Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 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

To the Commission:

COMMENTS OF
MARCO ISLAND CABLE

Marco Island Cable (MIC) applauds the Commission for prohibiting explicit "building exclusivity clauses" at multiple dwelling units and other real estate developments (collectively "MDUs").[1] This is an important first step, but it is not alone sufficient to enable the Commission to meet its stated pro-competitive goals for MDUs. As confirmed by the startling series of internal Comcast emails quoted below, major incumbent cable operators can and will circumvent anything but a clear, unequivocal, and comprehensive general ban on all forms of exclusivity at MDUs.

MIC also urges the Commission not to shy away from making critical distinctions on which the success or failure of competition at MDUs may depend. For many years, the Commission has recognized that exclusivity can be anti-competitive when entrenched incumbents use it to keep new entrants out and pro-competitive when new entrants use it gain footholds in markets that would otherwise be foreclosed to them. In the past, however, the

[1] *In the Matter Of Exclusive Service Contracts For Provision Of Video Services In Multiple Dwelling Units And Other Real Estate Developments; Report and Order and Further Notice of Proposed Rulemaking*, MB Dkt. No. 07-51, FCC 07-179, 2007 WL 3353544 (F.C.C.) ("*November 13 Decision*").

Commission failed to take any concrete action, finding that the record did not contain sufficient evidence to support a single "one-size-fits-all" rule.

Now, the record contains ample support for the Commission to prohibit incumbents from engaging in all forms of exclusivity while affording new entrants more flexibility. In particular, as the Commission focuses on whether to apply its rules on exclusivity to Digital Broadcast Satellite ("DBS") providers and Private Cable Operators ("PCOs"), the Commission should bear in mind that Small Cable Operators ("SCOs")[2] and PCOs are similarly-situated in most respects, and they also compete with each other. MIC submits that the best way for the Commission to foster competition at MDUs and at the same time maintain a level playing field for PCOs and SCOs is to grant both groups a time-limited exemption from the Commission's exclusivity rules. The Commission should certainly not impose restrictions on SCOs and not also on PCOs.

Robert Pepper, former Chief of the FCC Office of Policy and Planning, once characterized asymmetric regulation as follows:

> There are two kinds of asymmetric regulation. One is where you have firms that are similarly situated and treated differently. That is a bad thing; it leads to all kinds of distortions. *Likewise, if you have two firms that are not similarly situated and are radically different in their circumstances, but you treat them the same, that also leads to all kinds of distortions*.[3]

MIC submits that the major incumbent cable operators are so dissimilar from small new entrants like MIC that to treat them the same is fundamentally discriminatory. In its Report &

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2 The Commission's rules define a "Small Cable Operator" as one serving 400,000 or fewer subscribers nationwide. 47 C.F.R. § 76.901(e). This equates to approximately $100,000,000 in annual revenues. *In re Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393, 7408 (1995).

3 R. Pepper, *Policy Changes Necessary to Meet Internet Development*, 2001 L. Rev. M.S.U.-D.C.L. 255, 257 (emphasis added).

Order, the Commission has shown that it is serious about promoting competitions at MDUs. It should now draw the important distinctions that are essential to fulfilling its goals.

I. BACKGROUND AND PRELIMINARY STATEMENT

MIC is a small franchised cable operator that provides cable service, broadband, and voice service (currently in final testing) in competition with Comcast on Marco Island, Florida. MIC will soon be expanding to the mainland of Collier County, Florida.

In 1993, MIC began to provide cable service to a single condominium on Marco Island as a Satellite Master Antenna Television ("SMATV") system – that is, as a PCO. As its business grew, MIC found it necessary to build a wireline system that crossed public rights of way, so it obtained a cable franchise from Collier County (and the City of Marco Island) and became a SCO. As MIC's system expanded, it often used satellite or microwave facilities to transmit its signals to the MDUs until its outside wireline distribution system reached them. In all respects, and particularly with respect to inside wiring, MIC dealt with MDUs in exactly the same way.

From 1993 through 2001, MIC achieved great success in competition with Comcast's predecessors. MIC's success was attributable to the following factors: (1) it charged substantially lower prices for similar or even better services than those offered by Comcast's predecessors; (2) it developed an excellent reputation for highly responsive customer service; (3) it was one of the first cable companies in the United States to offer digital service and was the first on Marco Island (by two years) to offer high speed Internet access; (4) it engaged in aggressive marketing; and (5) it was favored by many MDUs that wanted to deal with a responsive local business rather than a large, remote corporation.

