

**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

OPPOSITION TO

**“PETITION FOR CLARIFICATION,
OR, IN THE ALTERNATIVE, RECONSIDERATION,
OF SHENANDOAH TELECOMMUNICATIONS COMPANY”**

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519839922

- I. The requested “clarification” would provide an exemption from regulations promulgated pursuant to §628(b) to any common carrier willing to engage in nominal PCO operations. **As a matter of law, a federal agency cannot grant such a request from a corporation.**

Shenandoah’s petition begins with a statement that the Federal Communications Commission should “clarify” that a rule promulgated pursuant to §628(b) “does not apply to any PCO, even if that PCO is a common carrier or an affiliate of a common [carrier] that provides video service directly to subscribers”. To use one of Shenandoah’s own arguments, the Commission could not possibly have intended for every common carrier that may happen to be a PCO or its affiliate, or to affiliate with a PCO to avoid the prohibition of exclusive contracts, to be immune from that prohibition.¹ Shenandoah even admits that it “would defy logic, as there is no apparent basis – in the record or elsewhere– to treat similarly-situated” corporations differently based on what other operations they have, but yet it asks that similarly situated common carriers be treated differently, based on whether they also engage in any PCO operations.

If the Commission were to grant such a blanket exemption to every company that is both a PCO and a common carrier, any common carrier could

¹ Shenandoah’s analogous wording was “the Commission could not possibly have intended for PCOs that may happen to be common carriers or their affiliates to be subject to the prohibition”.

evade the rule simply by establishing itself as a PCO. Shenandoah's own petition admits that companies might attempt to "create a PCO affiliate in the carrier's home region to circumvent the exclusivity clause prohibition otherwise applicable to it" or "establish PCO affiliates within their service territories to do an end-run around the prohibition otherwise applicable to their services."

Business often attempt to operate outside the law by incidentally engaging in exempt activities, in order to claim an exemption for all their activities, on the basis of the incidental exempt activities. For example, the IRS routinely denies requests for tax-exempt status from "religious" organizations that are established primarily for the purpose of financially enriching their founders, even though they also hold religious services or engage in other activities of a "church".

In one case, GE Capital established a shell corporation "Monogram Bank of Georgia" to make loans to consumers, and then deposited funds of the parent corporation (or another subsidiary) in the subsidiary bank, in order to take advantage of a federal law² that exempted state banks "engaged in the business of receiving deposits" (but not those organizations that made loans without accepting deposits) from certain state laws, and then charged a debtor an amount in excess of that allowed by Louisiana state law by \$3, leading to a civil suit by the debtor.³ The federal district court was informed by a letter from the Federal Deposit Insurance Corporation (FDIC) that the FDIC had determined that Monogram's acceptance of two deposits from affiliated parties was sufficient for the "state bank" exemption to apply. On this basis, the court initially ruled in favor of Monogram. After learning that Monogram had requested this letter, the court reversed itself, and ruled against Monogram.⁴ However, the judge's harsh rebuke was directed not at the defendant, but at the FDIC, noting "I'm very disturbed[.] I will say this about the actions of the FDIC in this entire matter, and I thought the FDIC was there to protect the public frankly and consumers and not to protect Monogram Bank and similar companies. I thought they were to regulate these companies and not to protect them and to the extent of even defending them in private litigation."⁵ After two appeals to the United States Court of Appeals for the Fifth Circuit⁶ and the Supreme Court's denial of certiorari, all appeals were exhausted. Although the district court was partially incorrect

² 12 U.S.C. 1831d, Federal Deposit Insurance Act §27

³ Although litigating a \$3 dispute is rarely cost-effective, the debtor requested class action certification and desired to be eventually awarded a considerably larger sum.

⁴ Heaton v. Monogram Credit Card Bank of Georgia, No. 98-1823 (E.D. La. Nov. 22, 1999)

⁵ Heaton v. Monogram Credit Card Bank of Georgia,, No. 98-1823-"J" (E.D. La.), Transcript of 12/20/00 hearing, pp. 31-32, as quoted at

http://www.nclc.org/initiatives/predatory_mortgage/fdic_com1.shtml

⁶ Heaton v. Monogram Credit Card Bank of Georgia, 231 F.3d 994 (5th Cir.2000); Patricia Heaton, Plaintiff-Appellee, v. Monogram Credit Card Bank of Georgia, Defendant, v. Federal Deposit Insurance Corporation, Movant-Appellant, 297 F.3d 416 (5th Cir. No. 01-30104).

about the purpose of the FDIC⁷, the purpose of the Federal Communications Commission is fixed by statute: “to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges”⁸. Therefore, the FCC is forever barred from honoring the request of Shenandoah, or any common carrier, for assistance in its efforts to use its PCO activities as a pretext to deny any citizen access to its competitors.

