

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Exclusive Service Contracts for)	MB Docket No. 07-51
Provision of Video Services in)	
Multiple Dwelling Units and Other)	
Real Estate Developments)	

**COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (“NCTA”) hereby submits its comments on the Further Notice of Proposed Rulemaking (“Notice”) in the above-captioned proceeding.¹

NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation’s largest broadband provider of high speed Internet access after investing more than \$100 billion in the past ten years to build a two-way interactive network with fiber optic technology. Cable companies also provide state-of-the-art voice service to millions of American consumers.

INTRODUCTION AND SUMMARY

In the *MDU Order and Further Notice*, the Commission prohibited cable operators from entering into exclusive access agreements with owners of apartment buildings and other multiple dwelling units (MDUs) and from enforcing existing exclusive access agreements.² Appeals of

¹ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-189 (rel. Nov. 13, 2007) (*MDU Order and Further Notice*).

² *Id.* at ¶ 1.

that decision – by NCTA and by organizations representing MDU owners – are pending in the D.C. Circuit.³ NCTA also has requested a stay pending judicial review with respect to the ban on enforcement of existing agreements.⁴ NCTA has argued, among other things, that Section 628 of the Act does not give the Commission any authority to interfere with MDU access agreements.

In the *MDU Order and Further Notice*, the Commission solicits comment on whether it should expand its new rules to cover additional companies (specifically DBS providers and private cable operators (PCOs)) and additional types of agreements (exclusive marketing agreements and bulk billing arrangements).⁵ As explained below, even if the Commission had jurisdiction to prohibit exclusive access agreements, a decision to apply the exclusivity prohibition only to cable operators, and not to DBS providers and PCOs, will unfairly skew the competitive marketplace and undermine the ostensible purposes of the rules. The Commission should take this opportunity to rectify that situation. Beyond that, however, there is no basis for any additional regulation of MDU access agreements, even if the court ultimately finds that the Commission has the necessary legal authority.

I. THE COMMISSION SHOULD EXTEND THE EXCLUSIVE ACCESS PROHIBITION TO ALL MVPDS

Among the many problems with the *MDU Order and Further Notice* is the fact that the Commission adopted rules that apply only to cable operators and common carriers pursuant to Section 628, but not to other MVPDs.⁶ From a consumer perspective, the identity of the company that holds exclusive access rights is completely irrelevant because the effect is the

³ *NCTA v. FCC*, Case No. 08-1016 (D.C. Cir. filed Jan. 16, 2008); *National Multi-Housing Council v. FCC et al.*, Case No. 08-1017 (D.C. Cir. filed Jan. 16, 2008).

⁴ *NCTA v. FCC*, Case No. 08-1016, Emergency Motion for Stay Pending Judicial Review (filed Jan. 22, 2008).

⁵ *MDU Order and Further Notice* at ¶¶ 61-65.

⁶ *Id.* at ¶ 61 (“The [order] is limited to those MVPDs covered by Section 628.”).

same, *i.e.*, the choices available to the tenant are limited by the building owner. It is impossible to reconcile the Commission's assertion that MDU residents are significantly harmed by this practice with a decision to allow a substantial portion of the industry (including DirecTV and EchoStar – the second and third largest MVPDs – and their affiliates and resellers) to continue entering into such agreements.

The Commission's failure to provide for equal treatment of all MVPDs would be fundamentally inconsistent with its stated intent to "achieve regulatory parity by applying a consistent regulatory framework across platforms."⁷ It would simply give those companies not covered by the prohibition an artificial advantage vis-à-vis their competitors that has nothing to do with any superior efficiency or attractiveness to consumers or building owners. There is no public policy justification for such an outcome.

Indeed, the initial decision limited the prohibition to cable operators and common carriers providing video service not because of any public policy but because the Commission based its statutory jurisdiction for the rule on Section 628(b), which applies only to such entities. As NCTA made clear in its comments in this proceeding, we do not believe that Section 628 provides such jurisdiction. But even if it did, the Commission's twin policy objectives of providing choice for MDU residents and ensuring regulatory parity could not be met unless the Commission were also able to find – and exercise – authority to extend the prohibition to the DBS and PCO entities not covered by its initial decision.

