

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
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 Report and Order and Further 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 07-189, released November 13, 2007 (“FNPRM”).

OpenBand rejects allegations that “bulk billing” arrangements for video services are anti-competitive, and opposes proposals that they be prohibited or restricted. Rather, in the developing broadband market, most bulk billing arrangements are carefully negotiated bargains between emerging broadband service providers and community associations that provide, at discounts, the specific packages of cutting-edge broadband services (including voice, data, video, Internet access, home security and automation services) desired by association members. These arrangements significantly enhance consumer welfare without adversely impacting video competition, and should not be prohibited, limited or otherwise interfered with by the Commission. At the very minimum, the Commission should exempt small service providers (for example, those serving less than 50,000 video customers) from any bulk billing prohibitions and restrictions it may adopt.

OpenBand

OpenBand, a wholly-owned subsidiary of M.C. Dean, Inc. headquartered in Dulles, Virginia, markets, designs, constructs and operates custom fiber-to-the-premises¹ networks known as Smart Neighborhoods™ that serve planned communities. Smart Neighborhoods™ are high-capacity, community-wide broadband networks that provide integrated voice, data, video, Internet, home security, home automation, and home entertainment services. OpenBand's always-on Glass Mile™ Internet access delivers bi-directional transmission speeds of up to 100 megabits per second ("Mbps")² to customer residences for traditional and premium services. This quality of service is unequalled in Loudoun County, Virginia (where OpenBand serves the Lansdowne on the Potomac, Lansdowne Town Center and the Southern Walk at Broadlands planned communities), as well as most other existing U.S. broadband markets.

OpenBand serves its existing planned communities pursuant to service agreements with their community associations. Each of these service agreements contains negotiated provisions that require OpenBand to furnish a particular package of voice, data, video and Internet services, and that permit OpenBand to bulk bill the community association for its service package at discounted rates. OpenBand, the community associations and the individual residential customers have all benefited from these service packages, bulk billing arrangements and rate discounts. OpenBand is able to give each planned community the package of services it desires at a discount (benchmarked against the rates of the competitors in this local market) because the

¹ OpenBand will use the term "Fiber-to-the-Premises ("FTTP")" interchangeably in these comments with the more familiar term "Fiber-to-the-Home ("FTTH")." Because the planned communities served by OpenBand contain a mixture of detached and attached homes and because OpenBand has installed fiber inside residential structures during their construction, OpenBand employs the term FTTP to describe its residential fiber facilities.

² 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 (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.

common package and bulk billing arrangement permit OpenBand to reduce its marketing, billing, collection, record keeping, programming acquisition, and related operating costs.

Community Associations Have A Proven Record of Advancing Consumer Welfare

Community associations (also known as homeowners' associations) have been one of the great and continuing success stories of democracy and consumer welfare. They are comprised of the owners of the residential properties in a planned community, condominium, cooperative or similar development. Generally, community associations are governed by resident boards of directors. However, they are sufficiently small and local that any and all interested residents can be heard and make their needs and preferences known as board members, board candidates, committee members, meeting participants and/or voters.

Community associations are responsible for managing common areas, preserving property values, and protecting the safety and welfare of residents. Among other things, they may arrange for the maintenance and operation of recreational facilities, enforce architectural, aesthetic and other covenants, and negotiate and administer contracts for utilities, security services, garbage disposal, landscaping and maintenance. Because they must determine and collect periodic assessments from members to support their activities, community associations pay very close attention to their contracts, budgets and expenditures.

In the context of this proceeding, community associations are important because they are accurate ascertainers of member desires and effective agents for increasing the consumer welfare of their members. Community association boards (the body most familiar with the needs and interests of association members) negotiate, administer and renegotiate broadband service contracts. Because the community association typically represents hundreds or thousands of residential customers, it can negotiate more favorable services, prices and other contract terms

with potential service providers than its members would ever be able to obtain individually. Since the community association's board must answer to its members, the community association has both the capability and the incentive to closely monitor its broadband service contracts to ensure that service quality is maintained and appropriate value is obtained for the cost of the services.

OpenBand does not believe that the Communications Act can be read reasonably to give the Commission statutory jurisdiction (under Sections 628 or 653 of the Act) or ancillary jurisdiction to prohibit, limit or modify provisions in contracts freely and fairly negotiated between service providers and community associations. More important, even if it had such jurisdiction, OpenBand does not understand why the Commission would want to interfere with the substantial existing and future consumer welfare benefits negotiated and obtained by community associations for their members.

**Prohibition or Limitation of Bulk Billing Arrangements
Will Destroy Existing Broadband Packages and Discounted Rates**

OpenBand presently has agreements with three community associations to provide particular packages of broadband services to their members. Each broadband package consists of a unique mix of voice, data, video and Internet services that is desired by the community association. Each particular package has been competitively bid, and the price discounted based on the rates offered by competitors in the local market. These service agreements also require OpenBand to present, to each association, an annual analysis of its broadband service package components and discounted pricing in the current telecommunications marketplace and make the necessary service and pricing adjustments to maintain the contracted service quality and value. This level of provider accountability is unique to such service arrangements. When these current

service agreements approach the end of their initial terms, they will likely be re-bid, giving competitors another opportunity to offer such competitive terms and serve these customers.

At the present time, the discounted prices for OpenBand's broadband packages are premised upon its bulk delivery and bulk billing arrangements with the community associations. Because of its small size (less than 10,000 broadband customers overall), OpenBand is not able to achieve substantial economies of scale and scope with respect to its overall operating expenses, nor to obtain significant volume discounts from content providers and other vendors. Consequently, the only areas where OpenBand can realize the cost savings necessary to support its package price discounts are the bulk-delivery license fees offered by programming providers and the operations sector of its business – in particular, its variable costs for billing, collection, record keeping, accounting and marketing. By bulk billing each community association for the common package of broadband services provided to its members, OpenBand is able to avoid the risks, costs and cash flow impacts of late payments, bad checks and uncollectable accounts, and save certain accounting and administrative expenses which would result from managing individual service agreements with each customer.