Adoption of Shenandoah’s proposal to exempt any company that acts as both a PCO and a common carrier from the rules that other common carriers must follow would lead to the absurd conclusion that the prohibition against indecency, which applies to broadcast licensees, but not to operators of networks only transmitted via cable or satellite service, should be “clarified” to state that it does not apply to companies which operate both types of networks, such as the National Broadcasting Corporation (NBC), the American Broadcasting Company (ABC), or CBS, which also operate MSNBC, ESPN, and Showtime, respectively!

II. Granting the relief requested by the petitioner would entirely defeat the sole lawful purpose for the rule enacted by the Commission.

The purpose of the prohibition of exclusive contracts was to protect the ability of consumers to select a service provider. The Commission did not act solely for the benefit of the excluded providers, nor would doing so have been within its mandate to protect the interests of consumers seeking access to communications networks⁹, and not to act as an antitrust regulator.¹⁰

In numerous comments submitted by consumers prevented by exclusive contracts from obtaining service, the holders of the exclusive contracts have been identified. In all, or nearly all, of these cases, the company holding the exclusive contract has been a PCO. In fact, I considered using a phrase such as “in nearly all cases, the service provider holding an exclusive contract was a PCO”, but felt it would be inaccurate, not because of comments from persons dissatisfied with non-PCO holders of exclusive contracts, but because of comments from persons complaining that a PCO

⁷ It was actually established to protect depositors, not debtors.

⁸ 47 U.S.C. 151, Communications Act of 1934 §1

⁹ 47 U.S.C. 151, Communications Act of 1934 §1

¹⁰ Enforcement of the Sherman Antitrust Act, which prohibits contracts that unreasonably restrain trade, on pain of felony indictment, three years incarceration, and financial penalties, is under the jurisdiction of the Department of Justice, and not the Federal Communications Commission, which is assigned “to make available, so far as possible, to all the people of the United States ... a rapid, efficient, Nationwide, and world-wide wire and radio communication service” [47 U.S.C. 151, Communications Act of 1934 §1]

holding an exclusive contract did not provide sufficient service to be accurately characterized as a “service provider”. Depending on whether OpenBand is engaged in sufficient PCO operations to qualify for the proposed exemption, it is possible that PCO “Century Communications”, OpenBand, and PCO “Consolidated Smart Systems” may *each* be the subject of more negative comments posted on the ECFS online commenting system (http://fjallfoss.fcc.gov/prod/ecfs/upload_v2.cgi and http://fjallfoss.fcc.gov/prod/ecfs/comsrch_v2.cgi) by their dissatisfied victims than were posted by customers of *all* non-PCO common carriers, *combined*. Furthermore, the number of comments successfully posted on the ECFS system (several hundred) may actually understate the true magnitude of the displeasure of residents of properties subject to exclusive PCO contracts, in that there have been allegations by the residents that they are prevented from successfully accessing the Internet by the contractual exclusion of those Internet service providers that wish to compete against the PCO.

If the relief requested by the petitioner is granted, then consumers who have previously been subject to an exclusive contract held by a common carrier will soon find themselves subject to an exclusive contract held by a PCO, which commenting consumers all, or nearly all, find to be even worse. Since there will then be no benefit to television viewers, the original action would no longer be justifiable as an action for their benefit. As the sole beneficiaries would then be the excluded corporations, the original order would then need to be vacated in its entirety.

Shenandoah’s own petition concedes that forbearance is only lawful if enforcement of the regulation or provision in question “is not necessary for the protection of consumers; and... forbearance from applying such provision or regulation is consistent with the public interest.” Because these conditions are not satisfied, the petition must be denied.

III. Technical deficiency in the public notice of the petition in the Federal Register

The petition of the Shenandoah Telecommunications Company sought “clarification, or in the alternative, reconsideration”. However, the public notice in the Federal Register refers to this petition (and a petition of Fox Entertainment Group, Inc.) simply as “petitions for reconsideration”. Granting Shenandoah’s preferred form of relief (“clarification”), in the absence of notice in the Federal Register of a petition for “clarification”, would be contrary to the intent of the requirement that the Federal Communications Commission publish notice of the petition in the Federal Register and then allow time for the filing of oppositions to the petition described in the notice. The alternative relief of “reconsideration” is a way to overcome the lack of complete notice, but resorting to alternative relief is an unnecessary response to an easily rectifiable omission. Therefore, the

Federal Communications Commission publish a more precisely worded public notice in the Federal Register, and should delay consideration of the petition's merits to allow for a period of 15 days for the filing of oppositions to "clarification", subsequent to notice in the Federal Register of a petition for "clarification".

Respectfully submitted by,

Stephen Weinstein
Camarillo, California
March 1st, 2008