MIC's business grew particularly rapidly from 1997 to 2001, when Comcast's predecessor MediaOne was the incumbent cable operator. As a former MediaOne executive would later testify in MIC's suit against Comcast, described in greater detail below, MediaOne did not attempt to use control of inside wiring as a competitive weapon against MIC because it believed that doing so would be unlawful.

In 2001, upon acquiring the MediaOne franchise (through AT&T), Comcast began to engage in a broad range of anticompetitive activities. These included claiming to own inside wiring that it did not own and did not treat as owned for personal property tax purposes; invoking the FCC's inside wiring rules in situations in which Comcast, itself, believed that the rules did not apply; misrepresenting the rules to justify charging MDU owners exorbitant rates; threatening to remove inside wiring from MDUs that did business with MIC; using exclusive contracts that explicitly barred MDUs from doing business with Comcast's competitors; insisting on the right to leave its facilities in place for up to six months after its right to serve an MDU had ended (which could result in a service gap of up to nine months if an MDU did not renew its service agreement with Comcast); inserting clauses in its agreements with MDUs suggesting that Comcast had installed inside wiring when in fact it had not; entering into "right of entry" agreements that gave Comcast the exclusive right of access to critical MDU facilities for up to a year beyond Comcast's service agreement (which gave MDUs the choice of either renewing their service agreements or paying much higher rates for services on an individually-billed basis); and routinely using exclusive take-or-pay bulk service agreements.

Through these practices, Comcast caused MIC's growth on Marco Island to flatten. Comcast also frustrated MIC's plans to expand to the mainland of Collier County, where, in the absence of any meaningful competition, Comcast was charging prices far higher than it could charge on Marco Island in head-to-head competition with MIC.

In 2004, MIC brought suit against Comcast to challenge its unfair, deceptive, and anticompetitive trade practices. In July 2006, following a nine-day trial, a federal jury found that Comcast's practices violated the Florida Deceptive and Unfair Trade Practices Act, and it awarded MIC money damages of $3,268,392. The trial judge subsequently reduced the damages to $800,000 and entered final judgment in MIC's favor. Comcast has appealed the judgment to the U.S. Court of Appeals for the Eleventh Circuit. The parties have completed their briefing and are awaiting oral argument.

The record of the Marco Island litigation provides the Commission an extraordinary opportunity to go beyond written comments and examine what America's largest cable company actually does in the field and what its executives say about these practices to each other behind closed doors. The trial record can therefore provide the Commission valuable background information for the purposes of this proceeding.

The string of internal Comcast emails referred to above is particularly instructive.[4] The first of these emails was a cover note from a Comcast account executive to her supervisor, the head of Comcast's district office in Southwest Florida, forwarding a draft of an agreement between Comcast and the developer of three ultra-high-end properties in Collier County – Hammock Bay, Veracruz, and Belize. The draft gave Comcast a non-exclusive right to provide cable service at these properties for 20 years and an exclusive right to use the owner's inside wiring throughout the 20-year term of the non-exclusive service agreement:

[4] Because Comcast designated the emails as "business secret," they are subject to a protective order that precludes MIC from submitting copies to the Commission. Attachment A. The protective order does, however, allow MIC to submit the portions of the trial transcript in which these documents were discussed in open court as well as briefs that summarize them. MIC is appending these materials as Attachments B and C.

> Here is the Hammock Bay Agreement modified at your request to state that Comcast has the 'exclusive right' to use the Owner's internal wiring. You'll notice, redlined, that I had to remove some other language that again referred to our non-exclusive right. Once you get the okays from Comcast if you want to call [the attorney for the developer] together to see if he is okay with this change for Veracruz and Belize we can do it together. Thanx.

The district manager immediately sent an email to Comcast's regional vice president. In full, and with our emphasis added, the email read as follows:

> Terese, here is the Hammock Bay agreement with a couple of changes. *If we include language that gives us the exclusive right to utilize the system during the term of the agreement then I believe that we are safe from Marco Island Cable.* So we don't have to start from scratch we could use this template for the two Marco Island properties. We can add this to our Monday stuff, we are meeting at 9 at a team and 10 is our conference call.

The regional vice president promptly responded, "That sounds like a plan." The account executive then went forward with the negotiations on the draft agreement, including the exclusive wiring provision.

