of high entry costs, considerable pricing constraints (albeit, to the benefit of consumers) and less purchasing power with respect to equipment and programming, without their possessing the economic resources of most incumbent operators such as Comcast and Time Warner to compensate for those smaller margins.

In this respect, waiver of the Integration Ban for WOW is particularly warranted and in the public interest given the Commission's statements that (a) "Congress intended 'that the Commission avoid actions which could have the effect of freezing or chilling the development of new technologies and services'"[16] and (b) waivers of regulations are to be granted when doing so "'is necessary to assist the development or introduction of a new or improved' service, *such as, for example, a nascent MVPD offering from a new competitor*."[17] As described in this waiver request, WOW clearly comes within the purview of a "new competitor" providing "a nascent MVPD offering" (not to mention the fact that WOW constitutes a small competitive provider that would incur substantial "economic hardship" as contemplated by the Commission in its *BellSouth Waiver Order*[18] as a result of the Integration Ban).

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[16] S. REP. 104-230, at 181 (1996) (Conf. Rep.).

[17] *See First Report and Order*, 13 FCC Rcd at 14801, ¶ 65 (declining to apply the Integration Ban to DBS providers and noting that "in many instances, the Commission refrains from imposing regulations on new entrants") (citation omitted) (emphasis added).

[18] The Media Bureau, citing *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 97-80, PP Docket No. 00-67 (Rel. October 3, 2003), has recognized that there may be a negative cost impact upon some small systems as a result of compliance with the obligations, and, accordingly,

B. The Presence of a Viable Facilities Based Cable Competitor in the MVPD Marketplace Brings Undeniable Benefits to Consumers

The Commission recognizes that direct facilities-based cable competition produces the greatest benefits to consumers, noting in its recent competition assessment that "[c]able prices decreased substantially *when a second wire line cable operator enters the market*," whereas the presence of DBS competition does not appear to constrain cable prices.[19] The Commission further observed that "prices were 20.6% higher in non-competitive communities compared to prices in communities with the second cable operator; this figure was notably higher than the differential presented in other competitive scenarios."[20] The following table illustrates the significant rate-related benefits stemming from the presence of a wireline competitor versus that of a DBS provider.[21]

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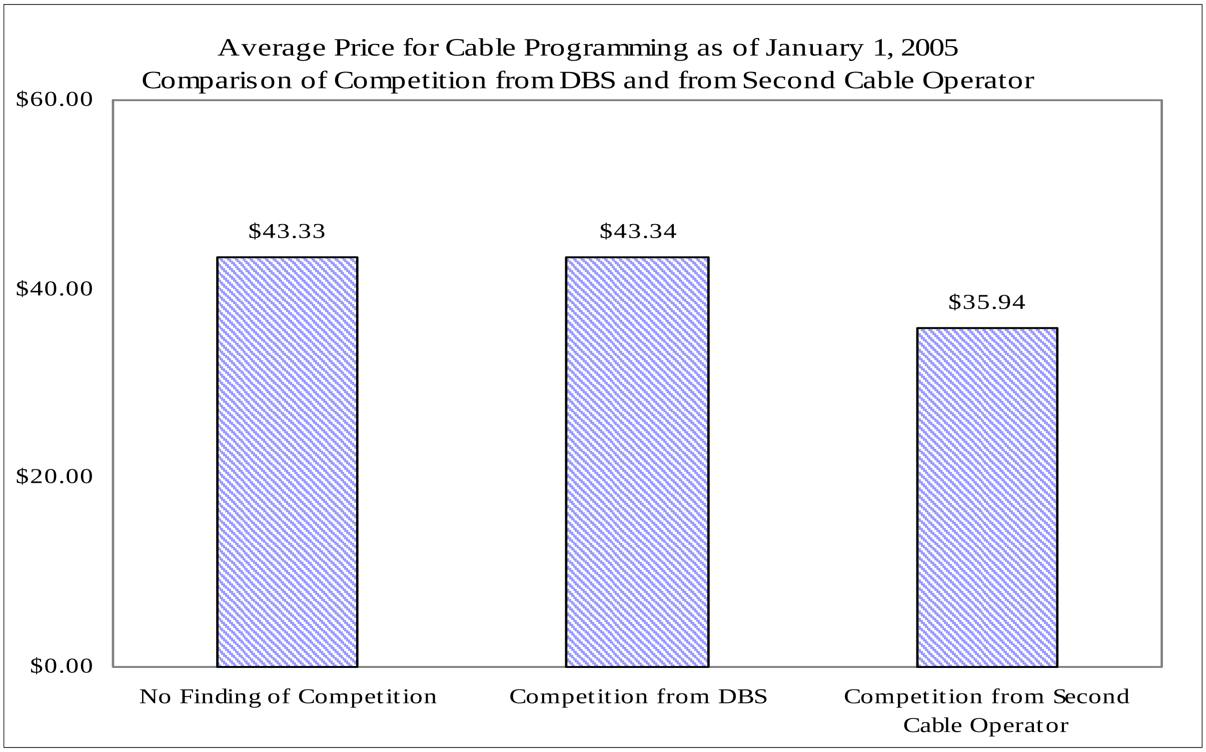
determined that "[t]o the extent that small cable systems would experience economic hardship as a result of these obligations, we will consider waiver requests on a case-by-case basis." *In the Matter of BellSouth Interactive Media Services, LLC and BellSouth Entertainment, LLC, Petition for Permanent Relief,* Memorandum Opinion and Order, CSR-6355-Z (Rel. August 18, 2004), at ¶ 5 ("*BellSouth Waiver Order*").

