

**Before the  
Federal Communications Commission  
Washington, D.C. 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 )

**COMMENTS OF  
CENTURY OF BOCA RATON  
UMBRELLA ASSOCIATION, INC.**

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UMBRELLA ASSOCIATION, INC.**

The Century of Boca Raton Umbrella Association, Inc., representing sixteen homeowners’ associations and approximately 8500 homeowners, submits these comments to ask the Commission to refrain from adopting any new regulations that would interfere with our ability to negotiate and enter into bulk billing agreements, which we refer to as “bulk discount” agreements.

**Summary**

Bulk discount agreements are one of the most effective tools we have to secure rapid deployment of state-of-the-art broadband and video services to new or underserved multiple-dwelling communities and properties (“MDUs”), along with specialized local and premium programming and other amenities, at the lowest possible price for our residents.

A prohibition of bulk discounts would impose immediate rate hikes of up to 70% or more on affected consumers because it would eliminate the cost efficiencies and programming discounts that make discounts to consumers possible. Federal law prohibits operators from offering non-uniform discounts within a franchise area except through bulk discount agreements, and the programming contracts bulk operators receive require

that the bulk service be provided to all residents of the MDU in order to qualify for the bulk discount.

If operators could not enter bulk agreements, these interdependent relationships between residents, homeowners' associations, video providers and programmers would necessarily collapse. Groups of consumers such as our associations would no longer have any ability to negotiate collectively for discounted rates, and the consumers who have previously done so would lose the benefits of those agreements overnight.

A prohibition of bulk discounts would also contravene Congressional intent. In 1996, Congress amended Section 623(d) expressly to override earlier limited Commission restrictions on bulk discount agreements. Since those limited restrictions on bulk discounts were unacceptable to Congress, clearly a total ban on bulk discounts would be even more so. In addition, a ban would also discourage market-entry by new providers to compete with incumbents, one of the principal goals of the 1996 Act. These competitors generally cannot obtain financing to build a new fiber network to a community without the prospect of a reliable, long-term revenue stream. Bulk deals therefore open the door for these upstarts to compete with the incumbents for a bulk discount contract.

Bulk discount agreements are not unfair to consumers who choose to move in to a home covered by such an agreement even if they do not want the included video service. Video services are but one of many benefits covered by homeowners' association dues or rents that some residents may not use. One of the very reasons people choose to move to centrally-managed developments is to take advantage of these amenities acquired through the aggregated purchasing power of the community. The social contract of these

communities would break down if residents could pick and choose which amenities they want to support. And if a community has bound itself to an unfavorable bulk agreement, future residents who thereafter move into such a property receive a lower purchase price or rental rate that fairly represents any detriment of the bulk agreement.

Bulk discount agreements therefore encourage the deployment of fiber and advanced services, foster market entry by new non-incumbent competitors, and reduce the prices consumers pay for video service. The Commission need not and should not take away our ability to secure these benefits for and on behalf of our residents.

**I. Bulk Discounts Promote Competition, Broadband Deployment, Reduced Prices and Better Services.**

The Commission asks whether bulk billing agreements have “been used to impede competition in the video marketplace.”<sup>1</sup> Our experience, to the contrary, is that bulk agreements *stimulate competition*. As we demonstrate below, bulk agreements enable representatives of multiple dwelling unit properties to secure better services at better prices on behalf of the residents collectively than the individual residents could ever obtain individually.

Residential real estate is a highly competitive market, especially during periods such as this one when there is a slump in the housing market. Property owners therefore face great pressure to deliver the highest-value residences possible to compete for buyers and renters. An amenity that is increasingly demanded by potential residents is the availability of a suite of state-of-the-art communications and entertainment services at discounted rates, including high-capacity broadband, high-definition (HD) video

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<sup>1</sup> *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-189, ¶ 64 (rel. Nov. 13, 2007) (“*Exclusive Access Order and FNRPM*”).

programming, and modern inside wiring. The availability of these services *at the time of move-in* is as important if not more important to many prospective home buyers as other amenities such as pools or clubhouses that have been more traditionally featured by planned communities, condominiums and other multiple dwelling units.<sup>2</sup>

Developers and homeowners' associations eager to obtain access to these services as a competitive advantage have found that we cannot always rely on incumbent providers to commit to a rapid and timely deployment of new, modern infrastructure to our communities.<sup>3</sup> Incumbents have declined requests to build facilities to new communities, or to commit to completing construction in time for the scheduled move-in of residents. Bulk agreements give us leverage in negotiating for new network construction in these instances, because they enable us to find competitors willing to undertake construction of new facilities such as fiber-to-the-home and inside wiring in exchange for a bulk agreement. The Commission recently recognized that bulk discount agreements "can provide benefits similar to those alleged for exclusivity clauses," such as inducement of "significant new investments."<sup>4</sup> One of the key reasons that bulk agreements promote competition is that they can increase the number and diversity of potential service providers. Many small, non-incumbent competitors could not obtain

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<sup>2</sup> See, e.g., *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, AT&T Reply Comments at 11 (Aug. 1, 2007) (comparing bulk discounted video service to desirable amenities such as gyms and shuttle buses).

