

**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          | ) |                     |

**REPLY COMMENTS OF  
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

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

**I. THE COMMISSION SHOULD EITHER EXTEND THE PROHIBITION ON EXCLUSIVE ACCESS CONTRACTS TO ALL MVPDs OR APPLY IT TO NONE**

In its initial comments, NCTA argued, first, that the Commission should extend its ban on exclusive MDU contracts to all competing multichannel video programming distributors (“MVPDs”), including direct broadcast satellite (“DBS”) providers and private cable operators (“PCOs”). To do otherwise would be inconsistent with – and would, in fact, undermine – the Commission’s policy reasons for banning cable operators from entering into such contracts as well as its policy of ensuring regulatory parity.

Two key elements of the Commission’s decision were its determinations (1) that exclusive access agreements impaired the ability of new wireline competitors to compete for MDU customers and thereby effectively provide competition in the local marketplace, and (2) that residents in MDU buildings should not be denied a choice among multichannel video providers. NCTA questioned both those policy determinations – the first because there was no evidence in the record that exclusive contracts were in fact impeding the roll-out of competitive

service by telephone companies and other competitors, and the second because it was flatly at odds with the commission's previous determination, in the context of its inside wiring proceeding, that building owners act in the interest of their residents when they choose a single provider for their building.

But whether or not they were reasonable, both these policy determinations would be undermined if DBS companies and PCOs were allowed to continue to enforce and enter into exclusive access agreements. Those exclusive contracts, no less than contracts entered into with a cable operator, would place a building and its residents off-limits to a potential competitor and deny residents a choice of multichannel video providers. Unless exclusive access agreements are barred across the board for all MVPDs, building owners will continue to have incentives to enter into and reap the benefits of such agreements where they are permitted. The only difference is that cable operators (including telephone companies that provide video service) will be precluded from competing with DBS companies and PCOs to be the exclusive provider.

Not surprisingly, the DBS companies and PCOs think that this would be a splendid idea.<sup>1</sup> But hardly any other commenting parties agree. Telephone companies, whose entry into the video marketplace the Commission has been attempting to accelerate with its rules in this and other proceedings, make clear that barring only cable operators and not other MVPDs from entering into exclusive access agreements is "by no means sufficient" to achieve this result.<sup>2</sup> As AT&T explains,

[R]egardless of whether the incumbent MVPD at an MDU is a cable operator or a provider using some other technology (such as a DBS provider or PCO), the impact of that incumbent's ability to foreclose new entry by alternative providers is the same. In either case, execution or enforcement of exclusivity arrangements

---

<sup>1</sup> See, e.g., Comments of Dish Network; Further Comments of DIRECTV, Inc.; Comments of Independent Multifamily Communications Council.

<sup>2</sup> AT&T Comments at 3.

by the incumbent would effectively preclude a new entrant (particularly a wireline new entrant that does not benefit from the Commission’s OTARD rules) from offering an alternative source of video services and information to MDU residents....<sup>3</sup>

SureWest Communications agrees that “[w]hile DBS operators and PCOs appear to hold many fewer [exclusive service contracts] than cable operators, the impact on the residents of those MDUs is exactly the same as the impact of an [exclusive service contract] held by a cable operator.”<sup>4</sup>

The MDU building owners, who oppose *any* restriction on their agreements with MDUs (and who, like NCTA, are seeking judicial review of the bar on exclusive access agreements with cable operators) argue briefly that “the Commission should not extend the rule to include private cable operators.”<sup>5</sup> But even they do not argue for a prohibition that singles out cable operators while exempting DBS companies. They are conspicuously silent regarding DBS.

As we showed in our comments, if the Commission believes that Section 628 embodies a Congressional policy that authorizes and requires the Commission to ban exclusive contracts between cable operators and MDUs because of their impact on competition and consumer choice, there is ample authority in Title III for implementing that public policy with respect to DBS. Moreover, because those public policy objectives – as well as the Commission’s often stated policy of ensuring regulatory parity<sup>6</sup> – cannot be fully realized without extending the ban

---

<sup>3</sup> *Id.*

<sup>4</sup> SureWest Communications Comments at 14.

<sup>5</sup> Comments of the National Multi Housing Council et al. at 28; Further Comments of the Community Associations Institute at 11.

