

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

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

**REPLY COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

USTelecom is pleased to submit its reply comments regarding the use of exclusive contracts for the provision of video services to multiple dwelling units (“MDUs”) or other real estate developments.¹ As the Federal Communications Commission (“Commission”) correctly notes in its NPRM, and the United States Telecom Association (USTelecom)² emphasized in its comments,³ this proceeding is as much about broadband deployment, as it is about video programming choice.⁴

The extensive record in this proceeding highlights two important points. First, as wireline entrants commence their entry into the video marketplace, many are discovering extensive barriers to entry in the form of exclusive contracts in MDUs. These exclusive contracts are forestalling entry throughout the country, thereby diminishing effective competition

¹ These comments are submitted in response to *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51 (March 27, 2007) (NPRM).

² USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

³ *Comments of the United States Telecom Association*, MB Docket No. 07-51 (July 2, 2007) (USTelecom Comments).

⁴ NPRM, ¶1 (noting that “for many participants in the marketplace, the ability to offer video to consumers and the ability to deploy broadband networks rapidly are linked intrinsically.”).

to entrenched cable incumbents while depriving consumers of increased choices in voice, video and advanced broadband services.⁵

Second, and perhaps most troubling, there is evidence to suggest that many of these agreements are being entered into with the intended purpose of preventing new video entry by telecom providers in MDU markets throughout the country. In particular, the record reflects that cable incumbents are locking up consumers residing in MDUs in direct response to the onset of competition from new wireline video entrants. Taken together, there is sufficient evidence for the Commission to conclude that exclusive contracts in the MDU environment are unreasonably impeding the achievement of the interrelated federal goals of enhanced multichannel video program competition and accelerated broadband deployment.

This is a crucial moment for the Commission in its constructive efforts to introduce additional wireline competition into the multichannel video program distribution (MVPD) market. Unless it acts quickly to address the anti-competitive effect of exclusive access contracts, large numbers of residents in MDUs – up to one third of the population – will be denied the benefits that flow from effective video competition: lower prices, improved services and increased broadband deployment. The situation is made all the more dire when one considers the fact that that the number of MDUs is growing “at a much faster rate than the number of single family dwellings.”⁶

⁵ USTelecom’s comments in this proceeding do not address the use of exclusive marketing agreements in MDUs. Exclusive marketing agreements can be beneficial in a competitive MDU environment, and should not be confused with exclusive access agreements which bar competitive entry.

⁶ *Comments of AT&T, Inc.*, MB Docket No. 07-51, p. 7 (July 2, 2007) (*AT&T Comments*).

I. EXCLUSIVE CONTRACTS IN THE MDU MARKET ARE A WIDESPREAD BARRIER FACING NEW, WIRELINE ENTRANTS.

Numerous commenters in this proceeding correctly note that this is a critical time in the marketplace for video services. Throughout the country in markets large and small, rural and urban, new wireline providers are entering the video market with a full array of new products and services utilizing advanced technologies. Unfortunately, new entrants in many of these markets are unable to offer their competitive services to large pockets of consumers residing in MDUs.

Despite the fact that many of these exclusive agreements are either subject to confidentiality provisions that forbid their disclosure⁷ or MDU owners are unaware of their existence,⁸ there is convincing evidence of their widespread existence.⁹ The record reflects that these contracts exist in numerous states, including those with the largest populations, California, Texas and Florida.

For example, SureWest Communications (SureWest) – a relatively new entrant to the MVPD service market in California – demonstrated that almost one third of its MDU market is affirmatively sealed off from competition by exclusive contracts.¹⁰ When SureWest includes MDUs whose status *vis a vis* exclusive service contracts cannot be verified, it found that the number may be as high as almost sixty percent.¹¹ SureWest concludes that such contracts “constitute significant barriers to entry” and “greatly impede competition in the MVPD

⁷ See e.g. *Comments of Verizon Communications, Inc.*, MB Docket No. 07-51, p. 9 (July 2, 2007) (*Verizon Comments*) (stating that “in many other cases, owners are unable (due to confidentiality provisions in their existing agreements) or unwilling to disclose that their property is subject to an exclusive access agreement.”).

