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 NATIONAL ASSOCIATION OF HOME BUILDERS

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SUMMARY

NAHB is a nonprofit trade association that represents 235,000 members involved in home building, land development, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. NAHB's goals are to promote home ownership; foster a healthy and efficient housing industry; and promote safe, decent, and affordable housing. Its members construct over 80 percent of the housing in the United States.

NAHB believes that the Commission should not prohibit the enforcement of existing exclusive marketing arrangements or bulk billing agreements, and should not prohibit such agreements in the future. The Commission should also not impose any form of regulation on such arrangements. On the third question of the FNPRM, NAHB believes that the ban on exclusive access contracts should not be extended to cover MVPDs who were not covered by the October 31, 2007, decision and the November 13, 2007, Report and Order.

NAHB describes the typical content of exclusive marketing agreements, defined as agreements allowing a Multi-Channel Video Programming Distributor ("MVPD") one or more material exclusive marketing rights with respect to a given Multiple Dwelling Unit ("MDU"). By their nature, these exclusive marketing agreements do not require any resident of an MDU to purchase any multi-channel video service offered by either the MVPD holding exclusive marketing rights covering that MDU or any of its competitors. In addition, these marketing

agreements do not place any prohibition on physical access to the MDU by any MVPD. Furthermore, they do not preclude an MVPD not a party to such an arrangement from communicating effectively with any resident of an MDU subject to such an agreement. In essence, such marketing arrangements represent the efficient, market-driven choice by an MVPD to bring its services to potential customers who want them within to a given MDU, at prices they can afford, with the expectation of a reasonable rate of return. NAHB believes strongly that investment in the uncertain markets of video and telecommunications must be encouraged in order to keep prices low and to expand the extent of service and the choices available to consumers. Private investment can be fostered efficiently, at no taxpayer cost, by reducing the uncertainty surrounding potential MVPD investments in new facilities. The "exclusive" marketing and bulk billing arrangements are mechanisms to reduce that uncertainty, promoting investment in a less risky venture. This furthers the goals of the Commission and the Cable Act.

MDU developers have invested material resources in creating not only superior housing products, but also effective marketing approaches to their customers based on the consumer's brand recognition of the builder or owner and the reputation for quality, as well as the features and amenities of the dwelling unit itself. Similarly, each MVPD has a full range of available marketing channels to sell its services to MDU residents, including national and localized radio and television advertising, cable television advertising, newspaper and magazine advertising, internet advertising, sponsorship of sporting events, rock

concerts, and other high visibility events, and billboards, to name but a few. MDU marketing agreements do not change the costs of these other channels.

Commission precedent appropriately treats marketing arrangements very differently from the provisioning of physical access, such as in the *Competitive Networks* proceeding. This policy is founded in sound economic principles and is consistent with past Commission precedent, such as the *Foreign Participation* proceeding. The Commission has also actively encouraged joint marketing arrangements between the local Bell Operating Companies ("BOCs") and their structurally separated long distance affiliate; has permitted BOC telemarketing personnel to affirmatively "recommend" selection of their affiliate's long distance service on inbound service order calls; and BOCs are also permitted to market nonregulated Internet and video services to their local phone customers through several different channels, some exclusive in nature, including bill inserts, separate mailings, media advertising, and inbound telemarketing. These various forms of joint and exclusive marketing arrangements have been permitted by the Commission notwithstanding the fact that the extent of the entity's market power with respect to its core wireline telephone service is far greater than that held by an MDU owner or developer and involve the leveraging of substantial legacy market power acquired under government franchise.

NAHB also describes the typical provisions of bulk service agreements, defined as an agreement between the centralized management of an MDU and an MVPD wherein the MVPD typically agrees to provide a basic level of multi-channel video services for delivery to each of the residential units of the MDU.

Many existing bulk service arrangements have been entered into with negotiated economic expectations and benefits to all parties involved. For example, the existence of a bulk billing arrangement may have made it feasible for the MVPD to escalate the time frame or technical capabilities of the network constructed to serve the MDU. Such agreements provide definite benefits to end users. Bulk billing allows the owners to provide cable at no additional cost to residents beyond the rent or purchase price. The cable service is merely one of the many amenities the consumer weighs when evaluating whether the unit is worth the price.

