Before the
Federal Communications Commission
Washington, D.C. 20554

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

COMMENTS OF VERIZON*

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INTRODUCTION AND SUMMARY

As the Commission has recognized, there is a basic difference between contractual provisions that grant a video service provider exclusive access – provisions that "foreclose individual choice" of video provider by denying competitors physical access to certain consumers, *MDU Exclusivity Order and FNPRM*[1] ¶ 28 – and exclusive marketing and bulk billing arrangements, which may offer consumers substantial benefits in the form of discounts and other features without denying "new entrants access to MDUs or real estate developments," *id.* ¶ 1 n.2. These latter types of arrangements are fundamentally different from exclusive physical access arrangements and "do not cause the harms to consumers that building exclusivity clauses cause." *Id*. Instead, exclusive marketing and bulk billing arrangements may offer consumers substantial benefits that the Commission found to be lacking in the case of exclusive access provisions, which were used by cable incumbents to undermine emerging video competition. *See id.* ¶ 28. New entrants have used such arrangements to enhance their ability to compete against established incumbents, and the Commission should not, on the record before it, restrict their use and enforcement.

DISCUSSION

I. Bulk Billing and Exclusive Marketing Arrangements Differ Fundamentally From Exclusive Physical Access Provisions

As the Commission correctly recognized, "[b]y far the greatest harm" of exclusive *access* arrangements is that "they deny [MDU] residents another choice of MVPD service and thus deny them the benefits of increased competition." *MDU Exclusivity Order and FNPRM* ¶ 17. By

[1] Report and Order and Further Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, FCC 07-189, MB Docket No. 07-51, 22 FCC Rcd 20235 (Nov. 13, 2007) ("*MDU Exclusivity Order and FNPRM*").

contrast, bulk billing and exclusive *marketing* arrangements are fundamentally different because they do not prevent competitive providers from gaining physical access to a property to compete for customers.

Exclusive access arrangements completely foreclose competitive providers from competing to serve MDU residents by denying them *physical access* to the premises. This is not true of either bulk billing or exclusive marketing arrangements. A bulk billing arrangement is a contract between a MDU owner or condominium association and a video service provider to provide services to the building at a discounted rate for a specified term. The property owner or association pays a monthly service fee based on the total number of units and then may recover this fee in the rent or as a charge allocated to all MDU units. In an exclusive marketing arrangement, a MDU owner contracts with a video service provider to promote that provider's services to residents exclusively in exchange for a marketing fee. Exclusive marketing efforts might include distribution of advertising materials with the leasing packet or placement of advertisements (*e.g.*, kiosks, posters, or banners) in the building lobby.[2] As discussed below, each of these types of arrangements can be an important tool for competitive providers seeking to attract the business of consumers who may only be familiar with the services offered by the cable incumbent.

Residents in MDUs with bulk billing arrangements can choose to use the bulk billing provider or to order services from a competitive video service provider. Verizon's standard bulk services agreement specifically informs the property owner that it does not impede competitive

[2] At one group of properties, the "marketing efforts include placing a link to the service provider's website (to sign up for service) on [the property] website, providing marketing information in the resident lease packet, verbal marketing efforts, and permitting the service provider to hold events and promotions on site." Declaration of Stephen J. Sadler, Director, Ancillary Services for Post Properties, Inc. ¶ 4, Exh. D to Comments of the Real Access Alliance (filed July 2, 2007).

providers' ability to access and serve the property. The agreement states: "Association is not restricted by this Agreement from allowing any competitive local exchange carrier ("CLEC") or other service provider to have access to Residents." Verizon Bulk Services Agreement ¶ 5.12. Verizon's standard exclusive marketing agreement contains similar language:

> Property Owner is not restricted by this Agreement from allowing any competitive local exchange carrier ("CLEC"), video service provider, or other service provider to have access to the Property or provide services to Residents. Residents may select another service provider of their choice for their communications services and Property Owner shall not, in any manner, inform its Residents that they are restricted to using Company as their sole communications services provider.

Verizon Exclusive Marketing Agreement ¶ 8.15.