⁸ *Verizon Comments*, p. 8.

⁹ CITE COMMENTS.

¹⁰ *Comments of SureWest Communications*, MB Docket No. 07-51, p. 3 (July 2, 2007) (*SureWest Comments*).

¹¹ *SureWest Comments*, p. 3.

market.”¹² Since the Commission has already concluded that the rapid deployment of broadband networks is “intrinsically linked to the ability to offer video to consumers,”¹³ SureWest’s conclusion that these contracts “discourage” investment in and deployment of broadband networks cannot be ignored.

Indeed, SureWest has one of the most extensive FTTH networks in the country, offering residential-end business users broadband speeds up to 60 Mbps – far greater than available from cable competitors. But this technology is being denied to residents of MDUs with exclusive access agreements.

Other new video entrants report similar findings in their respective service territories. Verizon has encountered the negative effects of these agreements in California, Florida, Texas, Virginia, and Maryland.¹⁴ Indeed, the company has “uncovered or been informed of exclusive access agreements covering scores of properties with tens of thousands of units in five separate states.”¹⁵ For its part, AT&T has encountered similar contractual barriers throughout its

¹² *SureWest Comments*, p. 3.

¹³ Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd. 5101, Statement of Chairman Kevin J. Martin (2006) (*Franchising Reform Order*). See also *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2659 (2006) (*Twelfth Annual Report*), Statement of Commissioner Jonathan S. Adelstein (“Of particular significance is the entry of some of the largest local exchange companies into the video marketplace. LECs are upgrading their facilities to fiber-based platforms in many areas of the country so that these carriers can offer a suite of video, voice and data services. This investment could bring the most substantial new competition into the video marketplace that this country has ever seen. Equally significant is the potential for this new revenue stream to drive broadband deployment, which can benefit consumers and the free flow of information beyond the video marketplace.”); Comments of AT&T Inc., MB Docket No. 06-189, at 6 (filed Nov. 29, 2006) (“[I]t is an indisputable fact that, ‘for all competitors in the marketplace, the abilities to offer video to consumers and to deploy broadband networks rapidly are linked intrinsically.’ Old distinctions between ‘telephony,’ video,’ and ‘data’ services are rapidly eroding. . . Such convergence over broadband networks promises increased facilities-based competition – and thus greater innovation and consumer choice – in the video markets that historically have seen only limited competition.”) (footnote omitted).

¹⁴ *Verizon Comments*, pp. 10 – 12.

¹⁵ *Verizon Comments*, p. 12.

operating territory, including in California, Texas and “virtually every market where AT&T has begun to enter the video service market.”¹⁶

The record also contains evidence of the disproportionate impact that such contracts can have in smaller, rural markets. Embarq, which is generally the Carrier of Last Resort (COLR) throughout its territory, notes that network expansion can be hindered by exclusive access agreements since they deprive the company of the ability to deploy video – a key broadband driver – with its voice services in MDUs subject to such agreements.¹⁷ While this same economic rationale applies in non-COLR markets, it is particularly acute in those smaller, rural areas subject to COLR regulation.

Ultimately, consumers residing in MDUs subject to such exclusive agreements – regardless of market – lose the multitude of benefits that result from a truly competitive video market. The only benefactors of these exclusive access agreements are the incumbent cable operators who are increasingly seeking them out as new video providers commence their entry into the MVPD market.

II. EXCLUSIVE CONTRACTS ARE BEING USED IN AN ANTICOMPETITIVE MANNER BY CABLE INCUMBENTS TO IMPEDE THE ENTRY OF WIRELINE COMPETITORS

When the Commission first addressed the problem of exclusive access agreements in 1997, it recognized that exclusive access agreements with MDUs “can be pro-competitive or

¹⁶ *AT&T Comments*, p. 10.

