

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

COMMENTS OF THE CITY OF WESTON, FLORIDA

AND

THE TOWN FOUNDATION, INC.

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COMMENTS OF THE CITY OF WESTON, FLORIDA AND THE TOWN FOUNDATION, INC.

I. Introduction.

These comments are filed by the City of Weston, Florida (“Weston”) and by The Town Foundation, Inc. (the “Foundation”)¹, in response to the Federal Communications Commission’s (“Commission”) Report and Order and Further Notice of Proposed Rulemaking (“FNPRM”) regarding the potential prohibition of bulk billing agreements.² Specifically, these comments address the issues raised in paragraph 65 of the FNPRM regarding the discriminating effect of “bulk billing” arrangements on multiple dwelling units (“MDUs”),³ as defined by paragraph 7.⁴ Weston has the unique distinction of having most of the City’s residents, approximately 15,000 households, forced to pay for cable services as part of their homeowners’ dues under a 20-year old bulk billing contract that will continue until 2013.⁵

Foundation residents have consistently complained about paying for cable services they did not ask for and may not want, and expressed frustration because they do not have the same choices as residents in surrounding communities to obtain service from other providers.⁶ Weston and the Foundation bring this matter to the attention of the Commission and respectfully request that the Commission take action that provides these residents a reasonable exit from this anticompetitive situation and utilize the suggestions provided herein.

II. Historical Background and Status of Video Competition in Weston.

Many private cable service contracts are preceded by a long and complicated history of corporate subsidiaries, transfers and assignments. There is often an existing relationship between a developer, an owner of a cable system and a homeowners’ or condominium association at the time the service contract is entered into. When the developer that owns a cable system sells it, the new cable service provider attempts to acquire the system subject to contractual rights reserved by the developer. Under such contracts, the home or unit owners are ultimately the party responsible for payment, yet they are excluded from the negotiation and selection process.

¹ Weston is a Florida municipality with approximately 61,500 residents. The Foundation is a not-for-profit Florida corporation whose sole responsibility is to manage a bulk billing cable contract for 14,639 single family and 368 multifamily residential homes, nearly all of which are within gated communities.

² 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 Docket No. 07-51, FCC No. 07-189 (rel. Nov. 13, 2007).

³ Paragraph 65 specifically addressed this issue in the context of exclusive contracts.

⁴ Paragraph 7 defines the term “MDUs” to include apartment, cooperative, and condominium buildings. For purposes of the Order, MDUs also includes gated communities, mobile home parks, garden apartments, and other centrally managed residential real estate developments.

⁵ The bulk billing contract that was initially negotiated and agreed to by the developer, the Town Foundation, (which at the time was controlled by the developer), and the original cable company, (which was also controlled by the developer), would have continued forever. Following litigation, the contract is now scheduled to continue until 2013.

⁶ The cable provider bulk bills the Foundation who bills residents and pays the cable provider approximately \$600,000 per month or over \$7 million per year under the contract.

Regarding the historical background of cable services in Weston, Arvida/JMB Partners, a Florida general partnership ("Developer"), purchased and developed land in the area in the early 1980's. The Developer declared such properties to be subject to certain covenants and restrictions as set forth in the Foundation documents and reserved the exclusive rights to provide cable television services. In 1987, Weston Communications Corporation ("WCC") (a subsidiary of the Developer), the Foundation (which at the time was controlled by the Developer), and the Developer entered into a bulk cable Service Agreement ("Agreement") whereby WCC would install a cable system and provide cable services to the Foundation's residents. The Foundation would bill all homeowners and then pay WCC. WCC transferred its rights under the Service Agreement to another subsidiary of the Developer, Gulf and Pacific Communications Limited Partnership ("Gulf & Pacific"). In 1996, this area incorporated into the City of Weston. In 1998, Weston entered into a cable franchise agreement with Gulf & Pacific, who shortly thereafter sold the cable system to Advocate Communications, Inc., d/b/a Advanced Cable Communications ("Advanced Cable"). Gulf & Pacific transferred its rights under the Agreement and the franchise to Advanced Cable. However, after the Florida Legislature adopted laws eliminating local cable franchising last year, Advanced Cable applied for and received a state certificate of franchising authority from the Florida Department of State, which terminated its franchise with the City.⁷

Although the Commission declared exclusivity provisions in private cable service agreements unenforceable, Weston residents remain obligated to pay for Advanced Cable's services regardless of the quality, rates, programming and channel availability. This Agreement requires every resident of the Foundation, approximately 15,000 households, to pay for basic cable services as part of the homeowners' assessments. There is no opt-out language in the Agreement that would allow residents to discontinue payment for cable services. Accordingly, residents cannot choose to disconnect and stop paying for cable even if they can no longer afford it or no longer want it. Similarly, they must continue to pay for cable even if they subscribe to DBS because they are unhappy with Advanced Cable's services.