Limitations imposed by the Commission on exclusive marketing agreements or bulk billing arrangements must not violate the constitutional or statutory rights of MDU owners or developers. A ban on MDU exclusive marketing arrangements with MVPDs would violate NAHB members' right to free speech. A blanket prohibition of exclusive marketing or bulk service arrangements would exceed the Commission's authority. Such a prohibition would be regulation of housing markets. They would define some aspects of the ways a landowner can deal with customers, not just the ways an MVPD can deal with landowners. Finally, retroactive invalidation of existing bulk service or exclusive marketing contracts would constitute an unlawful taking under the fifth amendment to the U.S. constitution.

Exclusive marketing and bulk service agreements between MDUs and MVPDs do not constitute an "unfair" method of competition having the "purpose or effect...to hinder significantly or to prevent" any MVPD of any kind from

providing any of its services. If the Commission were to subject such arrangements to scrutiny, under applicable law it should do so on a case-by case basis.

The Commission should not prohibit the enforcement of existing exclusive marketing arrangements or bulk billing agreements, and should not prohibit such agreements in the future. The Commission should also not impose any form of regulation on such arrangements.

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COMMENTS OF THE NATIONAL ASSOCIATION OF HOME BUILDERS

The National Association of Home Builders ("NAHB") hereby submits its comments in response to the Further Notice of Proposed Rulemaking in the above-captioned matter released November 13, 2007.[1] The FNPR was published in the Federal Register on January 7, 2008.[2]

NAHB's comments focus on setting forth its positions with respect to the questions raised by the Commission concerning exclusive marketing agreements and bulk billing arrangements.[3] However, the Commission asked for comments as to whether the ban on exclusive access contracts-published in the Report and Order accompanying the FNPR-should be extended to MVPDs who do not come within the terms of the order; NAHB believes the ban should not be extended to other types of MVPDs.[4]

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[1] *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 Docket No. 07-51, (Adopted: October 31, 2007;Released: November 13, 2007);, FCC 07-189 ("FNRP"). The Report and Order contained in this document is referred to herein as the "Report and Order."
[2] Federal Register, Volume 73, No. 4, Page 1080, et seq.
[3] FNPR at Para. 63-65.
[4] As these Comments are submitted, the Commission's ruling is undergoing judicial challenge. These comments are written under the assumption the Commission's ruling of October 31, 2007,

I. NAHB AND ITS INTEREST IN THIS PROCEEDING

NAHB is a nonprofit trade association that represents 235,000 members involved in home building, land development, remodeling, multifamily construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction.

NAHB is affiliated with approximately 800 state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Known as the voice of the American housing industry, NAHB's goals are to promote home ownership; foster a healthy and efficient housing industry; and advocate policies for safe, decent, and affordable housing . Its members construct over 80 percent of the housing in the United States. NAHB's website address is www.nahb.org.

NAHB members range from large national companies building thousands of homes and rental units[5] to many small firms that operate over limited geographic areas. The vast majority of single-family home builders are very small; 81 percent build fewer than 25 homes per year.[6] NAHB members own property and conduct economic activities that are affected by the FCC's proposed restrictions on the use of bulk billing arrangements and exclusive marketing agreements, since the availability of advanced technologies can be an important factor in the home purchasing decisions of home buyer customers of

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remains intact, though no inference should be drawn about NAHB's position on that ruling or on its probability of being sustained by the courts.

[5] For example, NAHB's High Production Builders Council consists of the 19 largest builders in the United States, but the collective home sales of these firms represent less than 25 percent of the homes sold in a typical year in this highly competitive industry.

[6] See, Gopal Ahluwalia, "Subcontracting and Channels of Distribution, "Housing Economics," (May 2003).

NAHB members. Cable and broadband access is a major component of competition between apartment owners. As a result, NAHB's comments are driven by its analysis of whether bulk billing arrangements and exclusive marketing agreements increase the prospect of competitive supply of multichannel video and other advanced communications services to its members' residential properties. NAHB members also may own or be served by Private Cable Operators ("PCOs").

II. THE COMMISSION SHOULD NOT REGULATE OR PROHIBIT ENFORCEMENT OF EXCLUSIVE MARKETING ARRANGEMENTS

In response to the specific questions raised at Paragraph 64 of the FNPR, NAHB provides the following comments.