¹⁷ Comments of Embarq, MB Docket No. 07-51, p. 6 (July 2, 2007) (noting that “without the opportunity to gain additional revenues from video and data and without a monopoly, rate regulated environment to help spread the cost of serving one particular area, facilities for just voice COLR obligations becomes an uneconomic obligation.”).

anti-competitive, depending upon the circumstances involved.”¹⁸ Numerous parties in this proceeding, however, have offered ample evidence that strongly supports the conclusion that these agreements are being utilized by cable incumbents in anti-competitive manner. Rather than being used to more efficiently deploy services, they are instead being used to forestall competition from nascent wireline video competitors.

The record in this proceeding is blanketed with accounts of the same troubling story. Prior to the onset of competition from a new wireline video entrant in a particular market – usually following franchise approval – cable incumbents are aggressively pursuing exclusive access agreements in order to “lock up consumers” within the relevant market. In a last ditch effort to fortify their already entrenched competitive position, cable incumbents are depriving consumers of the benefits from wireline video competition through execution of such agreements.¹⁹ Comments from the City of Lafayette in this proceeding are illustrative. In their local government role, the city has observed that:

Incumbent providers commonly engage in a flurry of activity to lock up MDUs and other real estate developments in exclusive arrangements as soon as it becomes clear that a new entrant will be coming to town. Incumbents do not necessarily wait to negotiate new contracts until a new provider begins franchise negotiations. Rather, the incumbents start as soon as they are certain that the new provider will be entering the market.²⁰

Such tactics are becoming increasingly common in numerous markets throughout the country. Verizon noted that in the Tampa Florida market, the local cable incumbent had entered into a fifteen year exclusive contract which had been executed “just two weeks before Verizon

¹⁸ *NPRM*, ¶2 (citing *Telecommunication Services, Inside Wiring Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, 3778 (1997)).

¹⁹ *AT&T Comments*, p. 9. See also *Verizon Comments*, p. 11.

²⁰ *Comments of Lafayette Utilities System*, MB Docket No. 07-51, p. 9 (July 2, 2007).

began to offer FiOS service in the area.”²¹ Additional contracts by the same cable incumbent executed in the same time frame were soon discovered, leading Verizon to appropriately conclude that “[t]he timing of these agreements is almost certainly not coincidental.”²² And it is not an isolated incident.

Other companies entering the MVPD market report identical tactics. For example, AT&T reports that as it was preparing to enter the San Francisco, California market, the local cable incumbent – Comcast – was busy attempting to get MDU owners to agree to “10-year contracts that would grant the [incumbent] cable giant an exclusive right to provide tenants with all broadband services.”²³

Despite the fact that the Commission’s recently enacted pro-competitive policies have made the market fertile for competition to flourish, incumbents are entering into an increasing number of exclusive contracts in direct response to this competition. As a result, the Commission’s long awaited goal of facility-based competition in the video marketplace is being mired down in the significant – and growing – MDU market. The pervasiveness of these agreements, combined with their anti-competitive application by cable incumbents, threaten to deprive consumers residing in MDUs of all the benefits of increased competition: lower prices, improved services, increased choice and greater broadband availability.

III. CONCLUSION

The record in this proceeding demonstrates the urgent need for decisive Commission action to address the negative implications of exclusive contracts in MDUs. Cable incumbents are using these exclusive contracts not for any public interest benefit, but rather to forestall the

²¹ *Verizon Comments*, p. 10.

²² *Verizon Comments*, p. 10.

²³ *AT&T Comments*, p. 10

nascent competition posed by entering telecom video providers. These anti-competitive agreements forestall the deployment of broadband services and increased competition to consumers residing in MDUs, ultimately resulting in fewer choices for consumers and less competition.

Respectfully submitted,

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