

an MDU, such as the owner of a rental complex or a homeowners association (“HOA”) in a condominium, townhouse, or single family home community with common facilities or property.²⁵ Under such an agreement, the MVPD typically agrees to provide a basic level of multi-channel video services to the MDU for delivery to each of the residential units. The MDU typically agrees to compensate the service provider at a materially reduced rate for these services relative to the generally-available retail rate.

For rental apartments, a bulk billing arrangement is negotiated between the MDU owner and an MVPD. The owner receives the services at a bulk discount on per unit basis, and all or part of the fees are included in the rent. The MVPD often wires the building at its own cost and connects to all the apartments. The owner then offers “free” basic cable as an amenity, just like it may offer swimming pools, exercise facilities, off-street parking, or numerous features that will be valued highly by some people and less highly by others. Prospective tenants evaluate the package of features offered by each apartment, along with the rent, and they choose the unit that offers the best value they can afford. Cable service is part of the competition among apartment buildings, and there is clearly no market power among the 20 million apartments in the country.

In the case of an HOA, each of the residents of the MDU is obligated to compensate the HOA for the fees paid to the service provider applicable to that resident’s particular unit. Generally, but not always, these obligations are set

²⁵ An HOA is often established while a new MDU is under development, and at the beginning is under the control of the developer, since the developer owns most if not all of the units or lots in the MDU. At some point established in relevant HOA bylaws, often when a majority of the units or lots have been sold, control of the HOA shifts to residents. Contracts by the HOA when under developer control are often subject to state real estate regulatory limitations.

forth in the real estate documentation pursuant to which the residential unit was purchased or leased. This documentation will include mandatory real estate disclosures under state real estate disclosure laws related to property purchases, the covenants of the HOA, provisions in a residential lease, or other contractual forms. Often residents' obligation to pay is included within the definition of the HOA dues that each resident is obligated to pay to the HOA for various services such as maintenance of common facilities, etc.

In addition to basic cable service provided to each individual residential unit, under such bulk billing arrangements the same basic service is sometimes provided to common areas of MDUs such as clubhouses, recreation rooms, meeting rooms, and the like. Furthermore, under such agreements the MVPD may provide a "community channel" for use by the community and its central management for such things as meeting announcements, school announcements, etc.

In the event that an individual MDU resident desires multi-channel video programming in addition to that contained in the basic tier of service typically subject to bulk billing arrangements, it is generally the responsibility of the individual MDU resident to contact the MVPD involved and establish an individual account for these additional services.

B. How Prevalent Are Bulk Billing Agreements?

NAHB has no reliable statistical information concerning the number of MDUs subject to bulk billing arrangements or the magnitude of the discounted pricing available under bulk billing arrangements nationwide.

The relative attractiveness of a bulk billing arrangement clearly varies from MDU to MDU, based upon its location, the actual availability of competitive alternatives, the nature of the resident body of the MDU, and the specific contract terms. For example, an MDU comprised largely of part-time residents using vacation condominiums at the MDU may find a bulk service agreement far more attractive than the residents of an MDU located in an urban area with greater competitive alternatives as well as greater full-time resident interests in these alternatives.

Anecdotal information indicates that discounts in the range of 20 to 30 percent are not uncommon in MVPD bulk billing agreements. Thus, bulk billing arrangements can provide a significant economic benefit to those residents desiring multi-channel video services.

C. The Relevant Economic Realities Underlying Bulk Agreements

The system cost structure of MVPDs gives rise to their interest in assurances of volume. Their initial investment, or capital cost, is very high, since it requires the stringing of physical cables to poles or the laying of cables in ditches for miles. Once the system is set up, however, the operating cost or marginal cost of each customer is relatively low. As a result, a higher sales volume results in lower total cost per customer. Therefore, at higher volumes the MVPD has a better opportunity to charge a price people are willing to pay, yet still obtain a return on the investment. Without a reasonable expectation of an acceptable return on investment, the MVPDs will not invest, and they will not extend service to currently unserved areas. This declining unit cost means that it

will always be cheaper to serve more households than fewer, on a unit basis, on any given level of investment. That cost savings can benefit everyone in the market.