A. What is the Typical Scope of an Exclusive Marketing Arrangement?

As used in these comments, an exclusive marketing arrangement consists of an agreement granting a Multi-Channel Video Programming Distributor ("MVPD") one or more material exclusive marketing rights with respect to a given Multiple Dwelling Unit ("MDU").[7]

It must be noted at the outset that there are wide variations amongst exclusive marketing agreements. Such variations depend not only on the identities and objectives of the parties, but on the unique factual circumstances of each MDU. Relevant circumstances include its geographic location, the nature of the homes being built, the MVPDs serving the area, the economic profile of the development and its target purchasers, to name a few. Thus, while there are

[7] As defined in the Report and Order, MDUs include gated communities, mobile home parks, garden apartments and other centrally-managed residential real estate developments. See, Report and Order at Para. 7; Appendix D setting forth 47 C.F.R. Sec. 76.2000.

similarities between many of these agreements, they generally reflect materially different circumstances of subject MDUs.

Although these exclusive marketing arrangements grant differing specific exclusive marketing rights to MVPDs with respect to specific MDUs, and contain other differing terms and conditions, such agreements often grant MVPDs the following types of marketing rights: exclusive rights to place written collateral material in common areas of the MDU; exclusive rights to participate in co-branded collateral material with the developer or owner of the MDU; exclusive rights to sponsor community events at the MDU such as picnics, sporting events, etc.; exclusive rights to display the provider's programming and service features in model homes and apartments and sales centers; and, subject to appropriate consents, access to information concerning consumers buying or renting residential units in the MDU.

These marketing rights can apply not only to multi-channel video services, but more recently have begun to apply also to broadband internet access, voice services, and similar "bundles."

These marketing agreements are often limited to a term of three to five years, or for the projected build-out schedule of the MDU involved.

By their nature, exclusive marketing agreements preserve consumer choice because they do not require any resident of an MDU to purchase or not purchase any multi-channel video service offered by either the MVPD holding exclusive marketing rights or any of its competitors. In addition, these marketing agreements do not depend for their effectiveness on any prohibition on physical

access to the MDU by any MVPD. They create no barrier to service by any other MVPD; no competing entrant would have to pay costs that were not paid by the MVPD with the marketing contract. Entrants would not even be paying the cost of the marketing contract.

Since the MVPD is receiving a valuable right, it is willing to pay the MDU for it. The payment cannot be any more than the enhancement in profit the MDU expects to gain by reaching customers and providing services that residents want, so it is constrained by the desires or predicted desires of consumers. The compensation paid by MVPDs to MDU centralized management entities for such marketing arrangements typically consists of either a flat fee based upon the number of units for which marketing rights are being granted, or in whole or in part a commission fee based on the success of the MVPD's sales efforts to residents of the MDU.

B. How Pervasive Are Exclusive Marketing Arrangements?

NAHB has no definitive statistical information establishing the number of such arrangements or the number of MDU residents covered by such agreements. NAHB is aware that such arrangements have been entered into by large developers covering numerous communities, as well as by small and medium sized developers of a more limited number of MDU communities. Such marketing arrangements have also been entered into by MVPDs that are cable television companies as well as MVPDs that are historically telephone companies now entering this MVPD market place.[8] Most large MVPDs have

[8] See, e.g., http://www.att.com/gen/press-room?pid=7881 where AT&T describes its Connected Communities program as follows: "The AT&T Connected Communities program is a strategic

dedicated corporate organizations or personnel focused on obtaining such agreements from MDUs. These marketing arrangements can be entered into on either a corporate-wide basis (i.e., between an MVPD and numerous MDUs being constructed by a particular developer) or on a community by community basis. They tend to be more common in real estate developments than in multitenant structures.

C. Exclusive Marketing Arrangements Do Not Preclude The Ability Of Any Other MVPD To Communicate Effectively With MDU Residents.

A critical characteristic of the exclusive marketing arrangements described above is that they do not mandate that any MDU resident subscribe to, or not subscribe to, any MVPD offering. Furthermore, they do not preclude an MVPD not a party to such an arrangement from effectively communicating with any resident of an MDU subject to such an agreement.

