

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) MB Docket No. 07-51
Other Real Estate Developments)
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)
)

COMMENTS OF W.A.T.C.H. TV COMPANY

W.A.T.C.H. TV Company (“W.A.T.C.H. TV”), a provider of multichannel video (“wireless cable”) service and wireless broadband service over Broadband Radio Service (“BRS”) and Educational Broadband Service (“EBS”) spectrum in Lima, OH and the surrounding area, hereby submits its comments in response to the Commission’s *Further Notice of Proposed Rulemaking* (“FNPRM”) in the above-captioned proceeding.¹ For the reasons set forth below, the Commission need not and should not take any action that would nullify existing or restrict future exclusivity clauses in service contracts between wireless cable operators and owners of multiple dwelling units and other types of centrally managed residential properties (collectively referred to herein as “MDUs”). There is no “market failure” to be corrected here, and any regulation of exclusive arrangements between wireless cable operators and MDU owners would otherwise undermine the Commission’s efforts to promote competition between incumbent cable operators and “alternative” providers of multichannel video programming service (“MVPDs”).

¹ See *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 07-189, at ¶¶ 61-65 (rel. Nov. 13, 2007) (“*R&O and FNPRM*”).

I. WIRELESS CABLE OPERATORS ARE NOT THE SOURCE OF THE PROBLEM THE COMMISSION IS TRYING TO SOLVE IN THIS PROCEEDING.

As noted in the *Report and Order* released simultaneously with the *FNPRM*, the Commission initiated this proceeding to determine whether it should regulate contractual clauses that give MVPDs exclusive access to MDU property.² Upon reviewing the comments and reply comments filed in response to its initial *Notice of Proposed Rulemaking*,³ and using Section 628 of the Communications Act of 1934 (47 U.S.C. § 548) as the linchpin of its analysis, the Commission determined that such regulation was necessary where the MVPD at issue was an incumbent cable operator, a common carrier providing cable service or an open video system.⁴ Clearly, however, incumbent cable operators were the Commission's primary concern. In particular, the Commission found that incumbent cable operators "are still by far the dominant force in the MVPD business," and "are the beneficiaries of the vast majority of exclusivity clauses."⁵

Equally important, the Commission found that the exclusivity rights held by incumbent cable operators pose a substantial threat to MVPD competition and to the introduction of new broadband services:

The evidence . . . demonstrates that exclusivity clauses, especially when used in current market conditions by incumbent cable operators, are a barrier to new entry into the multichannel video

² *Id.* at ¶ 1. See also *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Notice of Proposed Rulemaking, 22 FCC Rcd 5935 (2007)

³ *Id.*

⁴ See *R&O and FNPRM* at ¶ 30.

⁵ *Id.* at ¶ 32; see also *id.* at ¶ 3 ("The beneficiaries of most [exclusivity] clauses are incumbent cable operators.").

marketplace and the provision of triple play offerings. Such exclusivity clauses inhibit competition in these markets and slow the deployment of broadband facilities. . . These harms to consumers are traceable to the incumbent cable operators' practice, increased recently, of using exclusivity clauses, sometimes in fine print and without adequate notice to MDU owners, to forestall competition, particularly when new competitors are about to enter the market.⁶

Conversely, it comes as no surprise that the record remains barren of any evidence of anticompetitive harm where the same exclusivity rights are held by wireless cable operators. According to the last annual video competition report released by the Commission, “[t]he number of wireless cable subscribers has declined steadily from a peak of 1.2 million in 1996 to approximately 100,000 as of March 2005. . . Thus, wireless cable systems provide video competition to incumbent cable operators only on a limited basis.”⁷ In other words, given that incumbent cable operators have an exponentially larger share of both the MDU market and the overall consumer market for video services, the Commission has no sensible basis for concluding that wireless cable operators pose a comparable threat to MVPD competition in the relatively small number of cases where they have or may in the future obtain exclusivity clauses in their MDU service contracts. It is unlikely that the comments filed in response to the *FNPRM* will justify any finding to the contrary.⁸

⁶ *Id.* at ¶ 26.

⁷ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2565 (2006).

⁸ It is also telling that the Commission has *never* had cause to regulate exclusivity clauses in wireless cable MDU service contracts even though the issue has been before it in other proceedings for years, and at a time when wireless cable operators had many more subscribers than they have now. *See Telecommunications Services Inside Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, 1364 (2003); *Telecommunications Services Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, 3748-53 (1997).

It is well settled that the Commission cannot extend its ban on exclusivity clauses to wireless cable operators (or, for that matter, any other type of MVPD not already covered by the ban) if the facts do not warrant such action. Vague concerns about “regulatory parity” are not enough – the Commission must undertake a careful review of the record and determine whether the problem it seeks to solve actually exists.⁹ Here, no such problem exists where wireless cable is concerned. The Commission therefore should not prohibit or restrict exclusivity clauses in current or future service contracts between wireless cable operators and owners of MDUs.

II. A LOSS OF MDU EXCLUSIVITY WOULD CAUSE SUBSTANTIAL HARM TO W.A.T.C.H. TV AND CONSUMERS.

The Commission has recognized W.A.T.C.H. TV’s substantial efforts to provide consumers in western Ohio with competitive multichannel video and broadband services over BRS/EBS spectrum.¹⁰ Indeed, for well over a decade (and before the arrival of DBS and telco overbuilds), W.A.T.C.H. TV has been a poster child for MVPD competition. After nearly \$28 million of investment under challenging economic conditions, the company has successfully transformed its 11 channel wireless analog video system into a digital video/broadband system featuring over 200 channels and wireless broadband service with both fixed and portable capability. W.A.T.C.H. TV presently has approximately 12,000 video subscribers and is fully competitive with the local cable television systems and DBS services, providing consumers a similar range of programming at a lower cost. On top of that, W.A.T.C.H. TV has

⁹ See, e.g., *Home Box Office, Inc. v. FCC*, 567 F2d 9, 36 (D.C. Cir. 1977) (“[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.” (internal quotation marks omitted)).

