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September 28, 2006

Hon. Kevin J. Martin
Chairman
Federal Communications Commission
445 Twelfth St. S.W.
Washington, D.C. 20554

Dear Chairman Martin:

RE: MB Docket No. 05-311 (Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as Amended by the Cable Television and Consumer Protection and Competition Act of 1992)

We write to urge the FCC to prohibit, or at least refuse to enforce and declare contrary to the public interest, exclusive access agreements ("no-overbuild provisions") between any incumbent provider of multi-channel video services and the owners or agents of multiple dwelling unit buildings and developments ("MDUs"). These agreements are an unfortunate relic of the early days of cable television, when the owners of large buildings, eager for their tenants to enjoy multi-channel programming, readily agreed to contract conditions that foreclosed competitive entry.

Perhaps these agreements had public interest value a generation ago, when cable was a new business competing with the better-established broadcasting industry. Today, however, no-overbuild provisions operate as a barrier to entry for small and minority programmers, to the ultimate detriment of consumers. As we stated in the Comments we filed along with 33 other organizations in this proceeding,

> A multiplicity of service providers, each committed to serving subscribers at all socio-economic levels in a local community, holds out the promise of lower prices, better service quality, and more diversity in terms of programming content and programming ownership. Each of these benefits is particularly relevant to the needs of low-income and minority consumers (emphasis supplied).

MMTC Comments in Docket 05-311 (filed February 13, 2006), p. 3.

Video competition is a public good that should be available to all Americans, especially minorities and low income families, because they need "multiple and diverse sources of information that can help deliver them the full benefits of first class citizenship: full employment, a quality education, and the wide range of cultural and informational options that are the earmarks of a modern civilized society." MMTC Reply Comments, Docket 05-311 (filed March 28, 2006), p. 3.

Fewer than 2% of the nation's households have a choice in wireline video providers. See United States General Accountability Office (GAO), Report to the Chairman, Comm. On Commerce, Science, and Transportation, U.S. Senate: Telecommunications Issues Related to Competition and Subscriber Rates in the Cable Television Industry, GAO-04-8, p. 20, October 2003, available at http://frewebgate.access.gpo.gov. Plainly, that is unacceptable.

In determining how best to address this lack of meaningful competition, the Commission should first be guided by its own jurisprudence on the subject of no-overbuild provisions. In Promotion of Competitive Networks in Local Telecommunications Markets (First R&O and Further NPRM), 15 FCC Rcd 22983, 22985 ¶1 (2000), the Commission announced that it will "prohibit carriers from entering into contracts that restrict or effectively restrict owners and managers of commercial MTEs [multiple tenant environments] from permitting access by competing carriers[.]" It is reasonable, then, for the Commission to apply to multi-channel video the policy it already applies to telecommunications services.

The Commission might also look to Section 628 of the Communications Act, which prohibits cable operators from "engag[ing] in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." 47 U.S.C. §548(b). No-overbuild provisions significantly limit consumer choice and are therefore precisely the type of "unfair method[] of competition" that Section 628 seeks to proscribe.

The Commission should also be guided by Section 257 of the Telecommunications Act of 1996, codified at 47 U.S.C. §257 (1996), which requires the Commission to take steps to eliminate market entry barriers to small businesses. No-overbuild provisions are a classic market entry barrier to small and especially minority cable programmers, who must attain national scale in order to survive. To achieve national scale, they must have access to all television viewers. Cable systems compete on programming as well as price and service; thus, minority programmers frequently are able to secure carriage, or more desirable channel assignments, on a competitive cable system. Consequently, the minority television viewers who make up the core audiences for minority channels must have the ability to choose from multiple cable providers if they are to receive the optimal packages of channels that serve their needs.

Minority television viewers are often prevented from choosing cable providers by MDUs' no-overbuild provisions. As it happens, people of color are far more likely than others to reside in MDU housing. While 27.7% of all households are located in MDUs with 50 or more residents, 40.0% of all households headed by people of color (including Hispanics racially identifying as White) live in 50+ dwelling MDUs. See American Housing Survey for the United States (2005), Table 2-25, p. 106.

Consequently, no-overbuild provisions tend to deprive minority programmers of access to their core audiences. As a result, these programmers have more difficulty attracting investors and attaining the critical mass of viewers necessary to enable their investors to recoup their investments. For this reason, no-overbuild provisions are classic barriers to entry that offend Section 257.

Finally, the Commission should be especially mindful of Congress' paramount objective of providing "all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, [with] a rapid, efficient, Nation-wide, and world-wide wire and radio communication service[.]" 47 U.S.C. §151 (underscored language added in the 1996 Telecommunications Act). The dramatically disproportionate racial impact of no-overbuild provisions has its origins in the legacy of residential segregation that to this day keeps the majority of the nation's minority population living in central cities, often in MDU tenements. The end of no-overbuild provisions would go a long way toward remedying the present effects of past residential discrimination, an outcome in perfect harmony with Congress' objectives in Section 151.

We therefore urge the FCC to take action to prohibit no-overbuild provisions, or at least refuse to enforce them and declare that they are contrary to the public interest. 1/ The elimination of these provisions would serve to promote diversity in both programming content and programming ownership. As a result, all television viewers, particularly including minority viewers, would enjoy the benefits of increased choice in multi-channel video service. 2/

Sincerely,

David Honig

David Honig
Executive Director

/dh

cc: Hon. Jonathan Adelstein
Hon. Michael Copps
Hon. Robert McDowell
Hon. Deborah Taylor Tate

1/ We recognize that some no-overbuild provisions may also serve an inoffensive purpose, such as avoiding stress on the utility grids and ductwork in very old structures. Consideration of the value, if any, of these benefits turns on local building code policies, and therefore is best left to local authorities.

2/ This ex parte letter reflects the institutional views of MMTC and is not intended to reflect the views of any of its individual members, directors or advisors.