Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

TO: The Commission

COMMENTS OF OPENBAND MULTIMEDIA, L.L.C.

OpenBand Multimedia, L.L.C. ("OpenBand"), by its attorney, submits its comments in response to the Commission's Notice of Proposed Rule Making (*Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*), MM Docket No. 07-51, FCC 07-32, released March 27, 2007 ("NPRM").

I. Summary

OpenBand urges the Commission to recognize that the issue of exclusive video service contracts for multiple dwelling units and other real estate developments is a complex matter that affects not only cable television competition but also the Commission's objectives to increase the quality and penetration of broadband services. A blanket prohibition of all existing and future exclusive contracts like that sought by Verizon and SureWest Communications may prevent some large cable system operators from entrenching themselves against video competition from telephone companies. However, it will also have the collateral consequences of: (1) precluding or deterring entry into the video marketplace of companies offering innovative and flexible new broadband facilities and service packages; (2) reducing the level of market competition for video services and increasing costs; and (3) reducing consumer and ancillary economic benefits from the deployment of advanced video and broadband services.

OpenBand opposes any blanket prohibition or limitation on the use of exclusive contracts to provide video services to real estate developments. It also believes that any restriction upon exclusive video contracts should be limited to incumbent operators that possess market power, and should apply only to future exclusive contracts entered after a specified date. OpenBand proposes that, instead of imposing an outright prohibition, the Commission should subject future exclusive video contracts of incumbent operators having market power to a filing and public interest determination process like that established by Section 628(c)(4) of the Communications Act for exclusive video programming contracts.

II. OpenBand's Business and Interest in the Proceeding

OpenBand is a wholly-owned subsidiary of M.C. Dean, Inc., and maintains its headquarters at 22461 Shaw Road in Dulles, Virginia. It provides Fiber to the Premise ("FTTP")-based voice, video, data, security and automation services in broadband Smart Neighborhoods™ in planned communities in Loudoun County, Virginia, including Lansdowne on the Potomac and Southern Walk at Broadlands. Smart Neighborhoods™ are community-wide fiber optic backbone and fiber-to-the-home networks that provide advanced services including integrated broadband voice, video and data networks, home security, home automation, and home entertainment solutions. OpenBand has been operating its Smart Neighborhoods™ since 2001, a full five years before any other service provider contemplated or began construction of FTTP networks in Loudoun County. OpenBand's "Always-on Glass Mile™ Access" delivers bi-directional transmission speeds of up to 100 megabits per second ("Mbps")[1] to each home for traditional and advanced voice, video and data communications, a service rate that is still unequalled in Loudoun County or the broader marketplace.

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[1] The Commission currently defines "advanced telecommunications capability" and "advanced services" in terms of upstream and downstream transmission speeds of 200 kilobits per second ("kbps") or better. Notice of Inquiry

OpenBand competes to offer its services upfront to land developers and builders, often in direct competition with cable television operators and/or telecommunications service providers, and custom designs its Smart Neighborhoods™ during the pre-construction stages of new planned residential communities. Upon winning the opportunity to service these communities and engaging in service provider contracts, OpenBand then installs the Smart Neighborhood™ in conjunction with the construction of the streets and homes, so that both the advanced FTTP network and the in-home facilities are complete and services are available at the time that the initial community residents move into their new homes. Before and after occupancy, customers can add and upgrade their OpenBand services as desired, with no need for service calls and additional construction.

III. Exclusive Service Contracts Facilitate Market Entry for New Competitors

The Commission asks whether multichannel video programming distributors ("MVPDs") seek exclusive contracts in an effort to frustrate competitive entry, and whether video providers entering into such exclusive contracts would be unable to provide service to these multiple dwelling units ("MDUs") or other real estate developments absent the protections afforded by exclusive contracts.

The primary reason for OpenBand (and other companies lacking market power in the cable industry) to enter into exclusive contracts is not to impede competition, but rather to ensure the significant costs of deploying video (and in many cases, next generation FTTP networks) can be recovered. Smart Neighborhoods™ and other advanced broadband networks are expensive to design, construct and operate. Given that the potential market and revenue base for a Smart Neighborhood™ is limited to the several hundred or several thousand households in the planned

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(*Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*), GN Docket No. 07-45, FCC 07-21, released April 16, 2007, at par. 12.

community or other development, these networks will not be built without reasonable assurance that their design, construction and operating costs will be recovered. It is simply not possible to convince owners, directors, investors or lenders to finance the construction of such capital-intensive networks in such limited markets unless the networks will be able to serve a significant portion of the households in the developments for periods long enough to recover their projected investment and operating costs. Therefore, companies like OpenBand are plainly engaged in positive construction and service activities rather than any anything with a purpose or intent that remotely resembles an unfair method of competition or an unfair or deceptive act or practice under Section 628(b) of the Communications Act.