Advanced Cable serves the entire area that was originally incorporated as Weston under the bulk Agreement. After incorporation, Weston annexed additional areas consisting of approximately 4,000 cable subscribers served by Comcast of Greater Florida/Georgia, Inc., a subsidiary of Comcast Corporation ("Comcast"). Comcast serves nearly all other cities in Broward County.⁸ Even though Comcast has a city-wide franchise in Weston, and Advanced Cable has authority from the state of Florida to serve the same area, they have not overbuilt each other and they do not compete. Clearly, there is no economic justification for Comcast or any other certificate holder in the state of Florida, to overbuild Advanced Cable and offer competing services to Foundation residents because of the mandatory payment obligations under Advanced Cable's bulk Agreement.

⁷ §610.105, F.S.

⁸ Comcast competes with BellSouth as well as DBS and private cable operators in other cities in Broward County.

III. Bulk Billing Contracts are Unfair and Anti-Competitive.

Bulk billing contracts eliminate competition for video programming services for residents across the county. An increasing amount of Americans, roughly 30%, live in MDUs,⁹ and a majority of incumbent MVPDs serving MDUs pursuant to exclusivity clauses are incumbent cable service providers to the surrounding local community.¹⁰ Exclusivity clauses are widespread in agreements between MVPDs and MDU owners, and the overwhelming majority of them grant exclusive access to incumbent cable operators.¹¹ Such contracts create significant barriers to entry for other cable companies and DBS providers preventing competition, restricting consumers' choices, and allowing the monopolistic cable operator discretion to alter cable services and rates without fear of losing revenue or customers. They are also inconsistent with the Commission's goals of advancing Congress's objectives provided by the Telecommunications Act of 1996 (the "Act") to promote competition in cable communications. Weston and the Foundation urge the Commission to declare such bulk billing arrangements unenforceable and impose a fair, reasonable and binding solution.

A. Structure of Bulk Billing Arrangements in Bulk Billing Contracts.

Regarding the issues raised in paragraph 65 as to the structure of MDU bulk billing contracts, similar to the Foundation, such contracts are frequently entered into by either a cable operator and a developer or a cable operator and a MDU association. Owners are normally assessed a fee mandated by their MDU association. It is uncommon for a bulk billing arrangement to exist between a cable operator and residents without the presence of an owners association. These agreements have significant anti-competitive consequences as discussed in detail below.

i) Agreements between Developers and Cable Providers.

In new developments, the cable arrangements are typically formalized as agreements between the developer and cable operator. Developers are often given compensation by cable providers for the exclusive right to install inside wiring necessary for the provision of cable services throughout the development. Such negotiations and contracts frequently occur before construction is complete, before homeowners take title and ownership to the property, and/or before homeowner's associations take control over the function and services of the development. Additionally, provisions that require all residents within the development to pay the cable operator for basic cable or expanded services are also common. Upon the developer's sale and transfer of ownership of a specified amount of units to purchasers within the development, the developer is required to cease majority control of the association and turn it over to the unit owners within a specified period of time (within three (3) months of 90% purchaser ownership in Florida¹²). By this time, the developer, via their prior majority control of the Association, and the cable provider have already executed a long-term service agreement binding the unit owners.

⁹ FNPRM at 8.

¹⁰ Id. at 8.

¹¹ Id. at 10.

¹² See §718.301(1), Florida Statutes

While the Commission addressed enforcement of existing exclusivity clauses and the execution of new ones, Weston and the Foundation respectively submit that subjecting 15,000 residential units, representing over 50,000 persons in one city, to a private bulk billing contract demonstrates sufficient need for further government intervention. Additionally, while Weston may be one of the most egregious examples of an anticompetitive bulk billing contract, this contract is by no means unique. They are common in the context of a developer reserving the rights to provide cable services and then entering into a private bulk billing contract either with a subsidiary or with a franchised cable operator. Many bulk billing agreements for new construction are executed among a developer, developer controlled association, and cable provider with little to no input from residents. Private bulk billing contracts restrict citizens' ability to exercise their freedom to choose a cable provider based on quality of service and price. In such private bulk billing contracts, the consumer is completely removed from the cable provider selection process despite the reality that the consumer is the end user and ultimately responsible for payment. The mandated payment obligation significantly discourages consumers from seeking alternatives. In a free market society, consumers choose products and services that they deem to be of the best quality at the best price. Cable services should not be treated any different than any other service in the marketplace.

