

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling
Units and Other Real Estate Developments

MB Docket No. 07-51

Reply to the "Comments of ACUTA, Inc.: The Association For Telecommunications Professionals
In Higher Education"

Most Americans use a single Internet Service Provider throughout the year, in part because most Internet Service Providers require a minimum service commitment of one year or longer, and charge a fixed monthly rate during that time, regardless of the amount of usage. ACUTA proposes that every college, university, multiple dwelling unit, and other residential development be allowed to select an exclusive service provider for its students, tenants, or residents. Therefore, a student's college or university will be allowed to select the provider in academic buildings and on-campus housing, another party will select the provider for off-campus housing near the college or university, and a third party will select the provider for the student's permanent residence. If these three parties do not all select the same service provider, then the student will be forced to use, and pay, two or three different service providers. Additionally, each service provider will typically charge the student as much, or more, as if the student used the same service provider for entire year, resulting in a total cost to the student two or three (or more) times greater than if the student was permitted to select one service provider to use in all of these locations. Allowing property owners to enter into exclusive contracts prevents the users of the services from being able to use a single service provider on the property of different entities. This is true for all persons who use services on property other than their own, but especially for students, who (with the possible exceptions of military personnel, incarcerated or hospitalized persons, and small children) have the least flexibility to decide when and where they must use services and the least ability to pay multiple providers.

Section II correctly notes that students commonly move more often than other persons. For this reason, students especially need the protections that ACUTA seeks to deny them. If student housing is exempted, then students may have to change service providers each time that they move, which ACUTA claims to be every few months, and certainly more often than once per year. They will then need to reconfigure their computers and learn how to use the new service provider's equipment. Additionally, they will usually be required to continue paying the prior service provider for the remainder of the year, even though they will no longer be allowed to use its services.

Section II then goes onto an interesting, but irrelevant, tangent regarding the purpose of the facility subject to the exclusive contract, noting "the primary function of a college and university is education, not housing". The primary function of an airport is unquestionably transportation, specifically to provide a place for airplanes to land, for passengers to board flights, etc., not to provide lounges. (It is certainly more common for a person to be in an airport lounge because the person is waiting for an airplane flight than for a person to take an airplane in order to gain access to an airport lounge.) Yet, the Federal Communications Commission previously found that a state-owned airport was not exempt from the requirements of 47CFR1.4000 to allow a tenant to use a service provider other than the provider granted exclusivity by the agency owning the property (Docket ET 05-247). Therefore, exempting landlords on the basis of "primary function" is not consistent with precedent.

Section III(A) addresses security concerns. When I read the title of this section, I expected it to address information security concerns, such as the legitimate need to ensure that service providers do not provide students with the ability to cheat on exams or homework. (For this reason, examination rooms should be exempt from FCC rules that prohibit the jamming of

text messaging services.) However, it actually addresses physical security concerns, mainly related to the presence of the employees of the service providers. This is an absurd argument for two reasons: First, many services either (a) are provided wirelessly from a remote location, or (b) use equipment that can be installed by the students themselves (which would also be a valuable educational experience). In either of these cases, there is absolutely no need for the physical presence of service provider employees at the academic institution. Second, students are already free to select their own providers for a variety of other services, such as pizza delivery, that do require the physical presence of an employee of the service provider at the building where the student is housed every single time that the student uses the service, unlike the services subject to the rules presently under consideration. The suggestion that the presence of a technician during business hours on the rare occasion when something is installed or repaired poses a greater inconvenience to the university's security force than the daily presence, at all hours of the day and night, of numerous taxi drivers, pizza deliverers, Chinese food deliverers, visiting boyfriends and girlfriends, etc., would be funny if it did not distract from the very real issue that, as recent events at Virginia Tech demonstrated, most academic institutions do not require adequate background checks even for the students living in the buildings, which ACUTA claims are necessary for personnel merely working there briefly. (I am not opposed to background checks for technicians along with other personnel and students; I disagree only with ACUTA's premise that these checks are necessary for technicians when they are not imposed for other persons.)

Section III(B) states "extending access to multiple providers undoubtedly would require the school to accommodate additional facilities, including wiring...". While some providers may require additional wiring, it is the grossest of exaggerations to say that it is "undoubtedly" true in all cases. First, many providers use entirely wireless technologies, which will not require any such accommodation. Second, there is no insurmountable technical or legal reason why service from multiple providers cannot be provided through the same wiring as each other, much as service from multiple telephone companies can already be obtained through the same wiring.