In essence, such marketing arrangements are just one method for an MVPD to reach potential customers resident at a given MDU. MDU owners, developers and home builders devote substantial resources to the creation of marketing channels connecting them to potential purchasers or renters of their MDU properties. They work hard to establish corporate images and perceptions of their MDU communities through the quality and value of their products, and their features and amenities, as well as through the use of marketing techniques such as newspaper advertising, radio and television advertising and others.

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marketing initiative between AT&T and regional or national single-family builders, developers, real estate investment trusts, apartment ownership and management groups and homeowners' associations to provide next-generation communications and entertainment solutions to residents and homebuyers and increase the value of their communities." AT&T also states that "To date, AT&T Connected Communities has completed contracts with properties across the country representing more than 4 million homes, condominiums and rental properties." Id.

When a consumer makes a decision to purchase or lease a home or a condominium from one of these developers, it reflects the success of these various product development and marketing efforts and the desirability of that product and service combination, or bundle. This same consumer, of course, is subject to pervasive marketing programs from numerous other businesses, including competing builders and developers and MVPDs, seeking revenues from that consumer. In short, the MDU developers have invested time and effort in developing not only superior housing products, but also creating a marketing approach to the customer that is effective and based in substantial measure on the consumer's perception of the builder's brand and the value of the bundle of products, features, and services that come with the unit.

If an MVPD does not make an exclusive marketing agreement, it still has a full range of available marketing alternatives to sell its services to MDU residents. Such sales channels include, but are not limited to, national and localized radio and television advertising, cable television advertising, newspaper and magazine advertising, internet advertising, sponsorship of sporting events, rock concerts, and other high visibility events, and billboards, to name but a few. For example, an MVPD could decide to erect large billboards near the entrances to MDU communities; could elect to place advertisements in local real estate magazines and newspapers; and could even choose to fly the "MVPD blimp" over a targeted

MDU. Focused direct mail advertising is also available, including address lists obtained from the United States Postal Service Change of Address process.[9]

MVPDs also have their own internal marketing channels addressing their existing customers. Since customers must contact their service provider to discontinue or move service to a new home, that service provider has such information available to use in marketing efforts directed to the moving subscriber.[10]

In the context of these broad marketing options, an MVPD may determine that obtaining marketing rights from an MDU developer is a potentially effective marketing tool, or may decide that its other options are more cost effective. There is no doubt that there are numerous effective channels available to MVPDs to market their services to MDU residents, even when the MDU is subject to an exclusive marketing arrangement.

D. MVPD Costs Of Marketing, Promotions And Sales Do Not Substantially Increase In The Context Of Exclusive Marketing Arrangements.

Like any investment, an exclusive marketing arrangement with an MDU itself comes at some cost to the MVPD involved. As stated earlier, compensation schemes of such agreements differ, but generally range between a flat fee per unit and a performance based commission, or some blend of those two. In addition to the direct costs of acquiring such marketing rights, such agreements generally also entail additional costs such as production of collateral materials,

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[9] See, e.g., http://ctam.com/news/releases/070917.htm for a description of the cable industry program to utilize USPS change of address information to market to movers into new homes or MDUs.

[10] See, e.g., http://www.usa.att.com/move_att/index.jsp for a description of AT&T's Movers One Source Program.

sponsorship activities and the like. A rational MVPD entering into any such agreement would make its own internal determination that the costs involved would produce sales results sufficient to justify that investment.

Conversely, the costs of an MVPD's alternative marketing channels are unaffected by the existence of a marketing arrangement at a particular MDU. Newspaper, television, radio, cable television and other advertising media are priced on a regional or national basis, and the price is rarely if ever materially affected by a given MDU.

It is also highly likely that, when moving to an MDU, home buyers choose their MVPD provider on a number of interacting considerations such as their level of satisfaction with their current provider, multiple overlapping marketing channels, promotional offerings available from competing MVPDs, evolving new service and technology alternatives, and prices of various programming packages. It is clear, however, that an exclusive marketing agreement that does not require a purchase from any particular MPVD does not prevent MPVD competitors to market to any home buyer, because of the wide variety of alternative marketing methods available.