A few weeks later, Comcast's account executive sent another email to both the district manager and the regional vice president, forwarding copies of signed agreements for the Veracruz and Belize properties. Given the importance of the exclusive wiring provisions in these agreements to Comcast, the district manager was thrilled that the developer's attorneys had not proposed any changes: "What's really good is that they either did not catch or did not care that we asked to be granted the right to use their internal wiring for the term of the 20-year non-exclusive agreement!"

Shortly after receiving the account executive's email, the regional vice president responded with delight at the "Great news." With the exclusive right to use the inside wiring at these properties now in hand, the vice president observed, "Let's scratch these two off our list of "At Risk" projects we were working on." She also warned the account executive to act quickly to prevent MIC from obtaining access to the inside wiring. "If we inadvertently let him [MIC's Bill Gaston] slip in and start using the wiring it will be very difficult to get him out without a major court battle."

In her response, the account executive assured the regional vice president that she would indeed act quickly. She then added,

> I think as long as it's fair (Marco fair) we won't have to go lower than what we want to for 2004 (unlike some of the win backs we're trying to get) because we have a brand new contract to show them that gives us exclusive wiring usage. Thanx.

Taken together, these emails unmistakably reveal that Comcast understood that its exclusive wiring clauses would make it impossible for MIC to compete at the properties at issue, that this would enable Comcast to charge higher prices than it was getting in head-to-head competition with MIC, and that Comcast could safely agree to non-exclusivity in providing services without diminishing its ability to achieve its anticompetitive ends. This is compelling evidence that Comcast can and will circumvent any rule, no matter how clear and iron-clad, that only addresses exclusive service arrangements and does not also prohibit exclusive arrangements of other kinds.[5]

[5] These practices are described in detail in one of MIC's post-trial briefs, Attachment D hereto. In that brief, MIC that Comcast's practices did not merely violate the Florida Deceptive and Unfair Trade Practices Act (FDUTP), but also Fla. Stat. § 718.1232, which gives residents of condominiums a right to choose their cable operator. While upholding the jury's verdict the FDUTPA, the district court denied MIC's claim under Section 718.1232, finding, among other things, that MIC did not have standing under that provision. Attachment E. The Commission, of course, is not bound by Florida law and should declare the practices in question unlawful under federal law.

As it happens, Comcast was not aware at the time of the negotiations in question that the developer, seeking to facilitate cable and broadband competition at its three high-end properties, had installed two completely independent sets of inside wiring in each. Thus, Comcast‘s belief that its wiring exclusivity would keep it "safe from Marco Island Cable" for 20 years turned out to be illusory.

Of course, as the Commission knows, most MDUs in the United States have only a single set of inside wiring, and the cost of installing a second set of wiring would generally be prohibitive. Furthermore, few MDU owners would allow potential competitors to mount such a disruptive undertaking.

In its recent *Sheet Rock Order*, which involved far less burdensome and costly activities, the Commission found,

> We conclude that the refusal of MDU owners to permit competitive providers to cut into sheet rock walls attests to the significance of the work involved. The Commission asked if it is likely that many MDU owners and managers would not allow new service providers to cut, open, spackle, sand, and paint or replace wallpaper or other finishings on the common walls and ceilings on each floor of their MDUs in order for installers to complete their work. The majority of commenters agree that competition from new service providers in MDUs is impeded because MDU owners and managers do not want new providers on the premises cutting and repairing sheet rock because it causes damage to a preexisting structural element in the building and the process is disruptive to building residents.
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> …
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> Verizon argues that meaningful competition for cable services for millions of Americans living in MDUs is inhibited because MDU owners and residents consider cutting and repairing sheet rock a significant inconvenience and new entrants are placed at a competitive disadvantage.
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> …
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> [A]s Verizon and other commenters note, the cost of repairing sheet rock can often include repainting and re-wallpapering entire walls or ceilings. Although we do not have specific quotes for restoration work, it seems likely that repainting and/or re-wallpapering entire ceilings and walls can, at a minimum, run into the hundreds of dollars, particularly for more high-end MDUs that use more

> expensive surface finishes. These figures appear significant, especially when compared to the estimates we received for accessing wiring behind hallway molding.[6]

If new entrants cannot reasonably be asked to cut and repair sheet rock, it would be utterly unreasonable to require them to bear the much greater burden and cost of rewiring entire buildings, particularly in the face of all but certain opposition from MDU owners.