Because of the declining cost per customer as the number of customers grows, if there are more customers, an MVPD can realize an acceptable return at lower prices. If there is a party with some negotiating power, such as a developer, homeowner's association (HOA), or MDU owner, that power can be used to negotiate the price down from the individual open market price to something closer to the unit cost of serving every resident of the MDU or development. The owner or developer has an incentive to engage in that bargaining in order to offer a superior product that enhances the value of the home, as discussed in more detail elsewhere in these comments.

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The Commission has acted to abolish exclusive access contracts, which were one way to assure volume and enable bargaining for lower rates and improved product offerings. Bulk billing agreements are also means of assuring some volume, but they are very different from exclusive access contracts, because they still allow the consumer free choice of service from any MVPD in the market, provided it is willing to come serve the premises. Yet these exclusionary-looking practices improve the bargaining power of the occupants against the MVPD because they result in greater choice at lower cost to the consumer. There are gains to both sides: the residents get a lower price and the MVPD gets an increased profit. The two sides split the economic efficiency gains from the collective bargaining between the owner and the MVPD. Just how low the residents' price can go depends on how much it would cost the MVPD to extend service, yet still allow a profit.

This result is exactly the opposite of the "contrived scarcity" that is the problem of monopolies, where a monopoly is assumed to give consumers less output and charge a higher price for it. Instead, consumers get more services from the MVPD and pay a lower price for it, because the billing agreements give the MVPD some assurance of sales volume. Not only do the increased probabilities of sales cause firms to want to serve the property, the resulting buying power of the MDU can be used to play one MVPD against another, in those relatively few cases where there is more than one MVPD that could serve the property.

Therefore, bulk billing agreements are pro-competitive in those markets where more than one MVPD can serve the property. They are also procompetitive in that the ability to provide assurances of sales volume may induce a new entrant to serve the property, establishing competition against the incumbent. Finally, they may induce an MVPD to establish service in relatively remote or sparsely settled areas where no cable service currently exists, thus providing competition to satellite and broadcast systems. Monopolies are fought to obtain precisely these results: higher quantity and lower price, and in these cases, the competitive results are obtained by allowing MDUs and developments to provide non-coercive assurances of revenue, without denying anyone the right to choose his or her provider.

D. Bulk Billing Arrangements Produce Significant Consumer Benefits

The market for housing is extraordinarily competitive, such that no individual seller – whether it be a homeowner who has put his house up for sale or even the largest developers of whole new communities – has market power vis-a-vis the potential or actual purchaser of a housing unit. Many forms of price and non-price competition are to be found in the housing market. Developers and owners are forced to price their units at competitive levels, but also compete on non-price attributes, such as amenities, bundled appliances or other items that are to be provided with the purchased unit, not to mention the quality of the overall construction and finishes. Developers are routinely confronted with the

task of negotiating the best possible deals with their suppliers, and their ability to do so is both in their own and their customers' best interests.

One such amenity that may be offered to customers is a package of cable TV and other communications services, either individually or as a bundle. By entering into a bulk services agreement with a service provider, the owner or developer is able to offer its customers certain "basic" or "core" services (such as basic cable television, Internet access, or basic local voice telephone service) as part of the bundle of services and amenities included within the monthly rent or HOA fee, with the customer being afforded the opportunity to purchase additional or optional services either from the same service provider or from a competing service provider, if one is available.

Bulk service agreements of this sort present a variety of benefits to the individual consumer. First, they typically result from competitive, arm's length dealings between the MDU and alternative potential service providers. Because of the bulk purchase, the MDU is in a far more advantageous bargaining position than any individual homeowner to obtain the lowest possible price and highest quality service. Second, by working cooperatively with the chosen service provider, the construction of the cable/telecom infrastructure can be accomplished most efficiently at the appropriate stage of construction of the MDU, thereby keeping its cost down. Finally, it assures that the residents of the MDU will have a broad range of quality video and broadband services available post-construction by assuring the selected service provider of an ongoing minimum level of revenue for the included basic services.