[19] *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on the Average Rates for Basic Services, Cable Programming Service, and Equipment*, MM Docket No. 92-666 (Released December 27, 2006)("*Cable Prices Report*"), ¶ 14 (emphasis added).

[20] The Commission also referred to a 2004 study where the "GAO found that communities with overbuild competition experience lower rates (an average of 23 percent lower for basic cable) and higher quality service." GAO also found that BSPs were facing difficulties competing, such as access to programming and Multiple Dwelling Units (MDUs), and franchise requirements imposed by localities. *Cable Prices Report*, ¶ 91.

[21] *Cable Prices Report,* ¶14.



Cable operators that do not have direct facilities based cable competition simply charge more for their services[22] than they do when a terrestrial facilities based competitor is present, whereas there is no discernible reduction in rates resulting from the presence of satellite competitors. The Commission has found that "available evidence indicates that when an incumbent operator faces 'effective competition,' as defined by the Communications Act, it responds in a variety of ways, including lowering prices or adding channels without changing the monthly rate, as well as improving customer

[22] A study conducted by the Detroit News in 2002 showed that Comcast's rates are, on average, roughly 8% higher in areas in which it has no wireline competition, versus those markets where it competes with WOW. See, "Comparing cable rates: Single Choice Communities," and "Comparing cable rates," Detroit News, June 28, 2002. In many communities the difference was dramatic. For example, the Detroit News reported that Comcast offered an expanded basic rate of $29.95 in Lincoln Park (where it competes with WOW) and $40.95 in Rose Township (where it has no terrestrial based competition). This pricing differential continues today and is illustrated by the fact that Comcast charges $43.49 for its standard basic cable service in Lincoln Park, Michigan, a community also served by WOW, while in the immediately adjacent community of Ecorse, *not* served by WOW, Comcast charges $48.99 for the same service.

service and adding new services such as interactive programming."[23] In summary, terrestrial competition in the cable industry unquestionably furthers the public interest through more and better services at a lower pricing while the presence of DBS competition has "no statistically significant effect on the demand for cable services or on cable rates."[24]

C. Economic Costs of Operation are Far Greater for Competitive Cable Operators than for Incumbent Operators

The average video penetration rate for a cable provider is roughly 60%.[25] In other words, on average, 60% of the homes passed by a typical cable system will subscribe to video cable service. By contrast, WOW's average penetration is 25% -- less than half that of a typical incumbent cable system. At the same time, WOW's rates are lower than rates charged by monopoly systems,[26] even though WOW's relative capital and operating cost structure, as measured by almost any metric (e.g., costs of capital, programming and equipment), is much higher. As such, WOW's operational results as measured by margins, IRR, ARPU and other financial metrics are considerably lower than that experienced by incumbent providers who still enjoy monopoly conditions throughout most of their cable markets. These financial constraints mean that the Commission's

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[23] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, MB Docket No. 02-145 (Rel. December 31, 2002)("*Ninth Annual Competition Report*"), ¶9.

