

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Exclusive Service Contracts for)	MB Docket No. 07-51
Provision of Video Services in)	
Multiple Dwelling Units and Other)	
Real Estate Developments)	

**FURTHER REPLY COMMENTS OF THE COMMUNITY ASSOCIATIONS
INSTITUTE**

Introduction

The Community Associations Institute (“CAI”) respectfully submits these Further Reply Comments. CAI urges the Commission to take no further action pursuant to the Further Notice of Proposed Rulemaking¹ because any further regulation would be an unnecessary intrusion into the property rights of community associations and their members.

I. BULK SERVICE AGREEMENTS BENEFIT CONSUMERS, AND ARE A FAIR AND LAWFUL MEANS OF COMPETITION.

Most commenters recognize that both conceptually and in practice bulk agreements offer an effective, legal means of promoting competition for the benefit of consumers. Only a handful

¹ *In the Matter of Exclusive Contracts for the Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, ¶¶ 61-66, 22 FCC Rcd 20235, 20264 (2007).

of parties actually object to them,² and no party makes a compelling policy argument against bulk agreements. Nor has any party made a cogent legal argument demonstrating that the Commission has the necessary legal authority. CAI believes very strongly that this is not a proper area for Commission regulation, and Commission intervention would hurt far more association members than it would help.

A number of individual commenters have objected to bulk agreements in general, based on their own specific circumstances. The vast majority of these individual comments have been submitted by members of two homeowners associations, Live Oak, in Tampa, Florida, and Southern Walk in Loudoun County, Virginia. It is clear that residents of those communities are very unhappy with their cable television providers, but that is not enough to warrant Commission intervention. Many other commenters have informed the Commission of the very large discounts and other benefits that are available to residents under bulk agreements.³ Furthermore, as pointed out by Century of Boca Raton Umbrella Association, Inc., interfering with existing bulk agreements would amount to a rate increase of as much as 70% for residents of many community associations that have already negotiated such discounts.⁴ It would be inappropriate and unfair to deny whole groups of happy consumers the benefits they negotiated in order to relieve others of bad deals, especially on this limited record.

² As noted further below, a large number of brief comments were submitted by disgruntled members of two specific homeowners' associations. Because these comments relate to the same two underlying agreements, they should be analyzed as such, and the Commission must not be misled as to the true scope of public concern over this issue.

³ See, e.g., Camden Comments at 13-17; RealtyCom Comments at 26-27; Charter Comments at 9-10.

⁴ Boca Raton Umbrella Association Comments at 7, 11-14.

A few providers -- SureWest, the City of Lafayette, and Marco Island Cable -- object to the use of “mandatory” or “take-or-pay” bulk agreements.⁵ In practice, however, the vast majority of bulk agreements are of this type, and these are the kinds of agreements that deliver the greatest benefits to subscribers. Bulk agreements offer two benefits to the provider: a guaranteed revenue stream, and a high penetration rate for basic service, which makes it easier to sell additional services to residents. If residents can opt out, the benefits to the provider are reduced, which means that the discount – if the provider can even offer it on such terms – must also be reduced, to the detriment of all the other residents of the association. A provider will only agree to a discount that will provide an adequate return on its investment, and an association cannot afford to subsidize cable service by paying for a significant number of units that choose to opt out of the bulk service. Thus, limiting bulk arrangements to those that allow residents to opt out will harm other residents by reducing the size of the discount offered by the cable operators.

In any event, bulk cable service is simply one of many amenities offered by certain residential communities. It is not anti-competitive, monopolistic, or unfair in any way. The residents of any community – whether it be a condominium or a single family development – may pay for a range of services in their home owners’ association fees that they may not use, or that they may use only occasionally.⁶ Tennis courts, fitness rooms, swimming pools, and other examples abound. The economic reality is the same: these amenities are all part of a package of benefits provided by the association. Prospective residents make decisions on whether to join the community based on the whole package, including the amount of the homeowners’

⁵ Lafayette and Marco Island Cable apparently object only to the use of “take or pay” bulk agreements by incumbents; that is, it appears that they would permit the use of such agreements by competitors, including themselves. Marco Island Cable Comments at 13; Lafayette Comments at 8-9. Thus, they acknowledge that bulk agreements are indeed beneficial.