In a scenario where there is no bulk services agreement with a single selected service provider, and thus without the minimum level of revenue that would be specified in the bulk services agreement, there is no assurance that *any* service provider would be prepared to make the investment necessary to construct the distribution infrastructure, in which case the residents would have no service at all.²⁶ Alternatively, the developer would be forced to pay for the costs of construction that would then need to be incurred by the developer itself, much as the prices of housing units today include recovery of such infrastructure elements as roadways, utility mains (gas, electric, water, sewer) and other construction costs. There are no free lunches. If the developer is not permitted to enter into a bulk service agreement with an MVDP whereby the latter incurs the up-front costs and recovers same through monthly recurring service charges, then the developer would itself be forced to build the needed infrastructure and recover its costs through the prices of the dwelling units.

Some have argued that such “bulk services” arrangements are anticompetitive in that they may create barriers for other service providers seeking to compete for individual consumers’ business. Such concerns are speculative and unsupported. Indeed, if absent a bulk service agreement the developer is itself forced to build the required facilities and recover their cost in the prices of the dwelling units, the condition confronting a would-be entrant is virtually identical to that purportedly confronting the entrant where a bulk services contract is in place.

²⁶ This is of growing concern to greenfield developers, where no existing infrastructure might exist and traditional utility obligations to serve new territories are declining in the deregulated environment of both cable and telephone companies.

The Commission observes in the FNRM that while bulk billing arrangements may not prohibit MDU residents from selecting a competitive video provider, because of the nature of the contract residents “would have to” continue paying a fee to the bulk service provider as well as any new service provider.²⁷ Certainly, tenants must continue to pay their rent, and they will not receive a discount if they decline to use the cable services provided in the lease. They also receive no discount if they decline to use the pool, the exercise facility, or free parking associated with the unit. Numerous MDU residents spurn the “free” recreational facilities and join gyms, country clubs, or marinas of their own choosing, paying additional dues to the third party service provider, but there is no discount for refusing what has been made available through the lease. People who always eat in restaurants “have” to pay for the kitchen appliances, even though they don’t use the kitchen or the appliances are not those they would choose. However, the residents – rental and ownership – were aware of the cable provider when they signed the lease or the purchase contract. They took the apartment either in spite of or because of the cable service, but it was a willing bargain on the consumer’s part. To repeat, there is no monopoly power among apartments.

Contrary to Commission assumptions, the supposed permanence of bulk billing arrangements is actually quite variable.²⁸ This assumption also totally

²⁷ FNRM at Para. 65.

²⁸ Bulk service agreements contain differing contract terms, including duration, conditions under which termination is possible or required (such as change of law provisions, change of apartment building ownership, the voting percentage of HOA members required to modify, renew, or terminate the agreements, etc.). Rental unit owners will want to be able to update the contract as necessary to be able to offer competitive units. It is not possible to reach the Commission’s generalized conclusion absent significant factual record development.

ignores the countervailing benefits such an agreement may have delivered to the residents of the MDU, such as timely availability of advanced service, favorable pricing for basic service, and additional amenities such as a community channel and service in common facilities.

A ban on bulk billing would be a ban on including cable service as part the amenity package offered with a unit. There will be no more apartment advertisements that proclaim “Free Cable.” Such ban brings absolutely no benefits to the consumer at all. Banning bulk billing will not lower prices for any customers, because the source of savings has been eliminated: the bulk discount. Residents who were happy with the existing service will now have to pay higher, full retail prices. Residents who chose third party providers will not see their bills go down. Providers will have no more incentive to serve the premises than they did before. In short, all a ban accomplishes is to take away the discount enjoyed by residents satisfied with their cable service and programming. The ban would raise their prices up to the level paid by those who chose third party providers; the third party customers will not see their prices go down. It serves the public poorly to raise their prices in the name of an abstract theory of competition.

