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 "COMMENTS OF THE INDEPENDENT MULTIFAMILY COMMUNICATIONS COUNCIL (IMCC)"

Due to time constraints and the length of the comments of the IMCC, I have not been able to respond to all the points raised. My selection of certain specific points to address should be taken only as a reflection of these time constraints and not as agreement with the remaining points. In particular, the issues of business size, economies of scale, costs to providers, etc., were raised in the comments of several beneficiaries of exclusive contracts and are addressed in a separate reply that I filed earlier today. The IMCC comments that I have selected to address separately and my replies are:

1. "These contracts are a matter of and result of financial forces in the market place. These private contractual agreements are an outgrowth of the normal economic forces of capitalism." Normal economic forces result in contracts to which all parties subject to the contracts consent. Exclusive contracts restrict tenants without the consent of the tenants. "Normal" economic forces would result in the service provider selected by the tenants, not the landlord, receiving moneys that tenants pay for service.
2. "Bear in mind that MDU owners have as their primary objective to rent units." The primary objective of MDU owners is profit; they have no reason (other than tax laws) to care whether their revenue is received directly from tenants or is received directly from service providers (but ultimately comes from tenants). If an exclusive provider offers more money for exclusivity than the landlord can obtain through rent payments from tenants alone, then the landlord has no financial incentive to rely on rent, when more money can be obtained through payments from providers, who pass the cost onto the tenants. In this way, landlords can use providers a conduit for a greater total transfer of money from tenant to landlord that either competition or local rent control laws allow the landlord to collect directly from the tenant.
3. "To do so residents must be pleased with all services provided in the community, including video and other communications services." I know of no provision of law allowing a tenant to break a lease because of dissatisfaction with a video service provider. Once the tenant signs a lease, the tenant must either pay for the unsatisfactory service or do without service entirely. Even if tenants investigated the quality of video service prior to signing leases (which is unlikely), a tenant has no recourse if a landlord selects an unsatisfactory provider after the tenant signs the lease.

4. "Exclusive contracts provide a value to residents because through that contract there can be negotiation with any provider". This would make sense if tenants were a party to the negotiation. Because only the landlord and the provider need to consent to the exclusive contract, exclusive contracts eliminate the need for either party to negotiate with the tenant.
5. "[R]esidents receive better products and services." Residents receive products and services that are better for the parties who negotiate the contract—the landlord and the service provider—but are not better for the resident.
6. "For instance, one thousand customers have more leverage than a customer in a single family home..." One thousand customers who are free to select a provider have more leverage. One thousand customers who must use only the provider selected by their landlord have none.
7. "For this system to function there must be alternative providers". This is exactly correct. Because of exclusive contracts, tenants have no alternative to the provider who the landlord selects, and the system of competition does not function.
8. "A related fact is that franchised cable and the RBOCs/telcos are able to buy programming at rates far less than PCOs can acquire the same programming." If this is true, tenants should be permitted to obtain their programming through the providers with lower costs, instead of being forced by exclusive contracts to obtain their programming from providers whose higher costs result in higher prices for the consumer.
9. "A single resident can demand virtually nothing in terms of enhanced services or pricing discounts, but a thousand residents in an MDU complex can." A thousand residents of a non-exclusive MDU can. A thousand, or a million, residents of an exclusive MDU can demand nothing without the cooperation of the property owner. Although little, "virtually nothing" is still more than nothing.
10. "[T]he residents of the MDU must have a credible claim that they will take service from a competitive MVPD." This is precisely what they cannot do because the competitive MVPD is barred by the exclusive contract.
11. "Each provider presents potential benefits to these residents and the Commission should not intervene in a way that would intentionally or inadvertently determine what the marketplace will determine on its own." Neither should landlords "intervene in a way that would intentionally or inadvertently determine what the marketplace will determine on its own." The Federal Communications Commission should, however, intervene to ensure the marketplace composed of residents, not landlords, can determine which providers to use.
12. "The Supreme Court has defined market power as 'the power to control prices or exclude competition.' The FCC has characterized market power as `the ability to restrict output or raise price over what would

prevail in a competitive market, and maintain it over time.' In other words, market power is "the power to raise prices without losing so many sales that the price increase is unprofitable." These are precisely the powers that exclusive contract holders have over tenants. Indeed, exclusive contract holders can raise prices without losing any sales. Market power is absolute when customers lack the option to respond to price increases by selecting another provider. This is precisely the option that exclusive contracts eliminate.

13. "Thus, Justice Frankfurter wrote in 1949 that exclusive dealing arrangements,

    …may well be of economic advantage to buyers as well as sellers," Justice Frankfurter was presumably referring to exclusive contracts to which both buyers and sellers consent. This proceeding involves exclusive contracts between sellers and the landlords of buyers, without the consent of the buyers themselves. This distinction—lack of consent of the buyer—fundamentally distinguishes exclusive contracts between landlords and sellers from the contracts considered by Justice Frankfurter.
14. "In order for an exclusive contract to have an anti-competitive effect, there must be third parties who are negatively affected by the contract, but not present in the bargaining leading to the formation of the contract." This is precisely the case here. The tenants are "third parties who are negatively affected by the contract, but not present in the bargaining leading to the formation of the contract [between provider and landlord]."
15. "In a competitive market, where consumers, and their landlord proxies…" Landlords are not "proxies" for tenants. Landlords and tenants have competing interests. Since the provider will not agree to lose money, there is an inherent correlation between the amount paid by the provider to the landlords and the amount that tenants are charged by the provider. It is in the landlord's interest to maximize these amounts. It is in the tenants' interest to minimize these amounts. These are competing, perhaps even adversarial, interests.
16. " `We find that almost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers.' " The key word here is "almost". All, except those subject to exclusive contracts or technical limitations, have these options. Those subject to exclusive contracts have only whichever one option is not excluded.
17. "[W]hen, as a result of competitive bidding, one of those vendors is awarded an exclusive contract of limited term, this generally means that that provider was willing to offer supercompetitive service to residents at superior prices." When, as a result of competitive bidding, one of these vendors is awarded an exclusive contract of limited term, this generally means that that provider was willing to offer higher

payments to the landlord, and will need to charge residents higher prices in order to recover the cost of the payments to the landlord. The providers who offer superior service to residents or lower prices will prevail only if the residents select the provider.