[24] *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, FCC 02-107 (Rel. April 4, 2002) at ¶ 10.

[25] *Twelfth Annual Report*, ¶37.

[26] See, footnotes 19 and 22.

Integration Ban will impose a far greater economic and customer service burden on WOW than on incumbent providers such as Comcast and Time Warner.

As noted above, the Commission decided to waive the Integration Ban for satellite based DBS providers on the ground that they were new entrants. Those providers are no longer new entrants, and if the Integration Ban is applied to much smaller, and newer, entrants, it will likely prompt price sensitive cable customers to buy digital service from DBS competitors.[27] The competitive consequences associated with this disparity in treatment would be greater for an overbuilder such as WOW than some of the small incumbent cable operators who have also raised this concern,[28] since, unlike smaller incumbents, WOW not only competes with DBS providers but also the "giants" of the cable industry — Comcast and Time Warner. In addition, incumbent wireline competitors often "target" overbuilders like WOW, creating additional and often severe competitive challenges.[29] The economic facts of lower penetration, lower prices and

[27] See, *In the Matter of BendBroadband's Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*, Request for Waiver (filed October 4, 2006)("*Bend Request for Waiver*"), p. 15.

[28] See, e.g., *Twelfth Annual Report* at ¶178 (ACA and OPASTCO claim that when dealing with small- and medium-size cable companies, networks and major affiliate groups are demanding monthly fees of $0.50 to $1.00 per subscriber or more for each network-affiliated station, adding $2.50-$5.00 or more per month to basic cable rates in smaller markets. ACA contends that this could cost smaller cable companies and their customers an additional $1 billion over the next three years.); see also *In the Matter of National Cable & Telecommunications Association's Request for Waiver of 47 CFR § 76.1204(a)(1)*, CSR 7056-Z, CS Docket No. 97-80, American Cable Association Comments (filed November 30, 2006), p. 5.

[29] Large, incumbent MSOs, have engaged in a variety of tactics to eliminate competitors such as WOW. In its *Eighth Annual Competition Report*, the Commission describes MSO "competitive responses" to direct cable competition. For example, the Commission describes the "special" rates offered by Charter in Scottsboro, Alabama, where the city maintains a municipally owned system. Scottsboro contends that Charter's rates "are available only to Scottsboro's customers and are not available to all potential subscribers in Scottsboro." (¶203). Charter also offers a $200 "bounty" to switch from Scottsboro to Charter. (¶204). Knology describes similar behavior by Charter against its systems in West Point, Georgia and Montgomery, Alabama. There as well Charter engaged in severe rate cutting and the payment of bounties for customers switching from Knology to Charter. Knology further alleges "Charter is taking a significant loss on each new customer it takes from its competitors, but it will be able to recoup its losses once it has driven its competitors out of the market." (¶206). This Commission summarized: "The vast resources of a large MSO may simply prove too much if brought to bear in a targeted fashion against a

enhanced competition make it much more difficult for WOW to "absorb" the significant costs associated with the Integration Ban and still effectively compete against large incumbent operators like Comcast and Time Warner that have tremendous operating cost advantages. Ultimately, the Commission should take special care to ensure that application of the Integration Ban does not have the unintended effect of threatening the viability of facilities-based cable competition.