Many contracts contain a clause requiring the community to subscribe to basic or extended basic cable service, or a similar industry term.¹³ Many times such provisions do not specifically define the channel lineup included in basic or extended basic cable service. In such circumstances, the cable provider is free to add or delete channels to the channel lineup package without consumer input or consent. Additionally, many bulk contracts contain clauses allowing rate increases consistent with similar services in surrounding communities¹⁴. Despite the change in the provided service and/or the change in the rate, the consumer is still force to pay for it. Accordingly, bulk billing contracts grant cable operators a monopoly with discretion to alter cable services and rates without fear of losing revenue or customers.

ii) Agreements between Community Associations and Cable Providers.

Under bulk billing contracts, the MDU association will receive a single bill equal to the number of units in the development times the per-unit rate. The unit owners are billed through their association assessments and part of the assessment is allocated by the association for payment of the provider's bill. This structure effectively eliminates the cable provider's market risk and drastically reduces, if not completely eliminates the provider's associated collection costs. At the same time, unit owners are subject to the risk that they may be dissatisfied with the service, cannot afford it, or cannot afford to pay for the mandated service and the cable service provider of their choice. Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA")¹⁵ and the Florida Condominium Act¹⁶ are insufficient to protect citizens and competing cable operators from the monopolistic consequences of bulk billing contracts in Florida. §718.1232, F.S., also known as a section of the Florida Condominium Act, specifically provide:

¹³ See contract details in Marco Island Cable, Inc. v. Comcast Cablevision of the South 509 F. Supp. 2d 1158 (M.D. Fla. 2007).

¹⁴ Id.

¹⁵ See Sections 501.201-501.213, Florida Statutes.

¹⁶ See Chapter 718, Florida Statutes.

No resident of any condominium dwelling unit, whether tenant or owner, shall be denied access to any available franchised or licensed cable television service, nor shall such resident or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or providers of such services to, single-family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

In March of 2007, The United States District Court, middle District of Florida, addressed the above statute's applicability to exclusive bulk-billing agreements in Florida¹⁷. In Marco Island Cable Inc., a cable company filed an action seeking a declaratory judgment that a competitor violated the FDUPTA by entering into exclusive contracts to provide services to condominium communities. The contracts at issue contained clauses granting Comcast the exclusive right to provide services at a condominium, requiring all residents to pay Comcast for basic cable service, whether or not they want service from Comcast, and granting Comcast the exclusive use of, or access to, the inside wiring necessary to provide cable.¹⁸ Marco Island Cable, Comcast's competitor, argued that such provisions violated §718.1232, F.S., because "a resident would essentially have to pay substantially more for basic service in order to do business with a competitor."¹⁹ Marco Island Cable argued that post-wiring a condominium is impractical, expensive and aesthetically displeasing and thus the effects of the wiring provision denied residents access to Marco Island Cable's services. The court concluded that the exclusivity provisions of the Comcast contracts did not violate plaintiff's rights under §718.1232, F.S. Further, the court found that "even if post-wiring is expensive and unsightly", such contractual provisions are allowed.

Although Marco Island Cable did not address residents' rights under such contracts, the court's rulings on Florida Law indicate that Florida statutory protection is insufficient to prevent significant barriers of entry or protect a consumer's right to choose a cable provider. Like Marco Island Cable, potential competitors face the overwhelming obstacle that any potential customer from the serviced community would have to pay twice if they wish to utilize the competing service. This mandated payment obligation substantially reduces economic justification for competitors to enter the market serviced by an existing bulk billing provider. Further, there are no federal restrictions or Florida restrictions that require the developers in new constructions to competitively bid the provision of cable services. Consequently, the cable provider is at the mercy of the developer, not the consumer who will ultimately use their product. Moreover, many bulk billing contracts grant the cable provider the exclusive use of, and access to, the inside wiring necessary to provide service. Without access to the community's inside wiring, competing providers are forced to resort to costly and unsightly overbuilds if they desire to compete. Accordingly, the significant capital outlay for the overbuild, the overwhelming obstacle of convincing unit owners to pay twice for cable services and unrestricted developer discretion in selecting cable providers for new construction projects effectively eliminates the competition.

¹⁷ See Marco Island Cable.

¹⁸ Id. at 1160.

¹⁹ Id. at 1168.

IV. Need for Relief From the Commission.

The Commission has repeatedly acknowledged the anti-competitive nature of exclusive contracts and that such contracts are an impediment to competition. The Commission has an opportunity not only to address the situation in Weston, but similar situations that frustrate communities and consumers throughout the country. Weston's residents are virtually captives of Advanced Cable's services because of the bulk billing contract. The Commission has the ability to impose reasonable exit strategies on such bulk billing contracts to foster competition and to eliminate such barriers to entry. If the Commission provides authority to states to adopt their own cable franchising laws and allows cable operators to terminate existing franchises, it should also provide an opportunity for MDU associations to terminate long-term bulk billing contracts. We believe that the following strategies can be effectively utilized to combat the anti-competitive nature of bulk billing contracts.