If the Commission were to prohibit bulk billing arrangements, the basis for OpenBand's discounts for its broadband service packages would be eliminated. With increased operating and underlying cost of goods sold ("COGS") expenses, OpenBand would have no choice but to establish higher prices to reflect the changed business conditions.

OpenBand notes that a prohibition of bulk billing arrangements for video services will have an immediate and adverse impact on its integrated packages of broadband voice, video and Internet services. Any required video service changes will force changes in the acquisition of programming, in the billing and collection arrangements for the entire package of services, and

in the marketing operations, which will result in price increases for the broadband services offered.

Bulk Billing Arrangements Do Not Impair Competition

Elimination of bulk billing arrangements will override the efforts of community associations to obtain cutting-edge broadband services for their members at discounted prices, without increasing competition in this local market.

Now that exclusive contracts have been prohibited, incumbent local exchange carriers (“ILECs”) and cable television multiple system operators (“MSOs”) have more than sufficient resources to extend their networks to serve planned communities and other multiple dwelling unit (“MDU”) developments. They also have the name recognition and economies of scope and scale to compete effectively in these markets. The ILECs and MSOs do not need the competitive playing field to be tilted any further in their favor, or any more against small emerging competitors such as OpenBand.

What OpenBand and similar companies bring to the marketplace are nascent ideas, services and technologies that are not implemented by larger companies (such as competing ILECs and MSOs in Loudoun County) because they do not want to provide better services to one group of customers within a local market, and/or they do not want to invest the amount of money necessary to upgrade their services on a broader scale. For example, OpenBand’s always-on Glass Mile™ Internet access delivers 100 Mbps transmission speeds in each direction to its customers, a quality of service that is unequalled in most of the nation’s residential markets. OpenBand is willing to customize a unique set of services for a buyer which greatly exceeds the capabilities offered by the ILECs and MSOs, and can offer a discount if the services are acquired

in bulk because its operating expenses and COGS are lower than with the traditional approach of individual customer service agreements.

Hence, if OpenBand is forced to cease bulk marketing and billing, the residents of the planned communities that it currently serves, or may serve in the future, are not likely to experience any increased competition or consumer benefit. Rather, with the elimination of bulk billing arrangements, this group of consumers will have access to the same high-speed OpenBand broadband package and the same lower-speed ILEC and MSO CATV service offerings available today, but without the bulk discount.

If allowed to continue along their present paths, OpenBand and similar emerging companies will have a significant and beneficial impact upon the development of competition. By installing new and higher-speed technologies and offering new combinations of existing and advanced services marketed to larger groups of consumers, they function as useful laboratories for determining the technologies, transmission speeds and services that will prove successful in various developing telecommunications markets and market segments. Their successes, failures and operating experiences will ultimately prove very useful to regulatory agencies and service providers of all sizes and types, as they endeavor to react efficiently and effectively to ongoing changes in telecommunications markets.

Small Operators Should Be Exempted

While the Commission should not prohibit any existing bulk billing arrangements freely negotiated and entered into by community associations and service providers, if the Commission determines to prohibit bulk billing arrangements moving forward, it should do so only with respect to service providers that are large enough to affect competition in the national and regional markets.

In Section 76.901 of its Rules, the Commission has defined a “small cable company” as a provider that serves 400,000 or fewer subscribers on one or more separate cable systems (Section 76.901(e)). It has also defined a “small cable system” as a separate cable system that serves 15,000 or fewer subscribers (Section 76.901(c)).

OpenBand proposes that the Commission exempt small providers of video services that have fewer than 50,000 customers in the aggregate and fewer than 10,000 customers in any particular planned community from any bulk billing prohibition it may adopt. These ceilings are significantly lower than the existing Commission standards for small cable companies and small cable systems. This exemption is justified because small companies lack market power, and are not capable of excluding ILECs or MSOs from, or otherwise impairing video or broadband competition in, significant portions of cable television franchise and market areas like Loudoun County, Virginia.

A small operator exemption of this sort will enable emerging and developing broadband service providers to negotiate and employ bulk billing and other mutually advantageous arrangements with community associations so that they can provide the residents of particular developments with cutting-edge broadband networks and services at discounted prices. Where successful, these small localized companies will increase broadband penetration, improve broadband service, advance technology, and enhance long-term broadband competition, which will collectively advance consumer welfare.

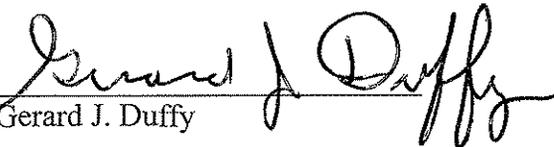
Conclusion

Bulk billing arrangements are mutually beneficial devices negotiated by broadband service providers and community associations to reduce the service provider’s operating costs in return for substantial pricing discounts on the service packages desired by association members.

These arrangements significantly enhance consumer benefits without impairing competition. In fact, by enabling community associations to obtain new and advanced broadband services for their members, bulk billing arrangements help to increase service options and quality as well as long-run competition.

The Commission is respectfully requested to reject requests for the prohibition of bulk billing arrangements. In the alternative, the Commission is requested to exempt small providers of video services that have fewer than 50,000 customers in the aggregate and fewer than 10,000 customers in any particular planned community from any prohibitions or limitations it might impose.

Respectfully submitted,
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