However, from a somewhat rigorous theoretical perspective, government intervention can make a market more efficient if there is a market failure, where a market failure is a departure from the conditions required to have perfect competition. In the case of video programming markets, there are plausibly two market failures: declining average costs (“natural monopoly”) and high

transactions costs. The transactions costs in this case are the high costs it would take for the residents to agree with an MVPD for an efficient contract. Without the presence of a landowner or HOA to do the negotiating for them, the residents would face an insurmountable burden to unite and engage in meaningful negotiations with the MVPD. To take bulk billing (or, to a lesser extent, exclusive marketing) out of the transaction would be to create a market with many disorganized buyers but only a few sellers. Any buyer's threat to take his or her business elsewhere would be trivial.

A well established theorem of public sector economics– the Theorem of the Second Best²⁹–shows that if a market has more than one failure, correcting just one of them will not necessarily increase economic welfare. Instead, trying to change just one thing in an imperfect market may actually make things worse. The ban on bulk billing is posited to make markets more economically efficient by expanding freedom of consumer choice. In fact, however, it will make things worse by removing an effective force to bring prices down and quality up: the greater bargaining power of the residents as represented by the developer or owner who negotiates for them.

Furthermore, bulk billing arrangements are subject to active oversight by state governments. For example, some states permit such bulk billing arrangements, but limit their permissible duration, or otherwise regulate permissible terms and conditions.³⁰ Thus, there exists an active and varied state

²⁹ R.G. Lipsey and R.K. Lancaster, *The General Theory of Second Best*, 63 *Rev. Econ. Stud.* 11 (1956).

³⁰ See, e.g., Sections 11000, et seq. of the California Business and Professions Code, and the Department of Real Estate Regulations found in Sections 2792 of Title X of the California Code

regulatory framework concerning bulk billing arrangements for multi-channel video services, and the record in this proceeding does not contain a comprehensive review or analysis of the extent, substance, or efficacy of these various state activities. The Commission would need a significantly stronger record to preempt such affirmative state regulatory programs.

IV. LIMITATIONS IMPOSED ON EXCLUSIVE MARKETING AGREEMENTS AND BULK BILLING ARRANGEMENTS MUST NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF MDU OWNERS OR DEVELOPERS

A. An Absolute Ban On MDU Exclusive Marketing Arrangements With MVPDs Would Violate NAHB Members' Right To Free Speech.

Preferred marketing arrangements are a means by which MDU owners and developers express their preference for a particular MVPD provider, through such actions as brochures placed on their property, websites they co-sponsor, and joint sponsorship of activities on developer-owned property. Precluding a developer from using its privately-owned property to effectuate the expression of its views as to a preference for a particular MVPD provider would be an unconstitutional abridgment of protected commercial speech. The freedom of a developer to express its view of a preferred provider necessarily requires the developer to restrict other providers from direct use of the developer's property and facilities to express or imply that the developer is affiliated with the services of an alternative provider, one with which it does not affiliate and whose services it does not recommend. The freedom to speak includes the freedom not to

of Regulations, and Chapters 718 and 720, Florida Statutes, establishing the powers of the Florida Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation, including the review of disclosures concerning, among other things, MVPD agreements.

speak; that is, to be free from coerced expression of views one does not hold. Owners and developers can not legally be required to endorse MVPDs whose service or prices they consider sub-optimal.

While the developer's speech in this regard is directed toward inducing a commercial transaction, such speech is at the core of protected commercial speech. Consequently, the targeted speech in this case fits soundly within the definition of commercial speech. As the Supreme Court observed in *U.S. West, Inc. v. F.C.C.*: "It is well established that non-misleading commercial speech regarding a lawful activity is a form of protected speech under the First Amendment, although it is generally afforded less protection than noncommercial speech."³¹ Therefore, the Commission's proposed ban on exclusive marketing arrangements implicates the First Amendment by restricting a developer's protected commercial speech.