In short, MIC's experience suggests that it would be virtually impossible for the Commission to devise an effective rule that dealt individually with every form of exclusivity that incumbents are currently using, or may invent in the future, to stifle competition at MDUs. In one of its *Competitive Networks* orders, the Commission dealt with similar considerations by enacting a broad, general prohibition:

> We emphasize that the prohibition on future exclusive contracts that we adopt today applies to all common carrier contracts in commercial settings that effectively restrict a building owner or its agent from providing access to any other telecommunications service provider. Thus, by "exclusive contract" we do not mean only a contract that gives the contracting provider the sole right to serve a building. Rather, we also proscribe, for instance, a contract with a competitive LEC that could permit access to that party and the incumbent, but deny access to any other competitor. Similarly, we forbid any contract that would limit access to providers using a particular technology. In addition, we emphasize that contracts between building owners and local carriers that do not explicitly deny access to competing carriers, but nonetheless establish such onerous prerequisites to the approval of access that they effectively deny access, are also prohibited. Finally, we note that contracts may be oral in nature. For the reasons discussed above, we find that all these types of contracts in the commercial context only hold the potential to restrict customer choice, and not to promote choice and competition. Thus, all fall within the rule we adopt today. Parties that allege that a carrier has

6 *In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring Report and Order and Declaratory Ruling*, ¶¶ 32, 33, 46, 22 FCC Rcd. 10640, 2007 WL 1670907 (F.C.C.) (footnotes omitted).

entered into a contract in violation of the prohibition we adopt today may file a complaint with the Commission under Section 208 of the Act.[7]

MIC submits that a similar approach is warranted here for large incumbent cable operators. As discussed more fully below, the same is not true for SCOs, including small PCOs.

II. RESPONSES TO THE COMMISSION'S SPECIFIC INQUIRIES

In the following sections, MIC responds to the specific questions that the Commission has raised in its Further Notice of Proposed Rulemaking.

A. The Commission Should Treat All Small Cable Operators the Same

In its Report and Order, the Commission relied primarily on its authority under Section 628(b) of the Communications Act to prohibit unfair methods of competition that have the purpose or effect of hindering significantly or preventing MVPDs from providing "satellite cable" and/or "satellite broadcast" programming to subscribers and consumers. With respect to DBS providers and PCOs, which are not subject to Section 628(b), the Commission asks (1) what remedies it should impose if it finds that the use of exclusivity clauses by such providers is harmful to consumers, and (2) what authority the Commission has to impose such remedies?

Turning to the second question first, MIC believes that the Commission has ample authority to prohibit DBS providers and PCOs from misusing exclusivity clauses. In its Report & Order, the Commission did not rely exclusively on its authority under Section 628(b), but also on several other sources of authority. Report & Order at ¶¶ 51-54. MIC agrees with the Commission's analysis of these authorities. Furthermore, as to DBS providers, Section 335(a) of the Communications Act authorizes the Commission to impose "public interest or other

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7 *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets …*, 15 FCC Rcd 22983, 2000 FCC LEXIS 5672, ¶ 37 (2000).

requirements for providing video programming" on such provider. Nothing elsewhere in the Act limits the Commission's authority to include a ban on exclusivity clauses that adversely affect the public interest.

Whether the Commission should exercise its authority, however, is a more complicated matter. With regard to DBS providers, the Commission noted in its Report & Order, at ¶ 9, that "[t]here is no evidence in the record that providers of DBS service use exclusivity clauses." That is not surprising in the context of a DBS's usual service – beaming cable signals directly to consumers' dishes. But MIC is aware of at least one instance in which a DBS provider is acting as a SMATV – that is, PCOs. MIC submits that DBS providers should therefore be treated as PCOs when operating as SMATVs.

As the Commission examines whether the exclusivity clauses used by PCOs are, on balance, more beneficial than harmful to the public interest, MIC urges the Commission to be mindful that PCOs and SCOs are similarly-situated in most respects, and the public-interest conclusion are likely to apply to both. PCOs and SCOs differ only in the manner in which their distribution systems transmit signals to MDUs. PCOs collect their signals at a satellite master antenna on the roof or on the ground near the building and transmit it by wire to lockboxes in one or more utility rooms or closets. SCOs collect signals at their headends and transmit the signals over their distribution wires to the lockboxes at the MDUs they serve. Both PCOs and SCOs then rely on home run and home wiring to convey their signals from the lock boxes to the individual units. In virtually all other respects, PCOs and SCOs operate similarly. The main differences are that SCOs' distribution systems are more expensive to develop and maintain; PCOs may have some advantages in the quality of their all-digital video signals; and SCOs have some advantages in qualify of their broadband services.