D. In Order to Develop its Digital Simulcast Solution, WOW Must Upgrade its Systems, Accelerate Replacement of its Set Top Boxes, and Pay Significantly More for Both New and Replacement Boxes; This "Perfect Storm" Will Stymie WOW's Digital Transition and Diminish WOW's Ability to Compete in the Marketplace

Since the inception of WOW's acquisition in December 2001 of the "overbuilt" cable television systems formerly owned by Ameritech New Media, Inc., WOW has provided a robust analog product utilizing advanced analog set top converters that are fully two-way interactive. Unlike most small cable operators[30], WOW continues to purchase and deploy these advanced analog converters for the reason that many of WOW's customers prefer a robust, lower-cost analog video product that requires a single box to deliver service to every television in the house.

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single system entrant. Moreover, we are concerned about the signal such targeting may send others who would compete in the MVPD market, and particularly to the financial markets to which a new entrant may well be dependent for resources." (¶209).

And, in its *AT&T/Comcast Merger Approval Order* (¶¶ 33-34), the Commission found that that 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 further explained that the practices of established incumbent operators with dominant market power "may be used to eliminate nascent competitors and stifle competitive entry."

[30] See *Bend Request for Waiver*, p. 8, ftn 11 ("most cable subscribers do not have a set-top box of any kind."). In contrast, WOW has deployed more than 392,000 set-top boxes for its 394,000 customer base.

Nevertheless, to stay competitive with large MSOs and satellite operators that continue to expand their digital service offerings, WOW must now migrate to a digital simulcast solution. Digital simulcast will not only improve the quality of our service, but will free up bandwidth that will allow us to provide additional programming, and services such as HDTV, VOD, Caller ID to the TV, and offer interactive channel guides, parental controls and other advanced services not available in analog format.[31] Consequently, WOW has deliberately chosen to phase out its analog boxes and replace them with a lower-cost integrated converter box with analog and digital functionality. Bresnan Communications states it clearly in its *Request for Waiver*: "The availability of low-cost boxes is the *minimum* necessary ingredient for a transition to digital simulcast."[32]

The capital cost for WOW to implement digital simulcast involves not only the capital costs of actually providing the digital simulcast service itself (which is estimated at $10,000,000), but also deploying well over 200,000 digital set top boxes to replace the analog set top boxes currently in service (along with the additional digital boxes required for homes with more than one television[33]). The Integration Ban will add at least $100 per

[31] See, *2005 Integration Ban Order*, ¶37.

[32] *Bresnan Request for Waiver*, p. 7 (emphasis added). Without the waiver, we anticipate our cost to provide digital service will increase by approximately $100/box just to cover the increased cost of the set-top box. The increased cost for an entry-level un-integrated digital box will further dissuade our customers from making the switch to digital. See, Armstrong Utilities, Inc, September 11, 2006 letter (CS Docket No. 97-80; CSR-7012-Z). See also, *Comcast Application for Review*, p. 16 ("The record makes plain that approval of the waiver will, among other things, accelerate consumer adoption of digital services" [and facilitate the] "transition to digital."). It should also be noted that the hardship occasioned by this diversion of limited resources will be especially pronounced for a number of small cable operators. See, e.g., *Bresnan Request for Waiver*, pp. 2-9. See also, *BellSouth Waiver Order*, ¶5.

[33] If we eliminated our analog product all together, a customer that now has a single analog converter would have to replace that single analog converter with a digital converter box for *every single television set within the customer's home*. Suddenlink reports that the average household has 2.5 television sets. *Suddenlink Request for Waiver*, p. 10. The replacement of every one of WOW's 200,000+ analog converters will result in the deployment of many more digital converters.

box for a comparable functioning replacement set-top box with removable security. As such, the increased costs associated with purchasing these removable security set-top boxes will change the fundamental economics of WOW's digital conversion plans.[34]

In sum, the Integration Ban not only significantly increases the costs that WOW will pay for *new* boxes placed into service after July 1, 2007, but also will dramatically increase the costs of *replacing* its 200,000+ analog-only boxes, which will directly affect WOW's ability to implement a digital simulcast solution. The Integration Ban has the ironic effect of forcing WOW to (i) divert limited resources away from the development of a digital simulcast solution in competitive markets dominated by the largest cable operators in the country and (ii) continue to deploy analog boxes for a period beyond which competitive forces would otherwise require a digital change out—and that, in turn, substantially limits our ability to provide vigorous competition in our markets.