<sup>3</sup> Although many consumers in built-out areas have a choice of at least three or four video service providers – the incumbent cable operator, the incumbent telephone company, and the two DBS providers – only wireline providers (incumbents or new competitors) are compelling for new centrally-planned communities because DBS does not deliver the broadband capacity and video-on-demand now demanded by new home buyers.

<sup>4</sup> See *Exclusive Access Order and FNRPM*, ¶ 28. It would be arbitrary for the Commission to eliminate bulk discount agreements only shortly after relying on their continued availability as justification for eliminating exclusive access contracts.

financing to build a new network to a community without the prospect of a reliable, long-term revenue stream that a bulk discount agreement provides.

Bulk deals therefore open the door for these upstarts to compete with the incumbents for a bulk services contract. In addition, the very fact that small non-incumbents can compete for a potential bulk contract sometimes spurs the incumbents to offer faster construction rollouts or make their own better offer for a bulk agreement than they otherwise would. The property owners can then choose the best offer from these multiple service providers. Numerous other property owners agree with our assessment that this exercise of collective bargaining with the multiple candidates for the provision of bulk service doesn't impede competition – it *is* competition.<sup>5</sup>

Our ability to grant a service provider the attraction of a reliable long-term revenue stream not only enables us to secure broadband, but also to influence the terms on which it is deployed. Bulk deals enable us to negotiate for facilities to be placed underground, an especially valuable benefit in our hurricane-prone region in coastal Florida, where we are located. In addition, bulk deals give us the leverage to negotiate terms to reduce the visibility of unsightly towers, pedestal boxes and other equipment.

Bulk discount agreements are therefore one of the most effective tools we have to facilitate the rapid delivery of high-capacity broadband and advanced services to our

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<sup>5</sup> See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Comments of Real Access Alliance at 17–18 (July 3, 2007) (explaining that bulk agreements are effective in securing lower prices and commitments to extend or upgrade facilities).

residents. The elimination of this tool would undermine the broader goals of the Act to deliver these facilities and services to all Americans.<sup>6</sup>

Of course, consumers not only want 21<sup>st</sup> Century communications facilities, they want them (and the rest of their home purchase) at the *lowest possible price*. Through the power of bulk purchasing, we can secure lower rates for security patrols, alarm systems, landscaping services, and, of course, broadband and video services than residents could obtain on their own. Bulk agreements typically secure an approximately 25-40+% discount for basic cable compared to the standard rates available from the incumbent in immediately adjacent communities. For example, we are aware of a nearby community that has secured a bulk rate of \$28 per month for basic cable, compared to the \$48 (70% higher) rate offered by the incumbent cable operator next door. This \$20 discount is *four times* the Commission's estimate of average consumer savings from the entry of a second wireline cable operator into a market – a savings for which the Commission was willing to radically overhaul cable franchising regulation and the relationship between the Commission and state franchising authorities.<sup>7</sup> Given the Commission's commitment to maintaining reasonable prices for cable services,<sup>8</sup> it would be nonsensical to strip away one of most effective tools consumers have in keeping such rates in check.

Cost-conscious buyers and renters have come to expect these significant discounts from planned communities and factor those savings in comparing the overall price of

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<sup>6</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified in notes under 47 U.S.C. § 157) (directing Commission “to encourage the deployment ...of advanced telecommunications capability to all Americans”).

<sup>7</sup> *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, FCC 06-180, ¶ 50 (rel. March 5, 2007).

<sup>8</sup> See, e.g., *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, Report on Cable Industry Prices, FCC 06-179 (rel. Dec. 27, 2006).

properties in our communities compared to other homes that do not offer these benefits. In addition, banks have also learned to account for these savings in the monthly income-expense test that they use to determine mortgage eligibility, which in turn helps a buyer qualify for a better interest rate and/or a larger loan than they would if buying a competing home in an unplanned area.