E. Exclusive MDU Marketing Arrangements Do Not Violate Section 628(B) Of The Act.

In the Report and Order, the Commission found that exclusive physical access agreements constituted unfair method of competition or an unfair act or practice proscribed by Section 628(b). The Commission found that such exclusive access provisions have

"the purpose or effect or preventing or MVPDs from providing the kind of programming covered by Section 628 – satellite cable and/or broadcast programming – to certain consumers; indeed that is the intended and inevitable effect of exclusivity clauses. Exclusivity clauses prevent new MVPDs from competing with entrenched incumbent providers on the basis of service offerings, including programming, and, on price. Foreclosing competition in the MDU market in this way is unfair because it deprives consumers residing in MDUs of the opportunity to choose an MDU provider."[11]

In contrast, exclusive marketing arrangements as described above do not preclude any consumer from obtaining programming covered by Section 628, nor do they prevent any new MVPD from competing with entrenched providers on the basis of service offerings, programming, or price.

As stated by the Commission in the Report and Order:

"Finally, other agreements incumbent MVPDs and MDU owners perhaps providing for marketing exclusivity or bulk discounts, can provide benefits similar to those alleged for exclusivity clauses [for physical access] without causing the latter clause's entry – foreclosing harms to consumers."[12]

As the Commission further stated in the Report and Order, the

"best results for consumers come from preserving their ability in playing an active role in making an individual choice rather than allowing cable operators using exclusivity clauses to foreclose individual choice."[13]

By enabling another marketing channel amongst many available, the exclusive marketing agreements at issue here provide information to consumers about their MVPD options with no search costs, and thereby enhance their individual choices without restricting or mandating their decisions in any way.

Assuming the Commission has authority over the types of arrangements under investigation, the appropriate legal and policy analysis in the context of

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[11] Report and Order at Para. 27
[12] Id. at Para. 28.
[13] Ibid.

§ 628[14] of the 1992 Cable Act[15] would balance on a case-by-case basis the anticompetitive effects of such arrangements, if any, against their pro-competitive effects. This is the essence of an analysis of whether such arrangements constitute an 'unfair" method of competition.[16] Exclusive marketing agreements between MDUs and MVPDs do not constitute an "unfair" method of competition having the "purpose or effect...to hinder significantly or to prevent" any MVPD of any kind from providing any of its services. These arrangements do not in any way "hinder or prevent" any MVPD from providing services to a customer who chooses to take service from it.

Proceeding through a case-by case basis, the Commission should conduct such a competitiveness analysis only upon a party's proper complaint against a cable or telecommunications provider alleging the provider is engaged in an unreasonable practice. In such cases the Commission may wish to engage in the required analysis and examine the particular terms of the agreement in the context of the economic position of the parties to the agreement, existence and technological and physical availability of competitors, and all other factors relevant to whether competition was in fact inhibited as the complaining party alleged. However, based on the record that can be made in this proceeding, the Commission must refrain from a blanket prohibition on these arrangements in all

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[14] 47 U.S.C § 548.

[15] Cable Television Consumer Protection & Competition Act of 1992 (Pub. L. No. 102-385, 106 Stat. 1460 (1992), codified at 47 U.S.C. §§ 521 et seq, (the "1992 Cable Act")).

[16] This is the fundamental antitrust analysis applied to the examination of whether conduct constitutes an unreasonable restraint of trade or unfair competition under the "rule of reason" first articulated by the Supreme Court in *Standard Oil Co. of New Jersey v. U.S.,* 221 U.S. 1 (1911). A threshold inquiry is made, however, as to whether scrutiny is justified by the presence of market power. In this case, NAHB members certainly do not individually possess any market power in the relevant market for new homes and thus have no ability to leverage such market power to diminish competition for MVPD services.

cases, because the arrangements have substantial procompetitive and pro-consumer effects.

As the Commission has properly observed, "the purpose of Section 628 of the Act...is to 'promote the public interest, convenience, and necessity by increasing competition and diversity in the [MVP] market, ...and to spur the development of communications technologies.'"[17] The availability of exclusive marketing arrangements to NAHB members enhances the competitive bidding process for the supply of MVP and communications services to their prospective residents. Permitting exclusive marketing arrangements under these circumstances is fully consistent with and promotes the purposes of § 628 of the Cable Act.

