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May 10, 2007

**Via Electronic Filing**

**Marlene H. Dortch, Secretary**

Federal Communications Commission

The Portals

445 12<sup>th</sup> Street, S.W.

Washington, DC 20554

**Re: WideOpenWest Finance, LLC; Supplement to Request for Waiver of the Set-Top Box Integration Ban; CSR-7139-Z (CS Docket No. 97-80)**

Dear Ms. Dortch:

As a follow up to our discussion with Michelle Carey on Thursday, April 26, 2007, WideOpenWest Finance, LLC (“WOW”) supplements its Request for Waiver by requesting a waiver from application of 47 C.F.R. §76.1204(a)(1) until February 17, 2009 or, in the alternative, the earlier of February 17, 2009 or the subscription to WOW digital services by not less than 15% of the households passed by WOW.

As described in more detail below, we believe this Request for Waiver is warranted for the following reasons:

- WOW is a terrestrial-based competitive provider with average penetration of less than 25% of homes passed and digital penetration of homes passed of less than 8% as contrasted with MSO incumbents such as Time Warner and Comcast (WOW’s principal competitors in its markets) with average penetration in excess of 60% and digital penetration to market more than four times that of WOW.
- Due to WOW’s low penetration resulting from its recent entrance into the market as a competitive provider, it has not been able to achieve economies of scale and other financial metrics that approach those of established MSOs who have historically enjoyed monopolistic conditions.
- Because of WOW’s status as a new competitive entrant and its correspondingly low penetration, relief in the manner requested is warranted under the “public interest”

standard of 47 C.F.R. §76.7(i) as well as the “good cause ... shown” standard under 47 C.F.R. §1.3 (along with the “necessary to assist” standard of Section 629(c)).

### **JUSTIFICATION FOR RELIEF**

#### **A. Preservation and Promotion of Competition.**

The requested relief is (a) “for a limited time” as required by Section 629(c), (b) tied directly to the Commission’s goal in the *2005 Deferral Order*<sup>1</sup> of promoting digital transition, and (c) focused exclusively on encouragement and preservation of competition which is at the very core of the 1996 Act and the Commission’s overall regulatory objectives in connection with the Set Top Box Integration Ban.<sup>2</sup> As reflected in the *BendBroadband* and *Bell South Waiver*

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<sup>1</sup> 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 Deferral Order”).

<sup>2</sup> Most recently Chairman Martin emphasized this policy objective in remarks before the Senate Committee on Commerce, Science and Transportation: “[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.” 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).

See also, Joint Explanatory Statement of the Committee of Conference, House of Representatives, 104th Congress, 2nd Session, Report 104-458 (January 31, 1996)(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”). Indeed, in promulgating 47 C.F.R. §706, the Commission described the objective of its regulatory goal as “encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing ... price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” 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”), ¶ 135 (emphasis added).

*Orders*, the Commission has repeatedly demonstrated its willingness to “refrain from imposing regulations on new entrants” in order to preserve and promote competition.<sup>3</sup>

## **B. Financial Constraints Imposed on Terrestrial-based Competitive Providers.**

The pressure exerted on its nascent MVPD services due to WOW’s status as a terrestrial-based competitive provider (WOW is a more recent market entrant than DBS which is exempt from the Integration Ban and is the third entrant in all its markets except for Columbus, Ohio where it is the fourth entrant) serves to significantly diminish its operational results as measured by margins, IRR, ARPU and other financial metrics. These constraints mean that the Commission’s Integration Ban will impose a far greater financial burden on WOW than incumbent operators such as Charter who face no terrestrial-based competition throughout most of their cable markets and for whom the Commission provided a waiver based upon “good cause” due to financial considerations.<sup>4</sup> The challenges associated with growing digital penetration and the attendant financial burdens imposed on WOW as a competitive provider will

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3 The Media Bureau in its BendBroadband 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.’ 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.’” In the Matter of Bend Communications, LLC d/b/a BendBroadband, 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-7057-Z, CS Docket No. 97-80 (Rel. January 10, 2007)(“BendBroadband Waiver Order”), ¶ 2.