For the same reasons, we also face enormous pressure to reduce costs that are built in to home prices. Bulk services agreements give us leverage to pass to the cable operator some costs ordinarily paid by the homeowner. This is true both for new construction and also in the renovation and upgrade of existing communities.

Buyers may also be attracted to specialized benefits enabled by a bulk services arrangement. For example, we can require bulk services providers to carry our own channels that broadcast local community events, homeowner association meetings, local school information, public safety warnings, and other important local information. We may also require them to deploy at the operators' expense a community web page and/or Intranet for internal communication, wireless networking, and free video, Internet access, and/or security monitoring services to common areas such as recreation rooms and clubhouses. Bulk deals also enable us to require the operator to include channels of special interest to our residents.

Bulk discount agreements therefore open the door for new competitors, lower the prices paid by consumers, improve the quality and reliability of services, deliver the greater variety of services desired by consumers, and facilitate the rapid deployment of broadband and advanced services.

**II. A Prohibition on Bulk Discount Agreements Would Violate Congressional Directive and Would Backfire by Immediately Raising Consumer Prices.**

As we explained above, our ability to offer bulk discount agreements provides us leverage with video providers to negotiate deep discounts for our residents far superior to what they could negotiate on their own. In fact, federal law effectively prevents individual consumers from negotiating on their own at all, as bulk agreements provide the only means by which cable operators not subject to effective competition may lawfully offer non-standard discount pricing. Elimination of bulk discount agreements would therefore subject affected consumers to rate-shock price increases of up to 70% or more overnight – in contravention not only of Commission policy to moderate cable pricing, but of express Congressional intent to limit the Commission’s ability to restrict bulk discounting.

**A. A Ban on Bulk Discounts Would, in the Commission’s Prior Words, “Thwart Congressional Intent.”**

The Cable Act of 1992 adopted Section 623(d) of the Communications Act, which required cable operators to “have a rate structure, for the provision of cable service that is uniform throughout the geographic area in which cable service is provided over its cable system.”<sup>9</sup> In implementing this law, the Commission found that Congress did not intend to eliminate bulk discounts, which the Commission found were beneficial to consumers:

multichannel distributors can realize significant efficiencies and cost savings by service multiple dwelling units and other high-occupancy buildings, and we do not wish to foreclose the prospect that those savings might be passed on to consumers in those dwellings. ... We believe that

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<sup>9</sup> 47 U.S.C. § 543(d) (1992).

permitting [bulk] discounts will foster competition among video providers, furthering an objective of the Act.<sup>10</sup>

However, the Commission expressed concern that “bulk discounts not be abused as a means of displacing alternative multichannel video distributors from multiple dwelling units, which have become important foothills for the establishment of competition to incumbent cable systems.”<sup>11</sup> It therefore made this bulk discount exception to the uniformity requirement available only to operators that passed on cost savings of volume offerings to the subscribers affected, provided the same bulk discount rate to all multiple dwelling buildings in the franchise area, and demonstrated some economic benefit from providing the bulk discount.<sup>12</sup>

Congress agreed with the Commission that bulk discounts are beneficial to consumers, so much so that it found that the Commission’s restrictions on bulk discounts went too far. The House of Representatives Commerce Committee found that the Commission’s rule restricting bulk discount agreements “does not serve consumers well by effectively prohibiting cable operators from offering *lower* prices.”<sup>13</sup> Congress therefore amended Section 623(d) expressly to override the Commission’s restrictions on bulk discount agreements:

(d) *Uniform rate structure required.* A cable operator shall have a rate structure, for the provision of cable service that is uniform throughout the geographic area in which cable service is provided over its cable system. ... Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not

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<sup>10</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, FCC 93-177, ¶ 424, 8 FCC Rcd 5631, 5898 (rel. May 3, 1993).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Conference Report, Telecommunications Act of 1996, H.R. Rep. No. 204, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 110 (emphasis in original).

subject to effective competition may not charge predatory prices to a multiple dwelling unit. ...<sup>14</sup>

Given that Congress acted to override a Commission regulation that merely applied a few restrictions to the offering of some bulk discounts, Congress clearly has foreclosed the Commission's authority to adopt a ban on bulk discounts or other regulations that would impair the ability of private parties and service providers from entering bulk agreements that could deliver discounted prices to consumers. Indeed, the Commission subsequently recognized in 2002 that Congress has circumscribed its authority in this area, in rejecting a proposed regulation that would have put new conditions on bulk discount agreements:

“We continue to believe that there is no statutory or policy reason to place conditions such as those suggested by WCA on a “bulk discount” under section 623(d).”<sup>15</sup> The Commission explained that it “share[s] th[e] concern” expressed by Congress that its former rules hurt consumers by unnecessarily limiting the ability of operators to offer lower prices to MDUs, and therefore found that a proposed restriction “would serve to thwart Congressional intent.”<sup>16</sup> Given this history, there can be no question that a ban or restrictions on bulk discount agreements would unlawfully contravene Congress’ instruction and federal policy.