<sup>6</sup> *See, e.g.,* Cox Communications, Inc. Comments at 3 (“A rule that forbids some MVPDs – but not others – from entering into exclusive MDU access arrangements obviously skews unfairly the video programming playing field in favor of certain competitors over others. But it also raises another specter: undermining the provision of competitive voice and broadband services in MDUs”). Cox has also rightly pointed out that regulatory parity is particularly important in this proceeding because unbalanced restrictions on MDU access affect not only competition in the video marketplace but also in the provision of voice and Internet services by many of the same entities that are competing to provide video services: “An imbalanced MDU access policy also will

to PCOs, the Commission should include such competitors within the scope of any restrictions, as well.

## **II. THE COMMISSION SHOULD NOT PROHIBIT EXCLUSIVE MARKETING OR BULK BILLING AGREEMENTS**

Second, NCTA argued that the Commission should not extend its prohibition beyond exclusive access agreements to cover exclusive marketing agreements and bulk billing agreements. We have maintained that the Commission had no authority to adopt its bar on exclusive access agreements, and it follows that it has no authority to extend the prohibition to these other practices. But even if that were not the case, the policy balance that the Commission struck in banning exclusive access agreements would not apply to a ban on exclusive marketing agreements or bulk billing agreements.

There is overwhelming consensus among the commenting parties that this is the case and that there is no basis for prohibiting such agreements. Incumbent and alternative competitive providers of video service – large and small – concur. As Verizon makes clear, “exclusive marketing and bulk billing arrangements do not prevent competitors from serving MDU residents and do not prevent consumers in MDUs from opting to buy service from a competing provider.”<sup>7</sup> Similarly, building owners and homeowner associations – large and small – also agree, cataloguing the ways in which such arrangements provide pro-competitive efficiencies

---

exacerbate the continued consumer and operator confusion that has been created by the lack of Commission clarity over the application of any of the hodgepodge of existing wiring disposition rules to wiring installed and used by a provider for multiple services, and the process that applies when disposition of wiring is warranted.” *Id.* at 2. NCTA agrees with Cox that, to alleviate such confusion, the Commission should address issues regarding (1) applicability of the home wiring and home run wiring rules when multiple services are provided over the same wiring, (2) the process for determining the first point of “physical accessibility” under the rules, and (3) the amount of compensation to be paid when wiring is required to be conveyed under the rules. *Id.*

<sup>7</sup> Verizon Comments at 3. *See also* Comments of WorldNet Telecommunications, Inc.; Ziletto, Inc.; Independent MultiFamily Communications Council; Charter Communications, Inc.; Home Town Cable TV, LLC.; MDU Communications International, Inc.; Thames Valley Communications, Inc.

and benefits for MDU residents, including the provision and upgrading of wiring and the availability of lower prices.<sup>8</sup>

The only dissenters are a single wireline video overbuilder – SureWest – and a single community of gated residences in Florida, both of which argue that bulk billing agreements effectively preclude residents from choosing an alternative provider.<sup>9</sup> Wholly apart from the fact that this contention that bulk billing is tantamount to *de facto* exclusivity is rebutted by virtually all other parties that address the issue, neither SureWest nor the City of Weston addresses the pro-competitive and price-reducing benefits of bulk billing agreements identified by those other commenting parties. The agreement of a broad array of incumbent providers, overbuilders and building owners – including homeowners and condominium associations – on the legitimacy bulk billing agreements is a compelling indication that such agreements do not preclude viable overbuild competition and that they provide efficiencies and benefits for MDU owners and their residents.

---

<sup>8</sup> See, e.g., Comments of Boca Raton Umbrella Association, Inc.; Manufactured Housing Institute; National Multi Housing Council, et al.; Community Associations Institute; National Association of Home Builders; Camden Property Trust; RealtyCom Partners; Apartment Industry Council; Apartment Investment and Management Company; Post Properties, Inc.

<sup>9</sup> See Comments of SureWest Communications; Comments of City of Weston, Florida and the Town Foundation, Inc.

## CONCLUSION

For the foregoing reasons and for the reasons set forth in NCTA's initial comments, the Commission should ensure regulatory parity and fair marketplace competition by applying the same restrictions on exclusive MDU contracts to *all* competing MVPDs, including DBS operators and PCOs. And it should not extend the current prohibition on exclusive access agreements to exclusive marketing or bulk billing agreements.

Respectfully submitted,

**/s/ Daniel L. Brenner**

Daniel L. Brenner  
Michael S. Schooler  
Steven F. Morris  
National Cable &  
Telecommunications Association  
25 Massachusetts Avenue, N.W. – Suite 100  
Washington, D.C. 20001-1431  
(202) 222-2445

March 7, 2008