F. The Commission Has Properly Treated Marketing Agreements Differently Than Agreements Affecting Physical Access

With regard to issues of dominance, bottleneck control, and competitive analysis, Commission precedent appropriately treats marketing arrangements very differently from the provisioning of physical access. In the *Competitive Networks* proceeding, the Commission has been appropriately cautious in imposing any restrictions on the use of exclusive marketing agreements between MDU owners and providers of telecommunications services.[18] This policy, which

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[17] CITE

[18] *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets* [and companion cases], WT Docket No. 99-217, First Report and Order and Further Notice of Proposed Rulemaking [in WT Docket No. 99-217], 15 FCC Rcd 22983 (2000) ("*Competitive Networks*" proceeding). NAHB notes that the Commission intends to address the issue of whether exclusive marketing arrangements are to be prohibited for telecommunications providers in its *Competitive Networks* proceeding. NAHB urges the Commission to adopt consistent requirements for both cable operators and telecommunications providers. There is no basis for different treatment. Consistent with its comments in this proceeding, the NAHB submits that the

is currently being reviewed in both contexts,[19] is founded in sound economic principles and is consistent with Commission precedent. For example, in its 1997 Order in the *Foreign Participation* proceeding,[20] the Commission evaluated regulatory options pertaining to alliances between a US carrier and a foreign carrier. The Commission focused, in particular, on situations where the foreign carrier was dominant in its home market(s) or where there was an affiliate relationship involved. In that proceeding, the Commission considered and rejected the option of restricting "exclusive arrangements involving joint marketing, customer steering, or the use of foreign market telephone customer information."[21]

In recent years, the Commission has actively encouraged joint marketing arrangements in situations where the entity in possession of market power not only controlled the post-sale relationship with the customer, but also held market power with respect to the purchase of the core service (as is the case with an Incumbent Local Exchange Carrier or "ILEC"). For example, the Commission has allowed the local Bell Operating Companies ("BOCs") to engage in joint marketing with their structurally separated long distance affiliate and in so doing to create and market local/long distance service bundles.[22] BOC telemarketing

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Commission should allow both cable operators and telecommunications providers to participate in exclusive marketing and bulk service arrangements.

[19] Shortly before the Commission issued the FNPR, it issued a Public Notice requesting that parties refresh the record in the Competitive Networks proceeding, WT Docket No. 99-217. Public Notice, DA 07-1485, March 28, 2007.

[20] *In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market; Market Entry and Regulation of Foreign-Affiliated Entities*; IB Docket No. 97-142; IB Docket No. 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 (1997).

[21] *Id.* at Paras. 20, 217, 224.

[22] *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 272(g). See also *In the Matter of Implementation of the Non-Accounting Safeguards of*

personnel have been allowed to affirmatively "recommend" selection of their affiliate's long distance service on inbound service order calls and, more recently, are no longer required to offer to read the names of alternative long distance service providers.[23] BOCs are also marketing nonregulated Internet and video services to their local phone customers through several different channels, some exclusive in nature, including bill inserts, separate mailings, media advertising, and inbound telemarketing. BOCs also market their wireless affiliates' services to their ILEC subscribers and, indeed, may even offer a discount or other bundled pricing arrangement where the customer takes both wireline and wireless services.[24]

These various forms of joint and exclusive marketing arrangements have been permitted by the Commission notwithstanding the fact that the extent of the entity's market power with respect to its core wireline telephone service was far greater than that held by an MDU owner or developer and involved the leveraging of substantial legacy market power acquired under government

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Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order, 11 FCC Rcd 21905 (1996) ("*Non-Accounting Safeguards Order*").

[23] In the Matter of AT&T Corp., Complainant, v. New York Telephone Company, D/B/A Bell Atlantic-New York, Defendant, Memorandum Opinion and Order, File No. EB-00-MD-011, FCC 00-326, released October 6, 2000 ("*AT&T/BA-NY Order*").

[24] See, e.g., Verizon New England, DTE MA No. 10, Exchange and Network Services, Part M Section 1, pages 72 and 72.1. In fact, in the case of the handsets used in connection with wireless services, the Commission permits not only joint marketing, but also practices that deny end users access to handsets other than those specifically selected and endorsed by the wireless carrier. Not only does the Commission not interfere with the major wireless companies' ability to negotiate with wireless handset providers, to promote one vendor's equipment line more vigorously than another's (or even exclusively) and to offer varying levels of promotional discounts – an alliance roughly analogous to the exclusive marketing agreements under consideration here – but it goes much further. Unlike the simple marketing relationships that the Commission is here considering disallowing with respect to MDU building owners/developers, the Commission actually allows wireless service providers to limit customers' access to their services to specific makes and models of cell phones – not based upon technical compatibility but solely at the discretion of the wireless carrier. In some instances, wireless providers may refuse to activate an otherwise compatible handset on their networks merely because the customer had not acquired it through an approved distribution channel.

franchise – something not possessed by the MDU owner – in an adjacent and otherwise competitive markets.