Exclusive marketing and bulk billing arrangements do not prevent competitors from serving MDU residents and do not prevent consumers in MDUs from opting to buy service from a competing provider. In the case of exclusive marketing arrangements, other video service providers can reach MDU residents through direct mailings and other forms of advertising – the same types of advertising that they use to reach non-MDU residents. Because residents "know about their MVPD options," they can "exercise freely their choice" of providers. *MDU Exclusivity Order and FNPRM* ¶ 63. Exclusive marketing arrangements can provide an effective means for marketing; otherwise video service providers would not employ them. Nevertheless, in Verizon's experience, such arrangements do not prevent effective competition for MDU residents. Rather, exclusive marketing arrangements – like any arrangement whereby a property owner provides information to residents about a specific business such as a neighborhood dry cleaner, dentist, or restaurant – leave the final choice of provider to the resident.

In the case of bulk billing arrangements, a potential competitor may have to convince a resident that it is worth paying an additional fee to supplement or replace a service that the resident may receive without a payment on top of their rent or condominium fees. In this regard, however, bulk billing arrangements are like other amenities that MDUs may include in a resident's rent or fees – for example, a pool or work-out facilities. Residents have an on-site option, which is included in their regular fees, but can – and often do – still choose to go elsewhere (for example, by joining a local gym) because of their preference for the alternative provider. Thus, "alternative multichannel video providers can compete at these properties based on the value of their services relative to incumbent cable services."[3] The enforcement of cable incumbents' exclusive access provisions was shown to undermine competition and completely eliminate consumer choice by denying competitive providers physical access to residents of MDUs; bulk billing arrangements preserve competition and consumer choice.

Furthermore, the Commission correctly concluded, based on the unique history of monopoly franchises and documented pattern of abuses by the cable incumbents, that incumbents' enforcement of exclusive access provisions under current market circumstances harms competition beyond the individual MDU where consumers are denied choice: such arrangements "deter[] new entry into the MVPD market in many areas because they put a significant number of new customers off limits to new entrants." *MDU Exclusivity Order and FNPRM* ¶ 13. Because bulk billing and exclusive marketing arrangements place no customer physically "off limits," they do not have the same entry-deterring effect.

In sum, because exclusive marketing and bulk billing arrangements – unlike provisions granting the cable incumbents exclusive physical access – do not deny competitors physical access to consumers, they are fundamentally different from the agreements that the Commission found to harm competition, and the Commission should not restrict their use under Section 628.

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[3] *See* Reply Comments of AT&T at 10 (filed Aug. 1, 2007).

II. Bulk Billing and Exclusive Marketing Arrangements May Provide Significant Pro-Competitive Benefits

Both bulk billing and exclusive marketing arrangements – in contrast to the incumbents' exclusive physical access arrangements – may offer consumers substantial benefits. In fact, Verizon and other competitive video providers have employed both bulk billing and exclusive marketing arrangements as competitive tools in their effort to overcome the advantages held by the cable incumbents – such as increased name recognition or a greater consumer awareness of the incumbents' service offerings – and, therefore, compete effectively to serve MDU residents.

Bulk billing arrangements are attractive to MDUs because they offer residents a concrete and substantial benefit – discounted rates. In addition to discounts, bulk billing arrangements often also include additional benefits that residents value, including concierge service with a dedicated customer service representative from the video service provider, free cable service in the property's gym, or wireless "hot spots" for the property.[4]

Congress recognized the potential benefit to consumers of these types of arrangements when it exempted the discounted prices charged pursuant to these arrangements from the rate regulation rules that apply to cable incumbents. *See* 47 U.S.C. § 543(d). Section 623(d) provides, "A cable operator shall have a rate structure . . . that is uniform throughout the geographic area. . . . Bulk discounts to multiple dwelling units shall not be subject to this subsection." *Id.* Likewise, in implementing this provision of the Act, the Commission

[4] While cable incumbents have argued in the past that some of these same benefits were extended in the context of agreements with exclusive access provisions, the fact that providers offer many of these benefits in the context of other agreements that do not wholly foreclose competitors' physical access to properties and opportunity to compete undermines the argument that the incumbents need to be shielded from competition. See *MDU Exclusivity Order and FNPRM* ¶ 28 ("Other agreements between incumbent MVPDs and MDU owners, perhaps providing for marketing exclusivity or bulk discounts, can provide benefits similar to those alleged for exclusivity clauses without causing the latter clauses' entry-foreclosing harms to consumers.").