E. Grant of Waiver to WOW Will not Adversely Impact the Commercial Availability of Navigation Devices

Many operators requesting waiver in this Docket have thoroughly analyzed the inconsequential impact that a waiver of the Integration Ban granted to a small operator would have on the commercial availability of navigation devices. WOW's continued

[34] Like much of the cable industry, we also expected that downloadable conditional access would become available before July 1, 2007, negating our need to take the costly interim step from analog converters to an expensive converter with removable security. In this connection, WOW supports the waiver advocated by NCTA and others until the availability of downloadable security. *In the Matter of National Cable & Telecommunications Association's Request for Waiver of 47 CFR § 76.1204(a)(1)* (filed August 16, 2006). Like the NCTA, the Commission and other operators that have sought waiver in this proceeding, we believe that a conditional access separation solution should "place as little cost burden resulting from the ban on the public." This objective simply will not be accomplished if the ban goes into effect before the availability of downloadable security due to the "cost and service disadvantages" of implementing the ban "using the hardware conditional access technology presently available." *2005 Integration Banl Order,*¶¶*27, 29.* See also, *In the Matter of Cequel Communications, LLC d/b/a Suddenlink Communications Request for Waiver of 47 C.F.R. § 76.1204(a)(1)*(filed December 5, 2006)("*Suddenlink Request for Waiver*"), p. 15.

deployment of integrated set-top boxes will have no adverse impact for a number of reasons:

1. WOW is a small operator that will deploy roughly 75,000 new set-top boxes this year. Like other small operators, WOW's use or non-use of CableCARDs in the new devices that it will lease to its customers will have absolutely no impact on the market for set-top boxes.[35] According to BendBroadband, "the cable industry as a whole places into service roughly *one million new devices every 45 days*."[36] MVPD consumers are served primarily by huge companies that dominate the marketplace. WOW's two principal competitors, Comcast and Time Warner, provide service to more than 50% of all cable customers in the entire country and the *five* largest cable MSOs serve at least *73%* of all such cable subscribers. When we add satellite carriers, the *ten* largest MVPDs serve *88%* of the overall MVPD market. By comparison, the collective market share of all BSPs in the country is *1.49%*.[37] And WOW's share of the MVPD market (as of June 2005) was about one third of one percent. The bottom line is this: the success of the CE industry and the ultimate commercial availability of navigation devices do not depend on WOW, or any other small operator with but a small fraction of the overall MVPD market. Moreover, with record revenues, the CE industry "does not need to have its $2000+ HDTVs subsidized by a small cable operator or individual consumers who use low-cost set-top boxes."[38]

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[35] See, e.g., *Bresnan Request for Waiver*, pp. 10-11 ("[T]he relative trickle of CableCARDs that would be used by small operators such as Bresnan would not have any material effect on nationwide volumes or pricing.")

[36] *Bend Request for Waiver*, pp. 12-13 (emphasis added).

[37] *Twelfth Annual Report*, ¶¶38, 152, and Appendix B.

[38] *Bend Request for Waiver*, p. 13.

2. Operators like WOW will continue to support CableCARDs, and ensure that its network supports CableCARD-enabled devices. Those obligations will be unaffected by the grant of waiver. And in all events, WOW still has strong economic incentives to ensure that consumers who have purchased cable ready equipment are able to receive services.[39]

3. Denial of the waiver request would "destroy, not enhance, the market for low-cost set-top boxes,"[40] as there is no concrete evidence that CE manufacturers have a true interest in building low-cost devices to be sold at retail. Rather, the CE industry has focused on "building high-end products for retail, such as HDTVs and HD/DVRs…"[41]

II. WOW IS ENTITLED TO WAIVER UNDER SECTION 629(C) BECAUSE, AS PART OF THE NASCENT OVERBUILD INDUSTRY, WAIVER IS NECESSARY TO ASSIST WOW IN THE DEVELOPMENT OF NEW OR IMPROVED SERVICE

For reasons similar to those we discuss in Section I, grant of waiver of the Integration Ban to WOW is also warranted under the Section 629(c) waiver standard. Section 629(c) requires that the Commission waive the Integration Ban for a "limited time upon an appropriate showing . . . that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products."[42]

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[39] See, *NCTA Request for Waiver*, pp. 33-37.

