

**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:**

**FURTHER COMMENTS OF LAFAYETTE UTILITIES SYSTEM**

On November 13, 2007, the Commission released the written text of its decision to prohibit cable operators subject to Section 628 of the Communications Act from entering into or enforcing “building exclusivity clauses” at multiple dwelling units and other real estate developments (collectively “MDUs”).<sup>1</sup> At the same time, the Commission invited further comment on whether it should extend its ban to other cable service providers and to other forms of exclusivity arrangements. On behalf of the City of Lafayette, Louisiana, the Lafayette Utilities System (“LUS”) is pleased to provide these comments in response to the Commission’s further notice.

**I. BACKGROUND**

LUS is currently building out a state-of-the-art fiber-to-the-home system that will make voice, video, data, and other advanced communications services available at affordable prices to all businesses, residents and institutions in the City of Lafayette. The fiber system will have vastly

---

<sup>1</sup> *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”). The Commission defined “building exclusivity clauses” as

more bandwidth capacity than is generally available in the United States, and it will greatly contribute to the City's economic development, educational and occupational opportunity, health care, public safety, homeland security, environmental protection, digital equity, government service, and quality of life. The City has already received commitments that will bring more than 1000 new high-paying jobs into the City, and it expects to receive many more.

From the time that the City announced its fiber project in the Summer of 2004, the incumbent communications providers, BellSouth (now AT&T) and Cox Communications, have vigorously opposed the project in every imaginable way, including in the state legislature, in the courts, and in the media. Having overcome all such opposition to reach the build-out stage of its project, the City is now concerned that it will encounter yet another form of anticompetitive behavior when the project becomes operational – exclusive arrangements at MDUs and other real estate developments that could significantly impair LUS's ability to provide services to resident consumers. As a result, LUS has participated in this proceeding and submitted the expert testimony of Douglas A. Dawson, who has vast, relevant experience in these matters across the United States. For the convenience of the Commission, LUS is submitting another copy of Mr. Dawson's testimony with these comments.

## **II. PRELIMINARY STATEMENT**

LUS believes that the Commission's decision of November 13 is an important first step, but it is one that will inevitably fail to achieve the Commission's pro-competitive goals at MDUs unless the Commission expands and refines the decision in certain critical respects. The specific questions that the Commission has asked are not only significant in their own right, but the information they

---

clauses that "prohibit any other MVPD [multichannel video programming distributor] from any access whatsoever to the premises of the MDU building or real estate development."

seek should also help the Commission gain a deeper understanding of the limitations of its initial decision and of adjustments that would strengthen it.

As the Commission determined in its decision of November 13, incumbent cable operators widely use exclusive arrangements at MDUs across the United States, that such arrangements are unfair methods of competition because they prevent consumers from obtaining access to satellite video programming, and that these arrangements therefore violate Section 628 and various other provisions of the Communications Act. *Report & Order*, ¶¶ 16-26, 50-60. In the *Report & Order*, the Commission went only so far as to ban “building exclusivity clauses” that “absolutely deny new entrants access to MDUs.” *Id.* at 2 n.2. The Commission left for another day the treatment of other unlawful forms of exclusivity.

On its face, Section 628(b) does not apply solely to exclusivity arrangements that “absolutely” deny entrants to MDUs. Rather, it applies to practices “the purpose *or effect* of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.” Communications Act § 628(b) (emphasis added).

In reaching activities that pose “effective” barriers to entry, Section 628(b) is very similar to Section 253(c), which provides that “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Of this language the Commission has stated,

[S]ection 253 expressly empowers -- indeed, obligates -- the Commission to remove any state or local legal mandate that “prohibit[s] or has the effect of prohibiting” a firm from providing any interstate or intrastate telecommunications service. *We believe that this provision commands us to sweep away not only those state or local*

*requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service. As to this latter category of indirect, effective prohibitions, we consider whether they materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.*<sup>2</sup>

LUS submits that the Commission should similarly sweep away all forms of exclusive arrangements in which incumbent cable operators engage. Mr. Dawson's testimony discusses several such practices, and if left unchecked, the incumbents will undoubtedly devise new ones as time goes on. In similar circumstances in the telecommunications area, the Commission found that only a broad and general prohibition could be effective:

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 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.<sup>3</sup>

The Commission should embrace the same comprehensive approach for incumbents here. At the same time, however, the Commission should recognize that incumbents and new entrants are

---

<sup>2</sup> *In re Public Utility Commission of Texas*, 13 FCC Rcd 3460, ¶ 22 (1997) (emphasis added).

