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

In the Matter of	)	
	)	
Improving Competitive Broadband Access to Multiple Tenant Environments	)	GN Docket No. 17-142
	)	

COMMENTS OF NCTA – THE INTERNET AND TELEVISION ASSOCIATION

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July 24, 2017

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NCTA – The Internet and Television Association hereby submits its comments on the Notice of Inquiry ("NOI") in the above-captioned proceeding.

INTRODUCTION

This proceeding raises two primary questions regarding deployment of broadband facilities and services in multiple tenant environments ("MTEs"): (1) do bulk billing arrangements and exclusive marketing or access-to-wiring agreements between a broadband provider and an owner of an MTE promote broadband deployment and benefit consumers; and (2) would government regulation of such arrangements impede broadband deployment?[1] The answer to both questions is a resounding "Yes."

Strong demand for broadband service by consumers is already ensuring that broadband facilities and services are deployed to MTEs, and there are no signs of market failure that would warrant regulating these private contracts. Owners of MTEs have a strong interest in ensuring that robust broadband service is available to their tenants on the most attractive terms and conditions;[2] it is becoming a necessity in attracting and retaining tenants. And cable operators,

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[1] Notice of Inquiry ("NOI"), ¶ 2.

[2] Or, in many cases, to themselves. Condominium associations have a strong interest in having broadband facilities deployed or upgraded and in obtaining the benefits of bulk billing and other agreements with broadband service providers.

telephone companies, and other broadband service providers have an equally strong interest in offering such service to the residents of MTEs.

Given the lack of market failure, the Commission should continue to allow competitive market forces to dictate the arrangements that are most beneficial for consumers and businesses that inhabit MTEs by adopting the following policies:

- Incentivize broadband deployment where it might not otherwise occur by continuing to permit exclusive use of inside wire by providers who have installed and maintain the wiring pursuant to an agreement with a landlord or building owner.
- Continue to allow consumers to benefit from the lower costs and other perks that can result from bulk billing and exclusive marketing arrangements.
- Revisit the Commission's determination that Section 628(b) extends beyond access to satellite-delivered programming in which a cable operator has an attributable interest and could be used to abrogate existing arrangements and agreements or prohibit new ones.

These type of arrangements and agreements ensure the *availability* of high quality service to residents at a *competitive* price, and are virtually always time-limited and serve consumers well. There is no sound policy reason (as well as no sound legal authority) to restrict or prohibit them. Where the marketplace is working effectively, and there is no market failure, the Commission should reject proposals to adopt new regulations.

In contrast, regulation of these arrangements and agreements would have the exact opposite effect and stand as impediments to broadband deployment. For example, regulations adopted in the San Francisco Ordinance, which grant competitors access to an existing provider's wiring despite the presence of an exclusive wiring agreement, are likely to thwart deployment of facilities to MTEs that require significant expenditures to wire. Such state and local regulations, which clearly conflict with the Commission's broadband deployment goals, should be preempted.

I. EXCLUSIVE WIRING ARRANGEMENTS PROMOTE DEPLOYMENT AND AVAILABILITY OF BROADBAND SERVICE IN MTEs.

In many cases, the greatest impediment to the availability of broadband service – especially in older MTEs that were not pre-wired for modern digital video and high-speed broadband services – is the high upfront cost to building owners of installing such wiring. Arrangements between providers and building owners can overcome this impediment and result in deployment of broadband facilities where such deployment might not otherwise occur. Providers can install wiring throughout a building and convey it to the owner as long as they have some contractual assurance that they will be likely to recover their investment by utilizing the wiring in providing services to building residents.

One common arrangement for providing this assurance is the grant, by the owner, of exclusive use of the conveyed wiring to the provider for a defined period – an arrangement that benefits residents. Such arrangements, which typically include a provision that the provider will maintain the wiring, give providers investment certainty, and often enable providers to upgrade wiring and associated technologies. As a result, both broadband deployment and innovation are promoted. In contrast, without these agreements, providers would have less incentive to deploy newer wiring and technologies. Interfering with wiring agreements would also leave technical decisions regarding how to build the network in the hands of the building owners, which could preclude innovation and make it more challenging for providers to service the building.

Exclusive wiring agreements do not necessarily preclude the provision of service by additional providers, and, in fact, in those states and localities where there are "access to premises" laws, building owners must allow additional providers to offer service. If there is an exclusive wiring agreement, such additional providers may be required to install their own inside wiring. But in today's broadband marketplace, the installation of additional wiring to offer

competitive broadband services may be a technological necessity in any event – particularly where a competitive provider offers only one of the multiple services typically provided by a cable operator or telephone company as an alternative for MTE customers.