[40] *Suddenlink Request for Waiver*, p. 9 (citing comments of Pace in support of Charter Waiver).

[41] *Comcast Application for Review*, p. 16.

[42] 47 U.S.C. § 549(c).

A. Waiver Under the 629(c) Standard is Especially Appropriate for New Competitive Market Entrants Like WOW

The Media Bureau in its *Bend Waiver Order* recognized that:

> "Congress intended "that the Commission avoid actions which could have the effect of freezing or chilling the development of new technologies and services."[43] Accordingly, waivers of those regulations are granted when doing so "*is necessary to assist the development or introduction of a new or improved" service, such as, for example, a nascent MVPD offering from a new competitor*.[44]"

WOW is, as we discuss above, part of the "overbuild" industry — a still developing group of MVPDs that provide facilities based competition in areas already served by an incumbent cable operator. The Commission has always recognized the "considerable challenges" faced by overbuilders like WOW and the "limited" availability of wireline competition.[45] It is a discouraging fact that "*[r]elatively few consumers…have a second wireline alternative, such as an overbuild cable system, as indicated by the small number of subscribers to BSPs and the limited entry by LEC thus far*."[46] WOW is among the few overbuilders left in the entire country. Over the past several years, many overbuilders went bankrupt, sold their systems or simply abandoned their construction plans. Multichannel News summed up the state of the overbuild industry this way:

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[43] S. REP. 104-230, at 181 (1996) (Conf. Rep.).

[44] *See*, *First Report and Order*, 13 FCC Rcd at 14801, ¶ 65 (declining to apply the Integration Ban to DBS providers and noting that "in many instances, the Commission refrains from imposing regulations on new entrants") (emphasis added).

[45] *Twelfth Annual Report*, ¶144.

[46] *Twelfth Annual Report*, ¶144 (emphasis added). The Commission reports that "BSPs, which typically operate overbuild systems, reported no appreciable change in subscribership since last year, maintaining total subscribership of approximately 1.4 million", or 1.49% of the total MVPD market. See, *Twelfth Annual Report*, ¶9 and Appendix B.

> "Companies like WINFirst, Digital Access and WideOpenWest were attracting billions of dollars in investment in early 2000 but fell on hard times in 2001 when the bottom fell out and many overbuilders significantly scaled back ambitious expansion plans. By 2004, aside from RCN, only WideOpenWest remained."[47]

The new market entrant rationale referred to by the Commission in the *First Report and Order*[48] and again by the Media Bureau in the *Bend Waiver Order* that supported the Integration Ban exemption for DBS applies equally to WOW. As noted by Verizon in its *Petition for Waiver,* "In creating the exemption for DBS, the Commission was particularly concerned with the possibility that compliance would hamper DBS providers' ability to compete in the marketplace…. The Commission also recognized that as relatively new entrants with a smaller market share in the MVPD service marketplace than incumbent cable operators, DBS providers were particularly harmed by regulations that forced them to alter their business model."[49] This rationale applies even more so to WOW as not only did it enter the marketplace after DBS but like other competitive wireline providers, WOW is a new startup competitive provider with only a fraction of the resources of Verizon.[50]

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[47] See, e.g., *Multichannel News*, "Debt-Light, RCN Explores Sellout Options" (September 18, 2006).

[48] *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14806 (1998) ("*First Report and Order*").

[49] *In the Matter of Verizon's Petition for Waiver of the Set-Top Box Integration Ban, 47 C.F.R. § 76.1204(a)(1)*, CSR-7042-Z, CS Docket No. 97-80, pp. 23-25 (filed July 10, 2006)("*Verizon Petition for Waiver*").