Whether a government restriction on commercial speech violates the First Amendment is determined under the test expounded in *Central Hudson* (where the Supreme Court struck down a regulation of the New York Public Service Commission which completely banned promotional advertising by an electric utility).³² First, the speech must concern lawful activity and not be misleading, as is the case here. If this threshold requirement is met, the government may restrict the speech only if it proves: "(1) it has a substantial state interest in

³¹ *U.S. West, Inc. v. F.C.C.*, 182 F.3d 1224 (10th Cir. 1999), 1233, (striking down FCC CPNI regulations on 1st Amendment grounds) citing, *Went For It*, 515 U.S. at 623, 115 S.Ct. 2371; *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

³² *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest.”³³ Any outright ban on exclusive marketing arrangements, existing or future, would fail under this standard because the ban would restrict NAHB members’ legitimate protected commercial speech.

While there is no doubt the Commission has a substantial interest in protecting and promoting competition for MVP services, which NAHB shares, a ban on exclusive marketing arrangements does not “directly and materially” advance that interest. Neither would it be narrowly tailored only to a ban on a case-by-case basis a particular agreement where the Commission has a record to show that an agreement in particular circumstances does on balance more competitive harm than good.

On this record, the Commission cannot show that a substantial state interest is directly and materially served by a ban on exclusive marketing arrangements; therefore, prohibition of them would be an unconstitutional abridgment of NAHB members’ protected commercial speech.

B. A Blanket Prohibition Of Exclusive Marketing Or Bulk Service Arrangements Would Exceed the Commission’s Authority

The Commission concedes as it must Justice Holmes’ admonition that “regulation may go too far.”³⁴ The Real Access Alliance (“RAA”) has raised legitimate objections that neither §628(b) nor any other provisions of the Cable

³³ *Revo v. Disciplinary Bd. of the Sup.Ct. for the State of N.M.*, 106 F.3d 929, 932-33 (10th Cir.) at 932 citing *Central Hudson*, 447 U.S. at 564-65 (determining that lawyer’s direct mail advertising to personal injury victims and family members of wrongful death victims constituted protected commercial speech), *cert. denied*, 521 U.S. 1121, 117 S.Ct. 2515, 138 L.Ed.2d 1017 (1997)

³⁴ Report and Order at ¶ 59.

Act bestow on the Commission jurisdiction to regulate the real estate industry or exclusive contracts between the industry and cable operators.³⁵ §2(a) of the Cable Act limits application of the Act to cable service, those engaged in providing such service, and facilities related to providing cable services. §628(b) is addressed to contracts which limit an MVPD's access to video programming, and does not expressly or by inference confer upon the Commission jurisdiction over access to real estate, and certainly does not extend by its terms to regulation of contracts which do not in any way restrict or deny MVPD access to interests in real property, such as bulk service agreements and exclusive marketing agreements. The RAA, for example, noted in its July, 2007 comments that the Commission needed Congressional authority to regulate the provision by utilities of space on utility-owned property for the purpose of pole attachments, and that regulation of access to property inside buildings owned by developers is directly analogous.³⁶ What's more, the proposed rule seeks to regulate the way the housing market deals with its customers, not the way MVPDs behave in buildings. No part of the statute grants FCC jurisdiction over landowners.

While a broad reading of § 2(a) of the Cable Act's general provision which extends FCC regulation to facilities related to the provision of cable services may be stretched to argue that the Commission has jurisdiction to regulate access to network components, conduit, inside wire, rights of way or other access to physical facilities used to provide cable services, neither bulk service or exclusive marketing arrangements restrict or deny access to any physical facilities or

³⁵ See, Comments of RAA at pp. 24-44, filed July 2, 2007.

³⁶ Id., p. 28.

property necessary to provide MVP services. If the Commission's authority under the Cable Act to regulate access to privately-owned buildings which are not the property of the utilities subject to its regulation is doubtful, its authority to regulate contracts which do not deny or restrict access to property, such as bulk service agreements and exclusive marketing arrangements, is extremely tenuous if it exists at all.