Specifically, if a resident chooses to purchase Internet service from an alternative provider while purchasing video service from a cable operator, it is not feasible for the two providers to share the same wiring without potential service degradation or outages occurring for the residents. The recent petition of the Multifamily Broadband Council seeking preemption of a San Francisco ordinance mandating access by competitive broadband providers to MTE wiring confirms that "interference caused by sharing of inside wiring will bear directly on the quality of signals delivered to subscribers."[3] Cox Communications, Inc. has had first-hand experience with this interference problem after a competing multichannel video programming distributor ("MVPD") began using Cox's wiring to provide video services to MTE residents who continued to purchase their Internet access service from Cox. As Cox previously explained to the Commission, the diplexers attached by the competing MVPD to Cox's wiring "cause harmful interference to Cox's DOCSIS 3.0 broadband signals transmitted above the 800 MHz frequency range and will likewise interfere with DOCSIS 3.1 signals planned for the future as the path to provide 1 GHz services."[4]

Even beyond a second provider deploying its own wiring, residents of MTEs reap the benefits of competition in the broadband marketplace. The multiple providers of broadband services in a community typically compete fiercely to serve MTEs, and this means that MTE

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[3] Petition of the Multifamily Broadband Council Seeking Preemption of Article 52 of the San Francisco Police Code, MB Docket No. 17-91, at 31 ("MBC Petition").

[4] *Applications of AT&T and DirecTV to Transfer Control of FCC Licenses and Other Authorizations*, MB Docket No. 14-90, Petition to Condition Consent of Cox Communications at 29-30 (Sept. 16, 2014).

owners – who are similarly competing fiercely for tenants – have the opportunity to choose the provider (or providers) and the contractual arrangements that will provide greatest value.[5] Indeed, alternative competitors have argued that such building-by-building competition *enables* them to offer competitive services and that restrictions on exclusive wiring and other arrangements between MTE owners and broadband providers can have the effect of *diminishing* their ability to compete in a community.[6] In other words, such arrangements can achieve *both* the goals of this proceeding – ensuring not only that broadband service is deployed in MTEs but also that MTE residents and other consumers throughout a community enjoy the benefits associated with competitive broadband offerings.

II. BULK BILLING ARRANGEMENTS ENABLE BUILDING OWNERS TO MAKE BROADBAND SERVICE UBIQUITOUSLY AVAILABLE TO ALL MTE RESIDENTS AND TENANTS.

Bulk billing is another type of arrangement that provides great value to building owners and their tenants while compensating providers for the costs and risks of deploying cable and broadband service in MTEs. By buying service in "bulk" and making it available to all tenants, building owners can effectively offer tenants service at a discounted price far *below* the competitive retail rates generally available to subscribers throughout the community. Bulk billing is most prevalent in condominium environments, healthcare facilities (e.g., nursing homes), and student housing, and by providing stable returns on investment to service providers,

[5] Even where there is only a single provider in an MTE, that provider generally offers the same rates and promotions throughout a community, to single-family homes and MTE customers alike (except, of course, where bulk billing provides even lower rates). *See* Section II, *infra*. This means that MTE residents get the benefits of effective competition among providers in their entire community even if those providers compete on a building-by-building basis for MTE customers.

[6] *See In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Second Report and Order, 25 FCC Rcd 2460, 2465-66, 2473 (2010) ("Second Report and Order"). *See also* MBC Petition, *supra.*

creates incentives for facility upgrades. Prohibiting such arrangements would eliminate these consumer benefits.

The Commission has previously rejected the notion that MTE residents should be denied these substantial benefits of bulk billing. The Commission noted that – unlike exclusive service contracts, which its rules prohibit[7] – bulk billing does not prevent alternative providers from offering service in an MTE, and it cited evidence that "second MVPD providers wire MDUs for video service even in the presence of bulk billing arrangements and . . . many consumers choose to subscribe to those second services."[8] And it concluded that, in any event, "it would be a disservice to the public interest if, in order to benefit a few residents, we prohibited bulk billing, because so doing would result in higher MVPD service charges for the vast majority of MDU residents who are content with such arrangements."[9]

There is no reason why the conclusion the Commission reached regarding the provision of *video* services in MDUs should be any different in this proceeding regarding the provision of *broadband* service. To the contrary, the Commission's policy goal in this proceeding of encouraging widespread deployment and availability of broadband service should make the pro-consumer benefits of bulk billing arrangements weigh even *more* heavily in any balancing of benefits against conceivable harms.

III. EXCLUSIVE MARKETING AGREEMENTS CAN PROMOTE BROADBAND DEPLOYMENT AND EFFICIENCIES THAT BENEFIT CONSUMERS WITH NO COUNTERVAILING HARM.