[50] In response to this aspect of Verizon's *Petition for Waiver*, the NCTA complains that there is no "new entrant" theory that supports waiver, because Section 629(c) says that any waiver "shall be effective for all service providers and products in that category and for all providers of services and products." Verizon appropriately and logically responds that a waiver must extend to all providers and products in the same "category." The reading suggested by NCTA makes no sense. WOW agrees that the only plausible reading of Section 629(c) is that the Commission can grant waiver to a specific category of provider or product, which waiver would then extend to all operators and products that fall within the category. *In the Matter of Verizon's Petition for Waiver of the Set-Top Box Integration Ban, 47 C.F.R. § 76.1204(a)(1)*, Reply Comments of Verizon, CSR-7042-Z, CS Docket No. 97-80, pp. 12-14 (filed September 28, 2006). But even if NCTA's logic has merit in the specific context of Section 629(c), the general waiver standards

WOW's presence in the market since late 2001 has changed the competitive landscape in the areas in which it operates by requiring competing MVPD providers to invest in upgrades, improve their service and drop their prices — all of significant benefit to cable customers, but at a material cost to a small competitive provider such as WOW which goes up against a dominant and well-established incumbent operator. While the economic benefits to customers are well documented, it bears emphasis that the "improved service" factor cited by the Media Bureau is borne out by the fact that WOW has received the highest numerical score among cable or satellite providers in the North Central U.S. in the proprietary J.D. Power and Associates 2006 Residential Cable/Satellite TV Customer Satisfaction Study℠ (this is the second year in a row that WOW has received an award for Cable/Satellite TV Customer Satisfaction). Sustaining these service levels, however, is at serious risk as the Integration Ban will compel diversion of substantial resources from delivering exemplary customer service. Such a diversion would be contrary to the Media Bureau's finding that waiver is in fact "necessary to assist the development" of an improved service where "grant of the waiver will allow [the operator] to continue to deliver digital services to its subscribers *and remain a viable competitor in the MVPD marketplace.*"[51]

B. Waiver is "Necessary to Assist" WOW in the Development of New or Improved Service to its Customers; WOW's Digital Service has not yet Achieved Success in the Marketplace by Comparison to Incumbent Cable Operators

For the reasons described in detail in Section I of this Request for Waiver, the waiver requested by WOW is in fact "necessary to assist" WOW in the "development of

of the Commission's rules have no such constraints, as is demonstrated by the *Media Bureau Waiver Orders*.

[51] *BellSouth Waiver Order*, ¶ 8.

new or improved service" to its customers.[52] Although WOW has already launched digital service in its markets, it has not yet achieved success in deploying that service to subscribers remotely close to that of its competition. In that respect, WOW's circumstances are substantially similar to those of Verizon which asserted in its waiver petition that "waiver of the integrated set-top box security ban in Section 76.1204(a)(1) is *precisely* the circumstance contemplated in Section 629(c) and is in full accord with the goals underlying the waiver provision, *viz.* to ensure that the set-top box rules not be enforced at the expense of competition and innovation."[53] Like Verizon, WOW is an emerging MVPD service provider where relief from the Commission's rules will promote continued new services allowing WOW to remain a competitive force in its markets, "all to the public good, that Congress envisioned the waiver provision to apply".[54]

Due to financial and competitive necessity, WOW has approached its transition to digital service in a very deliberate, cost conscious and customer-demand oriented fashion. We currently have an enhanced analog service offering that has enabled us to keep our prices to consumers down yet has provided them with enhanced two-way service offerings that have served them well. WOW's robust analog service offering is supported by fully two-way functioning analog set top boxes that have been deployed to more than

[52] The Media Bureau concluded in its *Waiver Orders* that waiver is not appropriate where an operator has already "launched digital cable service" and has "already achieved success in the marketplace" for some of the advanced services. While Congress did indeed use the word "necessary" to describe the waiver standard in Section 629(c), it also used the phrase "to assist the development" of a new or improved service in the same sentence. We think Congress clearly explained its intent when it said in the Congressional record that the Commission should avoid actions "which *could have* the effect of freezing or *chilling the development of new technologies and services*." This legislative history and past Commission precedent certainly suggest that the Media Bureau's interpretation is far too narrow.