¹⁰ See, e.g., *Amendment of Parts 1, 2, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 MHz Bands*, Order on Reconsideration and Fifth Memorandum Opinion and Order and Third Memorandum Opinion and Order and Second Report and Order, 21 FCC Rcd 5606, 5649 (2006).

approximately 7,000 wireless broadband subscribers (with more signing up every month), many of whom have no other source of high-speed Internet access. In fact, because neither of its DBS competitors carries the local television stations in the Lima market, and because DBS is still struggling to develop a viable broadband product for the residential market, *W.A.T.C.H. TV is the only operator in its market capable of offering multichannel video programming packages and broadband services that are fully competitive with those of the incumbent cable operators.*¹¹

Notwithstanding its ongoing success, W.A.T.C.H. TV (and, as noted above, the wireless cable industry as a whole) clearly does not have the dominant market position of incumbent cable operators in the MDU market or anywhere else, and otherwise does not engage in the sort of anticompetitive behavior that has intensified the Commission's oversight of the cable industry over the past year. The simple fact is that W.A.T.C.H. TV and other wireless cable operators already provide the very same competition that the Commission is seeking to promote in this docket.

Although the majority of its customers reside in single-family environments, W.A.T.C.H. TV does hold exclusive access rights in a relatively small (fewer than twenty) number of MDUs. Importantly, however, in nearly all cases W.A.T.C.H. TV obtained its exclusivity *when the incumbent cable operator was already providing service to the same area*. In those situations, then, W.A.T.C.H. TV's exclusivity is the *result* of competition.¹² This is the polar opposite of what prompted the Commission to take action against incumbent cable operators in the *Report*

¹¹ Moreover, since off-air television reception often is not feasible for subscribers in remote areas, many of W.A.T.C.H. TV's customers rely exclusively on the company's multichannel video service for local television programming.

¹² In the isolated cases where no incumbent cable operator was providing service, W.A.T.C.H. TV's exclusive arrangements facilitated delivery of multichannel video and broadband to unserved areas, and thus produced public interest benefits separate and apart from the debate over MDU exclusivity.

and Order, i.e., where the incumbent cable operator has bound the MDU owner into an exclusive contract before he or she had any opportunity to consider competing alternatives.¹³

Furthermore, any rollback of W.A.T.C.H. TV's existing or future exclusivity rights would harm consumers. It must be remembered that provision of multichannel video service to an MDU involves substantial "sunk costs," and thus in many cases a service provider cannot earn acceptable return on investment absent an exclusive right serve all tenants in the building. The economic efficiencies of exclusivity are particularly significant to W.A.T.C.H. TV and other wireless cable operators who, unlike the cable incumbents, are not large enough to simply shrug off the financial impact of losing exclusivity in even a single building or small group of buildings. Ultimately, the loss of exclusivity-related efficiencies will compromise W.A.T.C.H. TV's ability to serve *all* its existing and potential customers, not just those who live in MDUs.

The impact of this scenario is twofold. First, W.A.T.C.H. TV will have greater difficulty sustaining affordable multichannel video and/or wireless broadband offerings in underserved areas that are too sparsely populated to support W.A.T.C.H. TV's operations by themselves. Second, W.A.T.C.H. TV's presence in western Ohio imposes downward pressure on how incumbent cable services are priced, as W.A.T.C.H. TV offers consumers a highly attractive alternative at a lower cost.¹⁴ The benefits of that price competition, however, will be put at risk

¹³ See *R&O and FNPRM* at ¶ 12 ("[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 an 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.'") (footnotes omitted).

¹⁴ The Commission has found that terrestrial competition is an essential safeguard against rising cable rates. See *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*, Report on Cable Industry Prices, 21 FCC Rcd 15087, 15088 (2006) ("Expanded basic prices [of incumbent cable operators] rose more than 6 percent or twice the rate of inflation last year. Prices are 17 percent lower where wireline cable competition is (continued on next page)

if the Commission suddenly were to compromise W.A.T.C.H. TV's business model by eviscerating the company's existing or future MDU exclusivity rights. These results, obviously, cannot be squared with the Commission's pro-competitive objectives.¹⁵

In sum, even putting aside the substantial legal issues surrounding the Commission's regulation of MDU exclusivity generally, there is no factual or public interest basis for the Commission to regulate MDU exclusivity where wireless cable operators are concerned. W.A.T.C.H. TV therefore urges the Commission to relieve wireless cable operators of any further uncertainty about this matter by declaring that their existing and future MDU exclusivity rights will remain intact.

Respectfully submitted,

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present. DBS competition, however, does not appear to constrain cable prices – average prices are the same as or slightly higher in communities where DBS is the basis for a finding of effective competition than in noncompetitive communities.”).

¹⁵ In addition, the Commission has already recognized the nexus between MVPD competition and new broadband entry, and must not take any action here that sacrifices either or both. *See R&O and FNPRM* at ¶ 20 (noting that broadband deployment and entry into the MVPD business are “inextricably linked”).