recognized that "non-predatory bulk discounts to multiple dwelling units . . . could form a valid basis for distinctions among subscribers." Rate Regulation, *Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 5631, 5898 (1993). Where the statutory criteria for effective competition, *see* 47 USC § 543(a)(2), are not met, bulk discounts are the only way recognized in the statute for cable incumbents subject to rate regulation to offer MDU customers a discounted market rate because they are otherwise required by statute to charge a uniform franchise rate, *see id.* § 543(d).

As discussed above, exclusive marketing arrangements promote consumer choice because they provide MDU residents with targeted information about a given provider – enhancing the efficacy and quality of information provided. The ability to provide such information also aids competitive new entrants in overcoming the advantages of cable incumbency. Furthermore, video service providers may provide MDU owners and residents with special services and other benefits in exchange for these marketing advantages, including discounted services, discounted sign-up fees, dedicated concierge service, or other benefits. MDU owners may also be compensated with a one-time per unit payment, a recurring (monthly or yearly) marketing assistance fee per unit, and/or a commission on annual revenues generated by subscribers in the building.

A prohibition on exclusive marketing arrangements would, moreover, raise significant First Amendment issues. Such regulation would place a substantial restriction on a video provider's ability to engage MDU owners as a channel for commercial speech. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding commercial speech protected under the First Amendment); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 636 (1995) (Kennedy, J., dissenting) (noting "commercial speech has become an essential part of the public discourse the First Amendment secures.”). A prohibition on providers speaking through MDU owners as their exclusive marketing agents would be permissible under the First Amendment only if the Commission could establish that the measure directly advanced, and was narrowly tailored to serve, a substantial government interest. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 569-71 (1980). As the Supreme Court explained in *Central Hudson*, a limitation on commercial speech also “must be designed carefully to achieve the [government’s] goal,” and such a “regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose.” 447 U.S. at 564. Because, as set forth above, exclusive marketing arrangements both provide significant pro-competitive benefits and do not foreclose competitive access, regulation or prohibition of such commercial speech would not only be “ineffective” and “indirect[]” at promoting competition, *id.*, it would have the opposite effect.

In contrast with bulk billing and exclusive marketing arrangements, exclusive physical access provisions have been employed by cable incumbents to foreclose meaningful wireline competition and have not delivered meaningful benefits:

> [M]any exclusivity clauses date from the time when cable operators had a *de facto* or *de jure* monopoly on wire-based MVPD service. In those market conditions, a MDU owner might have thought that agreeing to exclusivity was not giving the cable operator anything of significance. Some commenters state that a MDU owner can bargain for good service, low prices, and other concessions in exchange for exclusives. But the owner had no such bargaining power when the first cable operator was “the only game in town.”

MDU Exclusivity Order and FNPRM ¶ 12 (footnotes omitted).

Verizon and other competitive video providers have been able to employ bulk billing and exclusive marketing arrangements as an effective tool to gain entry into MDUs and new markets. Indeed, exclusive marketing arrangements reduce an important barrier to entry for competitive video service providers – incumbent brand recognition. Customers are far more likely to be aware of the incumbent cable provider and of their video offerings than of new video providers. "Customers [often] move from a prior home to which the [incumbent provider] provides service, and so when moving to a new home simply switch addresses of their service providers prior to move-in."[5] Verizon and other competitive video providers have used exclusive marketing arrangements to help them to compete more effectively and to overcome the incumbency advantage of cable providers, thereby facilitating competition. Similarly, bulk billing arrangements allow a new entrant to offer a concrete price advantage to a large group of potential subscribers, facilitating market entry to the benefit of MDU residents and other potential subscribers.

CONCLUSION

The Commission should decline to adopt rules prohibiting or otherwise restricting exclusive marketing and bulk billing arrangements.

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[5] Letter from Paul Rhodes, President, Litestream, LLC to Marlene Dortch, Secretary, FCC, at 1, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments,* MB Docket No. 07-51 (filed Oct. 5, 2007).

Respectfully submitted,

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