Moreover, even assuming that § 628(b) of the Cable Act extends the purview of Commission regulation beyond programming vendor contracts that restrict or deny access to programming, bulk service and preferred marketing agreements do not have the "purpose or effect...to hinder significantly or to prevent" an MVPD from providing its services. Such agreements do not restrict or deny an MVPD from providing its services to any end user. Instead, such agreements are designed to and do facilitate and attract the deployment of MVPD services to real estate developments on favorable terms. Bulk service agreements help redress the imbalance in bargaining position between individual end users and the typical dominant duopoly of MVPDs, and they result in significant concessions as to the price, quality and deployment of MVPD services on behalf of homeowners.³⁷ Marketing agreements obligate no end user to any MVPD offering. Depriving MDUs of these contractual tools does not advance competition and deprives consumers of its benefits. Competition between the

³⁷ One reason why a case-by-case analysis is appropriate for such agreements is that the form of governance of HOAs or other centralized management entities differs materially from MDU to MDU, and is materially affected by state law and custom as well as market conditions. Residents of MDUs have, in one legal form or another consented to and chosen to delegate selected obligations and rights to the management entity. The decision making process of that entity might require majority (or greater) approval of residents for material contracts or actions.

dominant providers is increased to the benefit of consumers because the dominant providers vie to obtain bulk service or marketing rights.

NAHB agrees that RAA has raised serious questions regarding the Commission's authority to regulate in this area to prohibit contracts which grant exclusive rights to inside wiring, or to serve, or to install facilities in a building.³⁸ More important here, the NAHB emphasizes that the Commission must distinguish those types of agreements it has prohibited in its Report and Order,—those that deny or restrict physical access and freedom of choice—from the ones at issue in this FNPR. Its authority over the arrangements under scrutiny in this FNPR is even more tenuous, since they do not restrict access by MVPDs or choice by consumers.

C. Retroactive Invalidation Of Existing Bulk Service Or Exclusive Marketing Contracts Would Constitute An Unlawful Taking Under The Fifth Amendment To The U.S. Constitution.

The Commission rejected in its Report and Order the arguments of commentators who argued that the abrogation of existing contracts granting exclusive access to buildings or restricting the right to serve would constitute an unlawful taking in violation of the 5th Amendment.³⁹ NAHB does not agree with the Commission on this point.⁴⁰ The Commission's analysis focused only on the legitimate investment-backed expectations of MVPDs and summarily dispensed with the substantial property interests of the MDU owners, relying on the thinly

³⁸ Id.

³⁹ Report and Order at ¶¶ 56-60.

⁴⁰ As Commissioner McDowell observed in his Concurring Statement, "Arguments that our actions today may constitute a regulatory taking that requires compensation may have merit as well, and I wish the Commission's appellate lawyers the best of luck in defending against such claims."

supported argument that its ancillary jurisdiction confers on it the authority to abrogate MDU owners' existing contracts.⁴¹ While the legal framework for the Commission's analysis supplied by the U.S. Supreme Court is beyond dispute,⁴² its application to bulk service and exclusive marketing arrangements dictates the opposite conclusion.

First, the prohibition of enforcement of bulk service or exclusive marketing arrangements will have serious adverse economic impact on affected MDU owners or developers. Further, in its analysis regarding the contracts at issue in this part of the proceeding, the Commission cannot rely on several critical elements of its analysis as to the contracts it prohibited in its new rules adopted in the Report and Order. It can not assert as it did there that its actions do not "prohibit the enforcement of other types of agreements between MDUs or MVPDs, such as exclusive marketing agreements."⁴³ The Commission is now in this proceeding considering such a prohibition. Neither can it maintain that "[t]he rule merely prohibits clauses that serve as a bar to other MVPDs that seek to provide services to a MDU."⁴⁴ As stated above, neither bulk billing nor exclusive marketing arrangements "bar" the provision of service by an MVPD to an MDU or any individual end user that occupies a home at all. The record in this proceeding as to these types of contracts does not demonstrate "adverse and

⁴¹ Report and Order at ¶ 60.