The heading to this section sums up the findings of the Commission when it last examined the issue of exclusive marketing agreements, and it remains accurate. The comments

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7 *See* 47 C.F.R. § 76.2000.

8 Second Report and Order ¶ 26.

9 *Id.*

in that proceeding showed that building owners and new entrants as well as established MVPDs found such agreements to be beneficial for consumers and for competition. As the Commission noted, real estate interests pointed out that marketing exclusivity "is something they can give to an MVPD in exchange for which the MVPD may pay a greater share of the wiring costs or may agree to provide better service, thus benefiting MDU residents."[10] Similarly, new entrants argued that "exclusive marketing arrangements are an especially valuable means of advertising for small new entrants who cannot afford high-priced mass media advertising that large incumbent cable operators and LECs regularly use," and that "such one-building-at-a-time arrangements help a new entrant to overcome the greater name recognition of the entrenched incumbent cable operator."

The Commission saw no corresponding downside to exclusive marketing agreements:

> Although marketing exclusivity confers an advantage on the MVPD in whose favor the arrangement runs, it appears to be a slight one and there is no indication that it prevents or significantly hinders other MVPDs from providing video services in MDUs with such arrangements. Neither does marketing exclusivity prevent or significantly hinder other MVPDs from reaching MDU residents via television, radio, and other media; deter MDU residents from subscribing to other MVPDs' services; slow the evolution of competing wireless technologies; raise prices to consumers; or, by unfair methods, acts, or practices, have the purpose or effect of hindering significantly or preventing other MVPDs from providing programming to consumers, especially programming ordinarily found on broadcast and cable video systems.[11]

In other words, there was no policy basis for restricting such contractual arrangements – and that remains the case.

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[10] *Id.* ¶ 33 (footnote omitted).

[11] *Id.* ¶ 36 (footnotes omitted).

IV. THE COMMISSION SHOULD REVISIT ITS DETERMINATION THAT ITS AUTHORITY UNDER SECTION 628(b) EXTENDS TO CONTRACTUAL ARRANGEMENTS UNRELATED TO ACCESS TO PROGRAMMING IN WHICH A CABLE OPERATOR HAS AN ATTRIBUTABLE INTEREST.

The Commission's *authority* for restricting all these contractual arrangements between broadband providers and MTE owners rests on tenuous grounds.[12] The Commission based its ban on exclusive MDU contracts for cable service on Section 628(b) of the Communications Act – generally known as the "program access" provision of the Cable Consumer Protection and Competition Act of 1992.

Section 628(b) generally prohibits a cable operator or a satellite cable programming vendor in which a cable operator has an attributable interest from engaging 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 [MVPD] *from providing satellite cable programming* . . . to subscribers or consumers."[13] Until 2007, it was commonly understood that (as the legislative history made clear) Section 628 was exclusively and specifically concerned with issues of DBS and other competitive MVPDs' access to cable-affiliated, satellite-delivered programming.[14] But in that year, the Commission decided that the scope of its authority under Section 628(b) extended well beyond program access and was, in fact, sufficiently broad to prohibit *any* conduct by a cable operator that had the effect of harming the ability of any other MVPD to compete,

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[12] NCTA recently provided an analysis of this issue in the *Modernization of Media Regulation Initiative* proceeding, *see* Comments of NCTA, MB Docket No. 17-105, at 11-14 (filed July 5, 2017), and incorporates those comments by reference here.

[13] 47 U.S.C. § 548(b) (emphasis added). Section 628(c) meanwhile directed the Commission to promulgate regulations setting forth particular conduct that would be prohibited by the general prohibition in Section 628(b). *Id.* § 548(c). And it set forth certain types of conduct that had to be included in those regulations – *e.g.*, certain exclusive and discriminatory contracts – all of which had to do with access by competing MVPDs to satellite cable programming in which a cable operator had an attributable interest. *See id.*

[14] *See, e.g.*, 138 Cong. Rec. H6487, 6533 (1992) (statement of Rep. Tauzin).

even if the conduct did not harm marketplace competition.[15] Specifically, the Commission held that Section 628(b) authorized a rule prohibiting cable operators from entering into exclusive contracts with multiple dwelling unit ("MDU") building owners.[16] In its view, contracts that hinder the ability of competing MVPDs to provide *any* programming to consumers in MDU buildings hinder those MVPDs from providing *satellite* cable programming.[17] And because this interpretation was not foreclosed by the literal language of the statute, the United States Court of Appeals for the District of Columbia Circuit deferred to and upheld the Commission's interpretation.[18]

By construing Section 628(b) in this manner, the Commission transformed a narrowly circumscribed provision aimed at access to cable-affiliated *satellite-delivered* programming into a mini-antitrust law that broadly prohibits any conduct by a cable operator or a cable-affiliated program network that allegedly hampers the ability of any MVPD to compete. Such an overreach of regulatory authority is not what Congress intended. Moreover, because Section 628(b) applies only to cable operators, it cannot even arguably authorize restrictions on providers of broadband-only service to MTEs, creating an artificial and utterly unfair regulatory disparity.