Section III(B) also raises the issue of roommates who desire different providers. However, this issue is not unique to academic institutions, as persons sharing housing who are not students could also desire on choice of service provider. Indeed, student roommates share the same occupation (student), approximate age (usually 17-25), and usually gender, so the same service provider should be acceptable to both. Conflict is more likely between roommates who are not students (especially if their occupations require they use different types of services), between parent and child, or between husband and wife. More importantly, there is no reason that two different service providers could not serve the roommates through a wireless technology that would not pose the problems ACUTA imagines. Even if one roommate desired a service that was not available wirelessly, the other roommate could use a wireless technology to avoid the need for duplicate wiring to the room. Additionally, many technologies already require separate wiring or equipment for each user, even if the users share the same provider, making the argument that separate providers would necessarily lead to a need for more additional equipment or wiring, in every case, particularly absurd.

Section IV of ACUTA's comments raise the existence of a variety of differing state rules, policies, and statutes in the various states, in particular varying requirements for service providers to submit bids or proposals. Ironically, this is possibly the strongest reason not to grant the exemption that ACUTA requests. If ACUTA is correct in its statements regarding the present regulatory situation, then service providers must deal with a host of differing state requirements. This alone is sufficient reason for federal preemption, so that more consistent rules may be enacted.

While differing state regulations are often troublesome and confusing, they are especially problematic when applied to student housing. First, students from one state who enroll in a college or university in another state will be unfamiliar with the rules, regulations, and statutes of the latter state, and will not be able to obtain service lawfully if the rules pertaining to service provider selection are not federalized for the seek of consistency. Second, students who are legal residents of one state, but attend a college or university in another state, must use service

providers selected according to the rules, regulations, and statutes enacted by the latter state, but can vote only in the elections of their state of legal residence. They therefore lack the redress available to persons adversely affected by the laws of their own state. Students who find, after waiting 18 years to be old enough to vote, that they are ineligible to vote for or against the persons enacting the laws which they desire or oppose will feel disenfranchised and become disillusioned about government and democracy. Federal protection of a student's right to select a service provider, or at least use a service provider selected by a college or university according to the rules of a government in whose elections the student can participate (either the federal government or the state in which the student can vote) would prevent this.

More importantly, a state cannot grant to any private entity, including a service provider, the exclusive right to engage in interstate commerce with third parties, including individuals, and especially not the exclusive right to provide residents of another state with access to commerce that which is subject to federal regulation (*Gibbons v. Ogden* 22 U.S. 1 (1824)). ACUTA's argument is based on the premise that state laws require that successful bidders be awarded exclusivity. To the extent that such laws require that students be prohibited from privately contracting with another service provider for access to television programs originating in another state, to communications satellites orbiting in space (usually over the equator), or to the Internet, they are unconstitutional, especially if the desired service provider has a federal license to provide the service.

Section IV also raises the issue of problems faced by state institutions. While an interesting topic, this is not unique to colleges and universities. States are often involved in the construction of housing for persons who are not students. These projects range from low income housing constructed (usually with financial assistance from HUD) for persons who otherwise could obtain housing to projects in which states use eminent domain to condemn housing deemed to be "blight" and sell the land to developers who wish to construct luxury housing. The Federal Communications Commission previously found that a state-owned airport was not exempt from the requirements of 47CFR1.4000 to allow a tenant to use a service provider other than the provider granted exclusivity by the agency owning the property (Docket ET 05-247), even if the tenant's activities could interfere with emergency communications. Does ACUTA believe that housing owned by state and local housing authorities and leased to low income families, where safety is less of a concern, should be exempt when airports are not? If an exemption granted for government-owned housing was applied to a municipality (such as Yonkers, NY) that has received a federal court order to build low income housing to remedy past racial discrimination, would denying the residents of this housing (most of whom are not white) legal protections (including protection from exclusive contracts) offered to residents of privately owned housing (most of whom are white) violate the court's order that the municipality ensure that the nonwhites receive housing equivalent to that available to whites? No rational or legal reason exists to provide an exemption to public educational institutions, but not other public institutions, such as housing projects and airports, especially since communications in the aviation industry have historically been assumed to have a greater need for protection from interference than is found in an academic environment, where experimentation is normally encouraged.

The only relevant difference between public educational institutions and other public institutions (including housing projects) is that most public institutions of higher education originated as land-grant colleges. As a matter of law, a grant of the right to build infrastructure upon land and use it for a particular purpose does not automatically convey the right to exclude others from providing service, if that right is not explicitly mentioned in the grant (*Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837)). When the federal government granted states the right to build academic institutions upon certain lands that it had acquired, it could not have foreseen the services that are the subject of this proceeding and therefore could not have explicitly conveyed the right to exclude service providers from privately contracting with students to provide those services. Therefore, as a matter of law, the power to exclude is retained by the original grantor (the federal government) and cannot be transferred, by contract or otherwise, from the academic institution to the exclusive provider, not because of any particular FCC regulation, but simply because the academic institution never acquired the right to

exclude service providers. ACUTA may petition to have this power added to the land grants, but only Congress, not the Federal Communications Commission, can grant such a request.