**B. A Ban on Bulk Discounts Would Trigger Huge Consumer Price Increases Overnight.**

Even if it were lawful for the Commission to prohibit or restrict bulk discount agreements or enable cable operators to terminate them,<sup>17</sup> such action would be contrary

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<sup>14</sup> 47 U.S.C. § 543.

<sup>15</sup> *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, CS Docket No. 96-85, Order on Reconsideration, FCC 02-117, ¶ 26 (rel. Apr. 22, 2002).

<sup>16</sup> *Id.*

<sup>17</sup> Contracts typically permit a party to terminate if a change in law resulted in that party's inability to enforce the agreement.

to the public interest because it would unavoidably trigger immediate and severe price increases for affected consumers. Under Section 623(d), cable operators would be forced to choose between lowering their standard rates throughout their entire franchise area to match bulk discounts or raising the bulk rates to the uniform standard rate.

Unfortunately, as we demonstrate below, the former would be impossible, so any application of a ban to existing agreements would impose a surprising, abrupt and enormous rate increase on affected consumers.

The reason a ban on bulk deals would raise video service prices is that the bulk nature of these agreements is what enables operators to offer the discounts in the first place. First, the bulk provider realizes significant cost efficiencies in reduced costs for billing, marketing, collection, disconnect and reconnect installation costs. Second, and more importantly, bulk agreements enable operators to achieve significant discounts in programming costs. Cable operators (as well as satellite and telephone companies) are currently able to obtain programming from network owners such as ESPN, CNN and the Discovery Channel at significant discounts in the range of 30% for homes that the operator serves via a bulk discount agreement. The programmers are able to offer a discount because they recognize a value in reaching consumers who might otherwise not subscribe to paid video programming services. The exact percentage discount typically tracks the discount given by the cable operator to the homeowners' association. The cable operators then are required, as part of their contracts with the cable networks, to pass along the percentage discount they receive from the cable networks to the association – in effect, a win-win-win-win for the consumer, the homeowners' association, the video service provider, and the cable network.

If the Commission prohibited or restricted bulk billing, these cost efficiencies and discounts would disappear overnight. Even if an operator wanted to voluntarily continue to offer its discounted rate to a development, it could not do so lawfully under Section 623(d) unless it reduced its rate everywhere else in its franchise area to the same discount (even though it would have none of the efficiency or universal penetration benefits in those areas). But if it did so, that rate would no longer be a “discount” and the operator would lose its discount with the programming owners. Therefore, the operators’ only real option would be to terminate discount contracts (based upon a change in law) and increase prices to the market rate – which would mean an immediate price increase of up to 70% or more for affected consumers. If the contracts were terminated, homeowners would also lose other ongoing amenities secured in bulk agreements, such as community and special-interest programming and free services to common-area spaces such as clubhouses.

Therefore, at a minimum, the Commission should grandfather and leave intact existing contracts to avoid massive rate hikes and unwarranted disruptions in the settled expectations of parties to existing privately-negotiated agreements. A Commission rule that would invalidate existing agreements or enable video providers to terminate them would also violate due process rights and constitute a taking without just compensation.

Given the Commission’s recent emphasis on concern for rising cable rates, it is inconceivable that the Commission should want to intervene to increase thousands<sup>18</sup> of

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<sup>18</sup> The Commission asks whether bulk billing agreements are pervasive. *Exclusive Access Order and FNRPM*, ¶ 64. At this time, we do not have nationwide data to provide comprehensive data to respond to this question. However, unlike exclusive access contracts that the Commission found to be inherently contrary to its policies, since bulk discount agreements are more likely than not to benefit consumers, the pervasiveness of bulk discount agreements would on balance be a favorable fact for consumers, not an unfavorable one.

consumers' cable bills by 70% or more. But that is exactly what a ban on bulk discount agreements would do to consumers.

### **III. The Social Costs of Bulk Discount Agreements Are Far Outweighed by their Benefits.**

We understand that some have questioned whether bulk discount agreements are fair to the few consumers who elect to purchase additional video services from other providers beyond what they receive under the bulk agreement. We believe these concerns are overstated, but in any event they ignore the fundamental principles of social contract theory on which centrally-managed communities are based.