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[15] *See In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments,* Report & Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007).

[16] *See generally id.*

[17] *See id.*

[18] *See Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009). The Commission relied on this expansive interpretation of the scope of Section 628(b) again in 2010 holding that, while the statutory prohibition on exclusive programming contracts was no longer necessary to promote competition, Section 628(b) provided a statutory basis for entertaining complaints against such contracts on a case-by-case basis. *See In re Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report & Order and Further Notice of Proposed Rulemaking and Order on Reconsideration, 25 FCC Rcd 746 ¶¶ 3, 11 (2010). The Commission also held in that order that it would even consider such complaints regarding *terrestrially-delivered* programming (such as regional sports contracts) because it theorized that such contracts could so impair the competitive viability of an MVPD that they could not successfully compete in the provision of *any* programming – including satellite-delivered programming – to consumers. *See id.* ¶ 19, 24. Once again, the D.C. Circuit deferred to and upheld the Commission's arcane and expansive reading of the scope of Section 628(b). *See Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011).

The Commission should revisit its interpretation of the statute, as it is authorized to do,[19] and restore it to its proper scope, meaning, and intent.

In any event, Section 628, by its terms, applies only to conduct that harms the ability of an *MVPD* to provide video programming to subscribers or consumers. Even under the Commission's strained prior construction, it confers no authority at all with respect to conduct that solely affects the provision of broadband service. Moreover, while the Commission has also suggested that it has authority in *Title II* to restrict agreements between telecommunications service providers and MTE owners,[20] it has proposed reversing the recent (and similarly erroneous) determination that broadband Internet access service is a telecommunications service.[21] So, this, too, is a thin reed on which to rest authority to regulate MTE agreements.

V. STATE AND LOCAL REGULATIONS THAT RESTRICT CONTRACTUAL AGREEMENTS BETWEEN BROADBAND PROVIDERS AND MTE BUILDING OWNERS IN A MANNER THAT DETERS DEPLOYMENT AND HARMS CONSUMERS SHOULD BE PREEMPTED.

Finally, the NOI seeks comment on whether state and local regulations may interfere with the Commission's efforts to facilitate broadband deployment and competition. In particular, the NOI asks whether "certain local regulations effectively limit broadband competition in MTEs by inhibiting market entry and foisting infrastructure access requirements onto private companies," and whether "such infrastructure access mandates have the effect of reducing investment in new infrastructure or discouraging maintenance of existing infrastructure."[22]

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[19] *See, e.g., United States Telecom Ass'n v. FCC*, 825 F.3d 674, 706-07 (D.C. Cir. 2016).

[20] NOI ¶¶ 7, 17, 19.

[21] *See In the Matter of Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108, FCC 17-60 (rel. May 23, 2017).

[22] NOI, ¶ 12.

As the foregoing discussion in these comments explain, *FCC* regulations that interfered with contractual arrangements between broadband providers and private MTE building owners by imposing access to wiring mandates would have precisely these harmful effects. So, too – for the same reasons – would similar *state and local* regulations. Both would conflict with explicit federal objectives, as expressed not only by the Commission in this proceeding and elsewhere but also by Congress.[23] Section 706 of the Telecommunications Act clearly identifies "the deployment . . . of advanced telecommunications capability to all Americans" as a federal policy objective. As NCTA has previously stated, the Commission should recognize and make clear that where such a conflict exists, preemption of state and local regulations is both necessary and appropriate.[24]

[23] *See*, *e.g.*, Section 706(a) of the Telecommunications Act of 1996

[24] *See* NCTA Comments on Petition of the Multifamily Broadband Council Seeking Preemption of Article 52 of the San Francisco Police Code, MB Docket No. 17-91 (May 18, 2017).

CONCLUSION

Competition among broadband providers is flourishing and there is no sign of any market failure in this marketplace. To the contrary, bulk billing, exclusive wiring, exclusive marketing and other arrangements benefit consumers by encouraging competition and broadband investment in MTE environments. There is no sound policy basis, and no sound statutory basis, for restricting such arrangements. Indeed, such restrictions would be at odds with the Federal policy goal of promoting broadband deployment.[25]

Respectfully submitted,

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[25] *See* NCTA Comments on Petition of the Multifamily Broadband Council Seeking Preemption of Article 52 of the San Francisco Police Code, MB Docket No. 17-91 (May 18, 2017).