In other words, exclusive contracts are an absolute necessity if new entrants to the video and broadband service markets are to continue to obtain the business plan approvals and financing necessary to design and build advanced networks. Essential revenue streams and cost recovery would be rendered uncertain or disrupted if exclusive contracts were prohibited outright or limited substantially, and even if such prohibitions or limitations applied only to the video portion of the integrated network and service packages.

IV. Exclusive Service Contracts may Increase Market Competition

The Commission seeks comment on the circumstances under which exclusive contracts can be pro-competitive, and whether the competitive impact of exclusive contracts differs depending on whether a competing terrestrial MVPD was able to provide service to the MDU or other real estate development at the time the exclusive contract was negotiated. It asks whether, in today's market, exclusive contracts benefit new entrants, incumbent providers, or both.

Many exclusive contracts are inherently pro-competitive by nature--they simply drive the competitive process forward to the inception of the community development. Cable system operators, incumbent local exchange carriers and other existing and potential service providers compete with OpenBand and similar companies for the rights to contract to serve future planned communities. This is a free and open market in which qualified and competent service providers can bid, negotiate and enter into contracts.

Once the initial bidding competition has occurred, OpenBand's experience in Virginia has been that exclusive contracts have the ancillary effect of further spurring competition within the broader region or service area. Specifically, in Loudoun County, Virginia, where OpenBand has constructed its Smart Neighborhoods™, providers not offering advanced broadband services were forced to develop new strategies to compete from both a price and performance perspective. The emergence of FTTP services in Loudoun County has encouraged other video and telecommunications service providers to accelerate their own network upgrade plans in the County and elsewhere. As a result, OpenBand's experience is that exclusive contracts actually increase competition over time as they raise the service and service quality bar for all providers and produce both an increased level and scope of services and decreased prices throughout the marketplace.

Nor do exclusive contracts impede or impair competition in recognized multichannel video markets. Planned communities (whether MDUs, retirement communities, resort communities, or gated communities) do not constitute a substantial percentage of the population in the Greater Washington area, Northern Virginia, Loudoun County or most other significant markets. Exclusive contracts for small sectors of such markets will not discourage or preclude any rational multichannel video service provider from entering or remaining in the broader markets as a whole.

V. **Exclusive Service Contracts may provide Benefits to Consumers, Consumer Groups**

The Commission seeks comment on the extent that exclusive contracts can benefit consumers, and on how the prices and services offered under the exclusive contracts compare to those offered to other customers.

To understand the source of benefits consumers and consumer groups derive from such contracts, it is necessary to understand the general nature of the competition for exclusive contracts and the subsequent service provider negotiations. As noted, many exclusive contracts entail upfront competition with new and existing video and telecommunications service providers, all of which are vying to place the best quality services at the lowest price on the table. Once a provider is selected, unlike individual consumers who have virtually no bargaining power vis-à-vis the service provider, MDU owners, developers or builders bargaining for an entire parcel can consummate negotiations on behalf of consumer groups for the highest quality services at reduced prices. As a result, exclusive agreements typically are for a fixed term of years and include performance standards regarding quality of service, price, channel selection, special services, and response times. Limiting the ability of property owners to enter into exclusive service arrangements would diminish this bargaining power for groups of consumers and diminish the quality of service provided to individual consumers. In addition, exclusive contracts often include provisions that require the service provider to furnish comparable or better products and services than the ILEC or MSO options. If the service provider does not stay competitive with (or ahead of) the market on price, technology and service factors, owners can terminate the contract and bargain as a group for a new contract. Therefore, these contracts promote the efficient delivery of the most advanced, highest quality communications services to consumers at the lowest competitive prices.

In addition to price and performance benefits, it is instructive to consider the additional benefits associated with such contracts. First, they may be the only option to ensure the propagation of advanced fiber optic and broadband services in areas which are underserved or unserved by the traditional providers. Second, these services are generally delivered concurrent with development and therefore are ready in advance of move-in with no need to upgrade facilities or physical plant over time, thus providing consumers with timely and enhanced service levels in addition to aesthetic benefits throughout their community since most FTTP deployments done concurrent with development are placed in underground or buried facilities.