A. Declare Bulk Billing Contracts Void and Unenforceable.

One viable strategy to enhance competition is to declare bulk billing contracts void and unenforceable. The Commission has already declared exclusivity provisions in service contracts void and unenforceable and could extend its ruling to apply to bulk billing contracts as well. In many MDU arrangements, particularly in new construction developments, the cable service provider negotiates and enters into a long-term contract with the developer as opposed to unit owners or homeowner associations. The industry standard for the length of such bulk billing contracts are usually coterminous with local cable franchises that run approximately 10-15 years. Cable providers with long term agreements, such as the agreement with Advanced Cable in Weston, have no incentive to offer or maintain pricing and programming at market levels because their bulk billing agreements guarantee payment regardless of market rates or customer satisfaction. By declaring these contracts void and unenforceable, cable companies would be encouraged to offer more competitive pricing and services and consumers would be able to ultimately participate in the selection process. Any fluctuation or dissatisfaction in the level of service or pricing during the term of the contract can be readily addressed and cured during negotiation for future services. Accordingly, eliminating bulk billing contracts levels the playing field between the consumer (end-user) and the cable provider.

B. Provide an Annual Opt-Out Period.

Residents subject to a bulking contract have not had the opportunity to evaluate or choose their cable service. If owners are dissatisfied with the services provided by such an arrangement, their only recourse is pay double and subscribe to an alternative provider. Given the economic consequences of such circumstances, owners are highly unlikely to do so and they should not have to make such a decision. Providing owners, new and old, with an annual opt-out period gives such owners a real, financially feasible choice and an opportunity to assess their individual levels of satisfaction with the video services. Additionally, an annual opt-out period to owners encourages video providers to negotiate competitive prices to discourage opt-outs with the developer and maintain high levels of customer service. We respectfully request that the Commission establish an annual opt-out period for bulk billing cable contracts.

C. Establish A Forum and Set Criteria For MDU Associations and Residents to Prove a Lack of Competition Caused by Bulk Billing Contracts.

Alternatively, the Commission could provide a forum for MDU associations and residents, similar to an effective competition proceeding, to demonstrate the lack of competition caused by a bulk billing contract. For example, cable companies may file a petition for effective competition with the Commission to revoke a local franchising authority's basic cable rate regulatory authority that may lead to varying and increased cable rates and have other negative effects on consumers. One factor in determining whether a cable system is subject to effective competition is if the number of households subscribing to programming services offered by multi-channel video programming distributor ("MVPD") other than the largest MVPD exceeds 15% of the households in the franchise area.²⁰ Further, §623(1)(1)(B) of the Act provides a formula using household data information for a cable operator to prove that it is subject to effective competition,²¹ and the Commission has held consistently that 2000 Census data is a sufficiently reliable means for making effective competition determinations.²² If the Commission provides a forum for MVPD's to prove competition exists in a franchise area, the Commission should also provide an opportunity and set criteria to file for relief with the Commission.

The Commission should set criteria, using updated household data such as the 2010 Census Bureau figures, for a determination of the lack of competition in a franchise area. For example, Weston has approximately 23,000 households.²³ Of the 23,000 households, approximately 15,000 are subject to one bulk billing agreement with one cable provider, Advanced Cable. Thus, nearly 65% of the entire City of Weston is locked into a single agreement with a single cable provider. This arrangement prevents competitors from entering the market and creates a virtual monopoly within the City. The Commission should use a 15% limitation for the amount of residents in a franchise or service area to be subject to a single bulk billing contract.

There are undoubtedly other strategies that the Commission could explore that would provide relief to consumers, foster competition, and at the same time protect cable operators' private investments. We believe that the above strategies are equitable, reasonable and effective and respectfully request that they be given the Commission's consideration. We suggest that the above strategies can be successfully implemented by requiring the applicable cable providers to provide prompt written notice to all affected developers, associations and residents.

²⁰ 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

²¹ *Id.*

²² *See Cablevision of Raritan Valley, Inc. et al.*, 19 FCC Rcd 6966 (2004); *Texas Cable Partners*, 17 FCC Rcd 6373 (2002); *Falcon Cable Systems*, 17 FCC Rcd 4648 (2002).

²³ Information from the U.S. Census-2005 American Communities Survey.

Conclusion

Weston and the Foundation respectively submit that subjecting 15,000 residential units to a single bulk billing contract is inconsistent with the Commission's mission to promote cable competition. Weston and the Foundation urge the Commission to declare private bulk billing contracts unenforceable, and to impose reasonable termination provisions or to adopt appropriate procedures to reduce the impact of bulk billing contracts to protect consumers and foster competitive alternatives.

Respectfully submitted,



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