[53] *Verizon Petition for Waiver* at 11.

[54] Id.

200,000 subscribers (out of our 394,000 subscriber base) — but these are boxes that we now must retire and replace before we can implement digital simulcast.

We have a long way to go in that transition: WOW's overall video penetration in the markets it serves is about 25%, and of this 25%, only 31% of WOW's customers subscribe to WOW's digital service. WOW's December 31, 2006 digital penetration in the marketplace is thus between *7% and 8%, **at least four times lower*** than the typical incumbent cable system operator such as Comcast and Time Warner that has enjoyed a monopolistic market for decades.[55] Although WOW has made some progress in moving its customers to digital[56], WOW has certainly not achieved the level of success in the marketplace that the Bureau found important in its *Media Bureau Waiver Orders*.[57]

A waiver is necessary for WOW to develop and implement its digital simulcast solution. Digital simulcast will: (i) free up bandwidth, allowing WOW to add programming and other advanced services that are competitive in the marketplace; (ii) improve the quality and reliability of WOW's service; and (iii) accelerate WOW's replacement of analog set-top boxes, all of which are critical for WOW to remain a viable competitor in the MVPD marketplace.

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[55] Using the Commission's June 2005 statistics, if we assume an average market penetration of 60% for a traditional cable operator, and an average digital penetration of 47%, the average traditional cable operator has a digital penetration of over 28%, or about 4 times higher than WOW's 2007 digital penetration, and about 5 times higher than WOW's June 2005 digital penetration. See footnote 57.

[56] In June 2005, WOW's internal digital penetration was 22%. It is now 31%.

[57] In the *Media Bureau Waiver Orders*, the Bureau observed that the operators' respective digital services have achieved success in the marketplace, noting that 45.6% of Comcast's customers are digital subscribers (although, we note that Comcast reports that "more than half" of its customers take digital service. *Comcast Application for Review*, p. 20); BendBroadband's digital has increased 33% in twelve months; and 77% of Cablevision's customer are digital subscribers. The Commission reports that, as of June 2005, the top cable operators' digital subscriber counts equaled 41% to 58% of their total basic cable subscribers, or about 47% on average. *Twelfth Annual Report*, ¶52. In June 2005, WOW's digital penetration was 22%, more than two times lower than the average for the top cable operators. Given WOW's 25% video market penetration, WOW's digital penetration rate in June 2005 was about 5%.

III. CONCLUSION

For the foregoing reasons, WOW respectfully requests that the Commission grant a waiver of the "integration ban" set forth in Section 76.1204(a)(1) of its rules until the development and industry-wide commercial deployment of downloadable conditional access.

Respectfully submitted,

_______/s/___________________________

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General Counsel for WOW! Internet, Cable and Phone

Dated: February 28, 2007

EXHIBIT A:

DECLARATION OF MICHAEL BRODY
CHIEF TECHNICAL OFFICER
WOW! INTERNET, CABLE AND PHONE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
WOW! Internet, Cable and Phone's	)	CSR-________________
Request for Waiver of	)	
47 C.F.R. § 76.1204(a)(1)	)	
	)	

To: Chief, Media Bureau

DECLARATION OF MICHAEL BRODY

1. My name is Michael Brody, I am the Chief Technical Officer, for WOW! Internet, Cable and Phone. By virtue of my position, I am familiar with WOW's equipment acquisition plans with respect to digital set-top boxes.

2. I have read the foregoing Request for Waiver ("Request") and I am familiar with the contents thereof.

3. I declare under penalty of perjury that the facts contained herein and within the foregoing Request are true and correct to the best of my knowledge, information, and belief.

/s/
Michael Brody
Chief Technical Officer
WOW! Internet, Cable and Phone
Executed on: February 28, 2007