VI. Any Restriction Should Be Limited to Service Providers with Market Power

The Commission asks whether it should limit exclusive contracts only where the video provider possesses market power, and how to define "market power" for these purposes. It asks whether it has authority to regulate only exclusive contracts entered into after the effective date of the regulations, or whether it can or should declare existing exclusive contracts void or voidable. The Commission asks whether it has authority to regulate exclusive contracts entered into by MVPDs other than cable operators.

It is not clear whether the Commission has the jurisdiction to prohibit or limit exclusive contracts for the non-regulated and emerging services furnished over integrated FTTP broadband networks, or why it would wish to do so. It is also not clear whether or how the Commission could separate out the regulated video and/or telecommunications portions of these integrated networks, and apply prohibitions or limitations regarding exclusive contracts to them. If the Commission were able to subject the video portion of integrated broadband networks to exclusive contract prohibitions or limitations, it would significantly reduce the attractiveness of such networks to the network operators and their owners, investors and lenders, as well as to real estate developers, builders, community associations and consumers. In any event, OpenBand believes that the Commission should regulate exclusive contracts only for incumbent cable television system providers with "market power", which we would define as those not subject to "effective competition" pursuant to Section 623(l)(1) of the Communications Act..

Any restrictions or limitations on exclusive video contracts should be prospective only, and should not interfere with existing contractual arrangements, investments and business plans. In other words, all existing exclusive video contracts should be grandfathered, while any restrictions or limitations should be imposed only upon exclusive contracts entered into after the adoption date. Otherwise, for existing contracts all of the past private financial transactions have been altered and property rights have been violated. Any action by the Commission that would alter that business model would be unfair to the contracting parties, could violate the lending covenants upon which the original contract was based, and would be subject to legal challenges.

It would be impractical for the Commission to place a cap on the length of exclusive service contracts since each MDU or development has its own unique needs, characteristics, number of units and demographics. The length of time necessary for a service provider to recoup its investment varies project to project, depending upon the size of the investment, the number of residents likely to subscribe to the service offerings, and the pricing structure of those service offerings. Under these circumstances, it is virtually impossible for the Commission to devise an exclusivity "cap" that accommodates every economic model for providing multi-channel service. Moreover, any regulatory cap on the term of exclusive contracts would cap the investment a new entrant could afford to make in any given project, and thus would be a detriment to competition and delay deployment of enhanced broadband services.

Companies like OpenBand that have deployed advanced FTTP broadband networks, are not cable operators per se and do not have market power. These companies should not be subject to Commission regulation, so that they can continue obtaining the financing necessary to construct innovative new broadband networks and provide advanced services to consumers. In long run, this will enhance broadband competition generally (including video competition) as well as increasing consumer welfare.

Finally, the NPRM is focused on MDUs but discusses "other real estate developments" in its context, without providing a definition. Given the significant differences between an MDU environment and a typical planned community, the Commission should carefully consider the definition of "other real estate developments" vis-a-vis the NPRM and clarify its intent and precise applicability outside of the MDU realm prior to imposing any regulatory constraints.

VII. Conclusion

Exclusive video service contracts are not all entered for anticompetitive purposes, and should not all be terminated by a blanket prohibition. Rather, in a significant number of instances, exclusive contracts enable the financing and construction of innovative new broadband networks and the development of new advanced service packages. Exclusive contracts can produce substantial benefits for consumers, as well as developers, builders, and community associations, and effectively increase rather than decrease the level of market competition.

A blanket prohibition of exclusive video contracts is overkill, and would destroy many important innovations and reduce consumer welfare in order to prevent some anticompetitive behavior. If, as appears, the alleged anticompetitive behavior consists entirely or predominately of the use of exclusive contracts by incumbent cable operators with market power to preclude video competition from telephone companies, the proposed restrictions upon exclusive contracts should be limited to them. Moreover, rather than prohibiting all exclusive video contracts, the Commission should instead subject them to a filing and public interest determination process like that established by Section 628(c)(4) of the Communications Act for exclusive program contracts. The mere existence of a review process would deter blatantly anticompetitive exclusive video contracts, while giving the Commission the flexibility and discretion to allow service providers with market power to implement exclusive contracts (with or without Commission-required modifications and conditions) where exclusive contracts are likely to generate important innovation, service and consumer welfare benefits.

Respectfully submitted,
OPENBAND MULTIMEDIA, L.L.C.

By____________________
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