For the purposes of this proceeding, the similarities between PCOs and SCOs are more important than the differences. PCOs and SCOs are typically much smaller than the major incumbents and lack their vast advantages of incumbency. PCOs and SCOs often cannot afford to incur the expense of providing service to an MDU without the benefits of at least some degree of exclusivity. If PCOs and SCOs are able to gain a foothold and grow in a market, they become increasingly able to add a sufficient number of marketing, customer service, and other support staff. They also become more visible and formidable competitors. In the end, by allowing a limited degree of exclusivity, the Commission can "prime the pump" of competition that will ultimately benefit the residents of all residents of MDUs.

A good example of the benefits of competition is the huge disparity between average rates on the mainland of Collier County, where Comcast currently faces no meaningful competition, and the much lower average rates on Marco Island, where MIC competes vigorously with Comcast. Competition has occurred on Marco Island in part because MIC has been able to use limited exclusivity arrangements to establish itself. MIC's form of exclusivity will be discussed in greater detail below.

In summary, MIC submits that the Commission should exempt both PCOs and SCOs from restrictions on exclusivity arrangements for no more than five years from new construction to or on an MDU or a major upgrade of dedicated MDU facilities. That should be ample time to recover the investments that PCOs and SCOs must make to become viable competitors. MIC recognizes that the Commission stated in its Report & Order, ¶¶ 38-39, that it was reluctant to take such steps. Based on its own experience, however, MIC submits that the Commission's reluctance is unfounded.

In no event should the Commission exempt PCOs from exclusivity restrictions while leaving SCOs subject to them. Because PCOs and SCOs often compete, such an action could significantly and unjustifiably tip the playing field in favor of PCOs.

B. The Commission Should Ban Exclusive Marketing Agreements

Next, the Commission invites comment on whether it should ban exclusive marketing arrangements. MIC strongly believes that the Commission should do so, regardless of anything else that it may do. There can be no rational basis for making it difficult for residents of MDUs to learn about their options or for making it unduly difficult or costly for a competitor to communicate with them.

C. Commission Should Ban Take-or-Pay Bulk Billing Arrangements

Finally, the Commission seeks comment on whether it should ban "bulk billing" arrangements. MIC believes that the Commission should only ban bulk billing arrangements that meet both of the following two conditions – (1) they are being used by major incumbents rather than PCOs and SCOs; and (2) they compel all residents of an MDU to pay for service whether on not they want or take it.

Bulk billing has long been recognized in Section 623(d) of the Cable Act, and as long as they are not predatory, they can be beneficial for cable operators, MDU owners, and residents alike. MIC has itself used bulk billing arrangements for years. Under MIC's practice, all residents of an MDU that wish to take service from MIC are entitled to a monthly discount at a level negotiated by the MDU on behalf of its residents. Any resident that prefers to receive service from another cable provider is free to do so, and he or she is not required to pay anything to MIC. Such is not the case with respect to Comcast's contracts on Marco Island.

As explained in greater detail in Attachment D, some bulk billing arrangements do cross the line and pose significant barriers to new entrants. This occurs when and incumbent adds a take-or-pay obligation that would effectively require residents of MDUs to pay twice for services if they choose to move to another provider. As one court had found,

> Although it is possible for a … resident to pay for two competing cable services, it is unreasonable to suppose that any but the strongest willed of them will do so. *The monthly charge levied by the homeowner's association is the functional equivalent of a prohibition on the use of plaintiff's services*.

Princeton Cablevision, Inc. v. Union Valley Corp., 195 N.J. Super. 257, 273 (Ch. Div. 1983). The Commission should ban such arrangements, when used by incumbent providers.

III. CONCLUSION

For the reasons discussed above, MIC submits that the Commission should (1) bar all forms of exclusivity by major cable operators, including but not limited to exclusive marketing and 100 percent take-or-pay bulk service agreements; and (2) exempt PCOs and SCOs from restrictions on exclusive arrangements for a period not exceeding five years from a new development or a major upgrade.

Respectfully submitted,

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