The exclusive MVPD marketing arrangements that the Commission is reviewing here are substantively identical to joint marketing arrangements that are found in virtually every sector of the US economy, and are, in any event, acquired not through the grant of a government monopoly but through investment and risk-taking on the part of the MDU owner or developer. When most people buy a new dishwasher, for example, there is probably a sample size box of detergent or other supplies used in conjunction with that appliance; the situation is analogous for washing machines. The appliance manufacturer does not make or sell the detergent, but it does want customers to use a product that will make the machine look good, so it co-markets only with products that will be at least adequate. If people use inferior detergents and get disappointing results, the appliance will get some of the blame, and the manufacturer will suffer. In the case of co-marketing, the primary consumer seller–the appliance manufacturer or the MDU–has its name and reputation at stake to provide satisfactory quality. The MDU does not want the residents to attach to an MVPD that provides inferior programming or undependable signals, so the MDU's interests are aligned with those of the residents–to seek affordable, quality service. Many brands can compete for the exclusive co-marketing channel, which gives them incentives to promise good service at low cost; once provider is selected, other competitors can use the numerous other available sales channels to persuade potential

customers to take the competing service, until the co-marketing agreement comes up for renewal.

Another form of joint marketing commonly used by businesses is bill inserts – offers that are included in the same envelope with a monthly credit card, oil company or department store bill. Other examples include coupons offering discounts or rebates if the consumer purchases several products of different manufacturers, or "product endorsements" that are purchased by their supplier. Companies subject to the Commission's jurisdiction, e.g., the ILECs, routinely use inserts in their billing for local exchange service (a market in which they remain dominant) to market service bundles that include long distance services and to market products and services offered by affiliates (e.g., Internet and/or wireless services). Nothing prevents these providers from selling advertising space in their widely distributed bill inserts to unaffiliated vendors (as, for example, some banks have begun to do with their monthly statements). Not surprisingly, however, these marketing channels are almost never made available to competitors of the co-marketing firms.

G. The Commission Should Not Prohibit The Enforcement Of Existing Exclusive Marketing Arrangements Or The Execution Of New Ones, Or Regulate Them In Any Manner.

Almost all types of marketing or advertising agreements include some form of exclusivity. Budweiser does not want a Miller beer commercial next it its own Super Bowl spot, and various forms of exclusivity are lawfully negotiated to accommodate this legitimate commercial interest. Even shopping mall leases often stipulate that no other tenants will be allowed in the same retail line.

An exclusive marketing agreement represents an investment by both sides – the MDU and the MVPD – that benefits not only the contracting parties, but also the MDU residents, who are really third party beneficiaries of the exclusive marketing contract. The MDU is pragmatically able to ensure available MVPD service (since no MVPD would pay for marketing rights for a service it did not intend to provide), as well as some compensation; the MVPD gets a low-cost way to reach customers and increase probable sales, and the residents get the MVPD to serve the MDU (which it might not have done otherwise) and additional information about alternatives that are available. The exclusive use of this marketing channel by a specific MVPD does not inhibit any other MVPDs from undertaking other numerous forms of marketing, some of which may be solely available to a particular competing service provider, to attempt to attract MDU residents. No resident is physically or economically precluded from choosing any available MVPD service. Exclusive marketing agreements do not tend to raise the price of video programming services, because the MVPD wants to keep a low price in order to help attract customers, who retain the power of choice. Neither do exclusive marketing agreements decrease the programming choices available to residents, because a resident not persuaded by the MVP's sales materials can always elect to obtain service from any other available MVPD.

III. THE COMMISSION SHOULD NOT PROHIBIT THE ENFORCEMENT OF BULK BILLING ARRANGEMENTS.

A. What is the Typical Scope of a Bulk Billing Arrangement?

Bulk billing arrangements, as addressed in these Comments, typically consist of an agreement between an MVPD and the centralized management of