Further, the Media Bureau in its Bell South Waiver Order found that a waiver designed to preserve competition is in the public interest: “BellSouth has made an appropriate showing under Section 629(c) that waiver is necessary to assist the development or introduction of a new or improved multichannel video programming service: grant of a waiver will allow BellSouth to continue to deliver digital services to its subscribers and remain a viable competitor in the MVPD marketplace. Requiring BellSouth to comply with Section 76.640(b) under these circumstances would disserve the public interest by making it impractical for BellSouth to deliver digital services to its subscribers and potentially eliminating a competitor from the MVPD marketplace.” 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)(“BellSouth Waiver Order”), ¶ 8.

4 In the Matter of Charter Communications, Inc. 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-7049-Z, CS Docket No. 97-80 (Rel. May 4, 2007)(“Charter Waiver Order”). We also request that the Commission in finding that it was “sympathetic to the fact that Charter’s financial difficulties may be due, in part, to its predominantly rural customer base” take note of the fact that WOW’s two largest markets where it competes with Comcast include the most economically disadvantaged area of Chicago as well as southeastern Michigan which carries one of the highest unemployment rates in the nation. While “Charter asserts that ... [its] digital transition costs more per subscriber because of higher distribution costs and a greater ratio of headends per subscriber”, due to WOW’s competitive status WOW neither possesses Charter’s marketplace dominance nor Charter’s ability to recoup such costs.

only be exacerbated by the entrance into the marketplace of AT&T and Verizon, both of whom have vastly greater resources and brand awareness and a customer base that dwarfs WOW.

**C. Regulatory Relief in the Absence of Sufficient Penetration.**

In other contexts, Congress and the Commission have established empirical penetration standards to determine when the marketplace should govern in lieu of Commission intervention.<sup>5</sup> The single most important economic difference between competitive providers such as WOW and established incumbents is penetration. Comcast and Time Warner have overall average penetration rates of 60% or more versus an average of less than 25% for WOW. The difference with respect to digital penetration is even more dramatic, as Comcast and Time Warner's digital penetration rate of homes passed is at least four times that of WOW (which on average is less than 8% and at 15% would still be less than half).<sup>6</sup>

**CONCLUSION**

The history of WOW reflects the ongoing story of Congressional and Commission policy aimed at establishing a robust competitive marketplace for MVPD providers that, in turn, will redound to the benefit of consumers. As is evident from the several reports of the Commission assessing the state of competition<sup>7</sup>, there remains a great deal to be done at a regulatory level and within the industry itself before this goal is achieved.

Accordingly, WOW respectfully submits that as a terrestrial-based competitive provider under the conditions described its Request for Waiver from application of 47 C.F.R. §76.1204(a)(1) until February 17, 2009 or, in the alternative, the earlier of February 17, 2009 or the subscription to WOW digital services by not less than 15% of the households passed by

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5 See § 76.905, Standards for Identification of Cable Systems Subject to Effective Competition.

6 See also 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") (The Commission reports that, as of June 2005, digital subscriber counts for cable operators averaged 47% whereas WOW's digital penetration among subscribers was 22%).

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.))

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WOW is warranted under the “public interest” standard of 47 C.F.R. §76.7(i) as well as the “good cause ... shown” standard under 47 C.F.R. §1.3, along with the “necessary to assist” standard of Section 629(c)). In that regard, it should also be emphasized that the Commission has the authority to grant specific waivers for a *specific category* of service provider—*terrestrial-based competitive MVPD providers*—pursuant to Section 629(c).<sup>8</sup>

**Very truly yours,**

**WOW! Internet, Cable and Phone**

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**D. Craig Martin**

**General Counsel**

cc (via email):  
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<sup>8</sup> “The Commission shall waive a regulation adopted under subsection (a) of this section for a limited time upon an appropriate showing by a provider of multichannel video programming and other services offered over multichannel video programming systems, or an equipment provider, 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. Upon an appropriate showing, the Commission shall grant any such waiver request within 90 days of any application filed under this subsection, and such waiver shall be effective for all service providers and products in that category and for all providers of services and products.” 47 U.S.C. §549(c).