⁴² Report and Order at ¶ 56, quoting *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 224-25 (1986): "In all of these cases, we have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. To aid in this determination, however, we have identified three factors which have particular significance: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."

⁴³ Report and Order at ¶ 57.

⁴⁴ *Id.*

absolute impacts upon would-be competitors who are otherwise ready and able to provide customers the benefits of increased competition.”⁴⁵ To the contrary, it demonstrates that a MVPD’s right and ability to serve is unaffected and that such arrangements advance competition amongst MVPD providers and benefit consumers.

Also, the Commission cannot claim here that because bulk service and exclusive marketing arrangements “have been under active scrutiny for over a decade, and the Commission has prohibited the enforcement of such clauses in similar contexts,”⁴⁶ such history would constitute notice that would somehow distinguish the bans on these arrangements from takings. As we have already noted, the Commission has for more than a decade permitted BOCs to utilize their marketing channels to affirmatively and exclusively “recommend” selection of their affiliate’s for a variety of services through exclusive marketing channels, including bill inserts, separate mailings, media advertising, and inbound telemarketing.⁴⁷ In its 1997 Order in the *Foreign Participation* proceeding, the Commission considered and rejected the option of prohibiting BOCs from entering into foreign alliances that included “exclusive arrangements involving joint marketing, customer steering, or the use of foreign market telephone customer information.”⁴⁸ Moreover, it would be legally incorrect to suggest that Commission inaction somehow puts developers “on notice” with respect to such contracts for these past ten or more years. Under such a theory, citizens would

⁴⁵ *Id.*

⁴⁶ *Id.* at ¶ 58.

⁴⁷ CITE

⁴⁸ *Supra.* *Foreign Participation* proceeding at paras. 20, 217, 224.

not only be required to consider existing law and regulations in their business dealings, but also to incorporate any speculative proposals by government agencies and officials at all levels irrespective of the actual likelihood that such proposals would ever be adopted, would be adopted in the form proposed, or when such adoption or disposition of such proposals would take place. The fact that an illegal taking is foreseeable does not preclude it from being a taking nonetheless. Nor can the Commission rely on a claim that “States have also taken action to prohibit such clauses.”⁴⁹

Finally, with respect to the character of governmental action, a rule prohibiting the enforcement of bulk service or exclusive marketing arrangements does not even minimally advance the legitimate governmental interest in protecting consumers of programming from “unfair methods of competition or unfair acts or practices.” Any correct and detailed analysis of the harms and benefits of bulk service and exclusive marketing arrangements based on this record shows that such arrangements do not preclude or restrict competition and consumer choice. To the contrary, they redress the imbalance in bargaining position between the duopoly of dominant MVPD providers and NAHB members, promote competitive bidding for the supply of MVP services to MDUs and benefit consumers. A retroactive abrogation of contracts establishing such arrangements “goes too far” and will be recognized as a taking. It would not be “carefully calibrated to promote” the Commission’s legitimate goals under the Cable Act.

⁴⁹ Report and Order at ¶ 58.

V. CONCLUSION

For the reasons set forth above, the Commission should not regulate or preclude enforcement of existing or future exclusive marketing agreements or bulk billing arrangements between MVPDs and MDUs or their central management entities. If the Commission or its staff have any questions or remarks, please contact the undersigned or NAHB's Federal Regulatory Counsel Andrew Holliday at 202-266-8305 or aholliday@nahb.com .

Respectfully submitted,



William P. Killmer
Group Executive Vice President, Advocacy
National Association of Home Builders
1201 15th Street NW
Washington, DC 20005
202-266-8000

Prepared with the assistance of:

James M. Tobin
William C. Harrelson
Tobin Law Group
Two Embarcadero Center, Suite 1800
San Francisco, California 94111
415-732-1700
415-732-1703 (facsimile)