

contracts.⁵³ Among other things, BOMA, et al. make the following assertions:

- "[W]e are concerned not with the outcome of the battle among DBS, cable and SMATV operators, but with the possibility that Commission regulation may make it difficult and expensive to serve some segment of the apartment market. Current market conditions may not be perfect, but we are skeptical of the Commission's ability to do better."⁵⁴
- "Even though building owners might benefit from the right to escape unfavorable agreements, we do not believe it is appropriate for us to support any Commission interference in freely-negotiated arms-length contracts, for a number of reasons.... [T]he Commission's goals will be met by the market as current contracts expire."⁵⁵
- "[A]ny attempt by the Commission to restrict the terms of existing exclusive contracts over the objections of building owners might raise difficult legal questions."⁵⁶
- "[T]he required time period [to recover capital investment] could vary significantly from building to building and region to region. Therefore, it is unlikely that a general rule [capping the term of years for all exclusive MDU contracts] would achieve the desired result; in fact, such a rule would probably have unintended consequences that would actually hinder the

⁵³ See Further Joint Comments of Building Owners and Managers Association International, Institute of Real Estate Management, International Council of Shopping Centers, National Apartment Association, National Multi-Housing Council, and National Realty Committee. See also Joint Comments of these same parties filed on March 18, 1996, in MM Docket No. 92-260, at n. 1 in which the parties describe each of the joint commenters. For example, BOMA is a federation of 98 local associations representing 15,000 owners and managers of over six billion square feet of commercial properties in North America; and the National Apartment Association is the largest industry-wide, non-profit trade association devoted solely to the needs of the apartment industry.

⁵⁴ Id. at 3, n. 2.

⁵⁵ Id. at 5.

⁵⁶ Id.

Commission's goals and harm building owners and their tenants."⁵⁷

- "The Joint Commenters do not support such [a fresh look] approach, however. Building owners generally would prefer to allow the market to take its course than for the Commission to intrude."⁵⁸

Such strong opposition to Commission intervention into the MDU owner-MVPD relationship by a group that could stand to benefit from such intervention further highlights that there simply is no basis for the Commission to abrogate or restrict MDU exclusive contracts.

Finally, as heavily as the Commission weighs the comments of BOMA, et al. it should discount the comments of certain non-cable MVPDs who support exclusivity restrictions as long as they apply only to their cable competitors and not to themselves. For example, DirecTV and GTE request that the Commission prohibit exclusive MDU contracts as long as such a prohibition does not cover their own exclusive agreements.⁵⁹ Similarly, the Wireless Cable Association argues that fresh look should be imposed on existing cable exclusive contracts to give non-cable competitors a chance to bid for these MDUs, but that no fresh look should later be applied to any exclusive agreements which wireless cable operators may secure during this initial fresh look period, even if new MVPD entities later enter the MDU marketplace.⁶⁰

⁵⁷ Id. at 7.

⁵⁸ Id.

⁵⁹ See Comments of DirecTV at n. 9; Comments of GTE Service Corporation at 13-14.

⁶⁰ Comments of Wireless Cable Association at n. 35.

Such self-serving requests for a regulatory handicap should be rejected. As TCI and other commenters demonstrated, there is no basis for according different regulatory treatment to cable and non-cable MVPDs in this context.⁶¹ Moreover, the suggestion by these commenters that without a government handicap they will be unable to flourish in the MDU marketplace is squarely at odds with recent Commission findings on the state of competition in the MDU marketplace⁶² and with the intensity with which non-cable MVPDs are pursuing significant new MDU business strategies and investments even under the current regulatory regime.⁶³

⁶¹ See, e.g., Comments of Cable Telecommunications Association at 3-5; Comments of Time Warner at 12-14; Comments of NCTA at 5-7; Comments of Cablevision/Comcast/Tele-Media at 4. For example, as TCI noted, many of the contracts which it entered into over 15 years ago were not exclusive contracts. The fact that in many cases in the past MDU owners, for whatever reason, elected not to extend exclusivity to TCI reinforces that those MDU owners which did extend exclusivity did so not because they felt compelled as a result of any perceived market power, but because it was in their, and their tenants, interests for them to do so. See Comments of TCI at 32-35.

⁶² See footnote 12, supra.

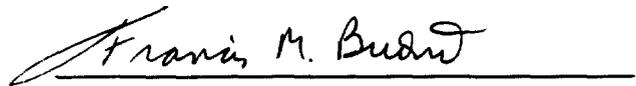
⁶³ See, e.g., "Latest Battleground: Cable Fighting For MDUs," Multichannel News, July 17, 1995, at 16; "DBS Makers Target MDUs," Multichannel News, March 4, 1996, p. 5 (describing industry-wide DBS efforts to compete in the MDU market); "DirectTV, Inc. Signs Agreement with American Telecasting, Inc.; Wireless Partnerships Provide Key Local Presence for DirectTV in Multi-Unit Market," PR Newswire, December 11, 1997 (describing how DirectTV has signed a series of cooperative marketing agreements with the nation's top private cable and wireless operators to provide it with a key local sales and service presence, as well as local broadcast channel access, in MDU markets across the United States); "MDU Market Attracts Notice As Competition Enters Field," Multichannel News, December 15, 1997, at 34 (local telcos are presenting a further competitive threat in MDUs through their ability to bundle video programming with their telephone, Internet, and other service offerings for an attractive package price); "MSOs Scramble in Face
(continued ...)

V. CONCLUSION

Based on the foregoing and TCI's initial comments, TCI respectfully urges the Commission to refrain from implementing the proposals in the Second FNPRM or any restrictions on exclusive MDU contracts.

Respectfully submitted,

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of MDU Clash," Multichannel News, February 23, 1998, at 3 ("The battle for the hearts and minds of cable subscribers in apartment buildings is heating up and forcing some wired and wireless cable operators to make changes to keep up."). See also Comments of Time Warner at 2-4 (given the high degree of competition in the MDU marketplace that has existed since the early 1980's, the Commission should continue to refrain from interfering with contracts that have been freely negotiated); Comments of U S WEST at 4 (same).