In this case, the Commission has ample authority to extend these rules to any company that holds a license under Title III of the Act. Section 309 provides that no license may be granted unless the Commission determines that "the public interest, convenience, and necessity

⁷ *Telecommunications Services Inside Wiring*, CS Docket No. 95-184, Report and Order and Declaratory Ruling, Statement of Chairman Kevin J. Martin (rel. June 8, 2007).

would be served by granting thereof.”⁸ Similarly, Section 335 directs the Commission to impose on DBS providers “public interest or other requirements for providing video programming.”⁹ There should be no doubt that the Commission’s broad public interest authority over licensees generally, and DBS providers in particular, combined with its rulemaking authority under Section 303(r), enables it to condition the use of any license on a requirement not to engage in practices the Commission has found to be “unfair methods of competition” or “unfair or deceptive acts or practices,” or to sell service to entities that engage in such practices. Moreover, given the Commission’s finding that it had ancillary authority to impose the prohibition on cable operators under Title I and Title III¹⁰ – a finding that NCTA disputes – it follows that it may use that ancillary authority with respect to other MVPDs that are not Commission licensees.

II. THE COMMISSION SHOULD NOT REGULATE EXCLUSIVE MARKETING AGREEMENTS OR BULK BILLING ARRANGEMENTS

The *MDU Order and Further Notice* asks whether the Commission should prohibit bulk billing arrangements and exclusive marketing agreements.¹¹ Under a typical bulk billing arrangement, the building owner purchases service on behalf of all the MDU residents and includes the cost of the service in the monthly rent or community association fees. Under an exclusive marketing agreement, the MVPD obtains the exclusive right to market video service in the building, *e.g.*, by providing marketing materials in the leasing office or installing signage in common areas of the building. In return, it typically provides the building owner with compensation based on the number of units that purchase service. *The Commission has no legal authority to regulate either type of agreement, but even if it did, there is no reason to do so.*

⁸ 47 U.S.C. § 309(a).

⁹ 47 U.S.C. § 335(a).

¹⁰ *MDU Order and Further Notice* at ¶ 52.

¹¹ *MDU Order and Further Notice* at ¶¶ 63-65.

As a legal matter, as NCTA has explained previously in this proceeding,¹² the Commission's authority under Section 628(b) does not extend to MDU access agreements of any type. Section 628 was intended to address issues related to program access. It is not a mini-Sherman Act granting the Commission broad authority to address any and all issues related to competition among MVPDs and it certainly provides no authority to interfere with commercial relationships between MVPDs and building owners. Absent a grant of additional authority from Congress, the Commission has no role to play here.

Even if the Commission did have authority to act, adopting additional regulation of MDU access agreements not only is unnecessary, but it is actually harmful to consumers. As building owners and MVPDs explained, there are significant costs associated with wiring MDUs and providing service. Agreements between MVPDs and MDU owners enable MVPDs to reduce the risk associated with these investments, making it more likely that MVPDs will invest in new wiring and provide additional benefits to MDU residents.¹³

With respect to bulk billing arrangements, the record developed in response to the NPRM in this proceeding demonstrates the significant consumer benefits that they produce. In particular, by agreeing to purchase service for the entire MDU, the building owner generally is able to obtain service at rates that are lower than the rates offered in the community.¹⁴ These bulk discounts are specifically contemplated by the Act.¹⁵ While it has been suggested that bulk billing arrangements should be prohibited because a tenant in the MDU will have to "pay

¹² See Comments of the National Cable & Telecommunications Association at 4-5 (filed July 2, 2007); Reply Comments of the National Cable & Telecommunications Association at 1-5 (filed Aug. 1, 2007); Request for Stay Pending Judicial Review at 9-12 (filed Dec. 11, 2007).

¹³ See, e.g., Comments of the Real Access Alliance at 12-16 (RAA Comments); Comments of the Community Associations Institute at 5 (CAI Comments).

¹⁴ See, e.g., CAI Comments at 5 ("because of the associations' contract with the service provider, residents pay less than they would if purchasing service on an individual basis").

¹⁵ See 47 U.S.C. § 543(d).

twice” if it wants to take service from a different provider,¹⁶ that cost must be balanced against the significant benefit to all tenants from the discounts that would not be made available absent the bulk billing arrangement. It is difficult to see how eliminating a building owner’s ability to negotiate such arrangements would prove beneficial to the majority of MDU residents.

Similarly, there is no reason for the Commission to regulate exclusive marketing agreements. As building owners have explained, exclusive marketing agreements enable them to negotiate with a MVPD for benefits that otherwise might not be available to residents of the building, such as lower prices or improved customer service.¹⁷ Although some have argued that such agreements may have the effect of discouraging a building owner from allowing additional MVPDs to serve the building, the fact that most new entrants are in favor of preserving the right to enter into such agreements demonstrates that they are not being used by incumbent MVPDs as a mechanism for limiting competition within a building.

¹⁶ See, e.g., *MDU Order and Further Notice*, Statement of Commissioner Jonathan Adelstein at 2.

¹⁷ See, e.g., RAA Comments at 19-20.

CONCLUSION

For the reasons explained above, the Commission should extend the exclusive access prohibition to all MVPDs, but beyond that it should not adopt any additional regulation of MDU access agreements.

Respectfully submitted,

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