<sup>3</sup> *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets ...*, 15 FCC Rcd 22983, 2000 FCC LEXIS 5672, ¶ 37 (2000).

in fundamentally different positions and should be treated accordingly. As Robert Pepper, former Chief of the FCC Office of Policy and Planning, once observed:

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.*<sup>4</sup>

If meaningful competition is to flourish at MDUs, the Commission must act forcefully to encourage and protect new entrants. In particular, the Commission should give small cable operators, as LUS will be when its system is completed, a limited exemption from its exclusivity rules, as described below.<sup>5</sup>

## **II. RESPONSES TO THE COMMISSION’S SPECIFIC INQUIRIES**

In the following sections, LUS responds to specific questions that the Commission posed 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 Direct Broadcast Satellite (“DBS”) providers and Private Cable Operators (“PCOs”), which are not subject to Section

---

<sup>4</sup> R. Pepper, *Policy Changes Necessary to Meet Internet Development*, 2001 L. Rev. M.S.U.-D.C.L. 255, 257 (emphasis added).

<sup>5</sup> 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).

628(b), the Commission asks (1) what remedies it should it 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, LUS believes that the Commission has ample authority to prohibit DBS providers and PCOs<sup>6</sup> from misusing exclusivity clauses. In its *Report & Order*, at ¶¶ 51-54, the Commission did not rely solely on its authority under Section 628(b), but also on several other sources of authority, including Titles I and III of the Communications Act and Section 706 of the Telecommunications Act. LUS agrees with the Commission's analysis of these authorities. In addition, as to DBS providers, Section 335(a) of the Communications Act authorizes the Commission to impose "public interest or other 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 question. 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." DBS providers may not use exclusivity agreements when they beam cable signals directly to consumers' dishes, but DBS may in some cases act as Satellite Master Antenna Television providers – that is, PCOs. LUS submits that DBS providers should therefore be treated as PCOs when operating this way.

---

<sup>6</sup> In its *Report & Order*, at 4. n.12, the Commission defined PCOs as Satellite Master Antenna Television providers that provide video service through closed transmission paths that do not use any public right-of-way.

As the Commission examines whether the exclusivity clauses used by PCOs are, on balance, more beneficial than harmful to the public interest, LUS urges the Commission to be mindful that PCOs and SCOs are similarly-situated in most respects, and the same public-interest conclusions 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 satellite master antennas on roofs or on grounds near MDUs and transmit the signals by wire to lockboxes in one or more utility rooms or closets. SCOs collect signals at their headends and transmit the signals over distribution wires to lockboxes at the MDUs they serve. After their signals arrive at the lockboxes, both PCOs and SCOs rely on home run and home wiring to convey the 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 have some advantages in the quality of their all-digital video signals; and SCOs have some advantages in quality of their broadband services.<sup>7</sup>

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 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

---

<sup>7</sup> With their huge national operations, DBS providers have huge purchasing and other advantages over small cable operators. If DBS providers serve 400,000 or more customers when acting as PCOs, they should not be treated as large rather than small cable operators.

of exclusivity, the Commission can “prime the pump” of competition that will ultimately benefit the residents of all residents of MDUs.

In summary, LUS submits that the Commission should exempt both PCOs and SCOs from restrictions on exclusivity arrangements for no more than five years from new construction or a major upgrade. That is a common number of years for the term of MDU agreements, and it should be ample time for recovery of the investments that PCOs and SCOs must make to become viable competitors at MDUs. LUS recognizes that the Commission stated in its *Report & Order*, ¶¶ 38-39, that it was reluctant to take such steps. LUS 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. LUS 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. LUS 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 or not they want or take it.

Bulk billing arrangements have long been recognized as permissible 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. Some bulk billing arrangements, however, can pose significant barriers to new entrants. That occurs when incumbents add take-or-pay obligations that effectively require residents of MDUs to pay twice for service if they choose to take service from 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, as well as those set forth in its initial comments, LUS submits that the Commission should (1) bar all forms of exclusivity by major cable operators, including, but not limited to exclusive marketing and 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. In addition, LUS renews some of the other proposals that it made in its initial comments. Specifically, LUS urges the Commission to:

1. Expand the definitions in 47 C.F.R. § 76.800 to include gated communities, mixed residential and commercial multi-tenant environments, and various other forms of real estate

developments that may include residents who should have a right to choose among available competitors.

2. Expand 47 C.F.R. § 76.801 to apply to home run wiring as well as to home wiring.
3. Amend the rules generally to apply not only to inside wiring owned by the cable operator but also to inside wiring over which a cable operator exercises control through any form of exclusive arrangement.
4. Remove the limitations in 47 C.F.R. §§ 804 (a) and (b) that exempt incumbent cable operators from the home run wiring rules if they have a legally enforceable right to remain on the premises after their right to provide service has ended, or alternatively, preempt any contractual provisions, mandatory access laws, or other state laws that would give incumbent cable operators such a right to remain on the premises.

Respectfully submitted,



---

James Baller  
Sean Stokes  
The Baller Herbst Law Group  
2014 P Street, NW  
Washington, DC 20036  
[Jim@baller.com](mailto:Jim@baller.com)  
(202) 833-1144

Gordon D. Polozola  
Kean, Miller, Hawthorne, D'Armond  
McCowan & Jarman, L.L.P.  
One American Place, Suite 1700  
301 Main Street (70825)  
P.O. Box 3513  
Baton Rouge, LA 70821  
(225) 382-3440