Video services are but one of many benefits covered by homeowners' association dues or rents that some residents may not use. Dues or rent may pay for pools, libraries, golf courses, landscaping, security, garbage and recycling collection, entertainment centers, gyms, walking pathways, parks, or any number of other services that most but not all of the residents enjoy. Indeed, one of the very reasons people *choose* to move to centrally-managed developments is to take advantage of these amenities acquired through the aggregated purchasing power of the community. The social contract of these communities would break down if residents could pick and choose, month to month, which amenities they want to support.

The same dynamic exists in all communities that provide public services. Taxpayers support public schools even if they do not have children or send their children to private schools. A prohibition on non-exclusive bulk agreements, whether for video or other services, would harm everyone in the community by depriving them of their aggregated bargaining and purchasing power. Taking away that ability would not increase consumer choice; on the contrary, it would effectively deny consumers the

option to choose to live in communities that offer the benefit of discounted services and state-of-the-art facilities. The Commission should not attempt to take away communities' right to decide for themselves when the overall benefit of a decision for the majority of their citizens is worth the investment – just as the Department of Labor would not propose to “protect” employees by prohibiting them from negotiating collective agreements with employers.

Nonetheless, we wish to respond directly to the Commission's inquiry as to whether bulk discount agreements “have the same practical effect as exclusive access arrangements in that most customers would be dissuaded from switching video providers.”<sup>19</sup> Even if residents had the negative option not to receive services from the bulk rate partner, nearly all who want any paid video service would choose the bulk rate (if we still had it) because the agreements offer significantly lower rates and greater convenience<sup>20</sup> than they could obtain on their own from any other provider. But when the occasional resident wishes to purchase an additional service from another provider, bulk discount agreements permit them to do so. The amount they would pay for their additional video service typically would still not come close to the value of the other discounted benefits they receive from the community.

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<sup>19</sup> *Exclusive Access Order and FNRPM*, ¶ 65. The Commission also states that “bulk billing arrangements may be exclusive contracts because MDU owners agree to these arrangements with only one MVPD, barring others from a similar arrangement.” At the time we select a bulk services provider, we are open to considering proposals from any party, so that we may drive the best possible deal. Once we enter an agreement however, it would not be in our residents' interest to bind them to the purchase of a second largely-overlapping video service from another provider. We do not “bar” multiple providers; we simply do not enter into multiple agreements because there is no compelling reason for us to do so.

<sup>20</sup> Convenience is a particularly important factor in senior and resort developments, as well as in developments for transient populations, whose potential residents are attracted both to the favorable pricing offered by such deals and to the convenience of not having to arrange for, set up, and manage utility accounts.

We also understand that some have questioned whether consumers' interests coincide with those of the developers and homeowners' associations that enter into bulk agreements. We are confident that the benefits of most bulk discount agreements flow directly to residents as the ultimate consumers of video and broadband services. Of course, it may be possible that some property owners have entered into deals that are less favorable either for themselves and/or their residents. However, such an unfavorable agreement would reduce the value of the property and therefore the sale or rental price it commands. Residents who nonetheless decide to move into such a property do so voluntarily, and they receive in the alternative a lower purchase price or rental rate that fairly represents any detriment of the bulk agreement. Given the highly competitive real estate market, it is the existing property owners at the time an agreement is reached, and not future incoming residents, who ultimately bear the cost of an agreement that is unfavorable to the ultimate consumer.

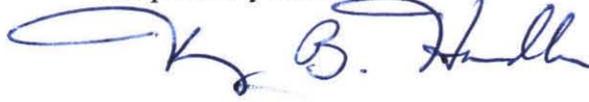
For all of these reasons, the supposed costs of bulk discount agreements would be easily exceeded by the costs to consumers if bulk discount agreements are prohibited.

#### **IV. Conclusion**

As the Commission and Congress have previously recognized, bulk service agreements are beneficial to developers, property owners, and residents; they foster competition and entry by small competitors; they facilitate investment in advanced services and infrastructure; and they reduce costs and lower prices. Under the deregulatory approach of the Telecommunications Act of 1996, the Commission should not impose new regulations where the market is already working, and it should especially not do so when those new regulations would hurt consumers far more than they would

help. The Commission should therefore not prohibit cable operators, developers, and associations of consumers from entering into bulk discount arrangements.

Respectfully submitted,



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