⁶ NAHB Comments at 26-34.

association fee. The homeowners' association makes a collective judgment about what to include in the extra package and how much members are willing to pay for the package, and existing residents have input into the make-up of the package and the cost through the association's governance mechanism.

Residents who choose to obtain video service from a competitor may feel that they are "paying twice," but they are not. They are paying a certain cost for living in a community with a set of amenities, which they have the right to join or not to join, and the right to use or not to use. If they prefer to play golf at a private course, rather than play tennis at the condominium's courts, or use fitness facilities at a private gym instead of the exercise room in their building, they have that right, but they are not entitled to a refund or discount. Nor are they entitled to a refund on cable service that they may not use. And they most emphatically are not entitled to federal intervention to disassemble a package of benefits that contains elements that their neighbors may find useful and desirable. State laws exist to address problems related to association governance and management, and state legislators are keenly aware of such issues.⁷ This is not an area in which the FCC has any expertise or authority.

Far from calling for regulation, most commenters addressing the Commission's authority over bulk agreements recognize that Congress approved the use of bulk agreements in Section 623(d) as a way of lowering prices.⁸ Of the few commenters proposing regulation, none offers a

⁷ For example, the Virginia General Assembly is currently considering two companion bills, H.B. No. 516 and S.B. No. 301, aimed at addressing a number of issues related to association management that have arisen recently. Among other things, the bills require training and certification of association managers, and establish a state Common Intent Community Board empowered to establish licensing standards, to issue cease and desist orders against specific associations, and to comprehensively regulate association management. In other words, the states actively respond to problems affecting residents of community associations, and federal intervention is unnecessary and inappropriate.

⁸ See, e.g., Verizon Comments at 5.

rationale for regulating bulk agreements that successfully avoids this explicit Congressional endorsement. SureWest, for example, never even acknowledges the existence of Section 623(d). SureWest relies entirely on Section 628 and vague, over-generalized claims about the Commission's authority under Sections 601, 4(i), 303 and 706. These provisions have no substance on their own: they are of no use to the Commission because they do not override the specific authorization for bulk rates provided by Section 623(d), or the general rate regulation scheme laid down by Congress in Section 623 as a whole.

Marco Island Cable and Lafayette do acknowledge the existence of Section 623, but offer no way for the Commission to get around it. The best that Lafayette can do is to cite a New Jersey case that was decided long before Section 623(d) was adopted.⁹ Marco Island Cable cites the same case and suggests, without analysis, that a so-called "take or pay" arrangement is "predatory" within the meaning of Section 623(d).¹⁰ There is no evidence, however, that bulk agreements are in fact predatory, and it is difficult to see how they could be as a general matter: both logic and the language of Section 623(d) dictate that predatoriness can only be determined on a case-by-case basis, because it is the provider's cost of rendering the service in a given instance that determines whether the provider's price is predatory. Furthermore, no party offers a justification for regulation of bulk rates in the face of the Congressional prohibition on any rate regulation of cable systems that are subject to effective competition.

III. IT IS CLEAR FROM THE RECORD THAT EXCLUSIVE ACCESS RIGHTS ARE CRITICAL TO THE SURVIVAL OF THE PRIVATE CABLE INDUSTRY.

The record is very clear. The private cable industry requires exclusive access rights to attract capital investment. Even if some competitors could survive without exclusive access

⁹ Lafayette Comments at 8-9.

¹⁰ Marco Island Cable Comments at 13-14.

rights, the industry – already small – would be seriously harmed by extending the new ban to include private cable operators (“PCOs”). The franchised cable industry’s calls for extending the rule to PCOs must therefore be rejected. Not only would eliminating a whole class of competitors be of no benefit to consumers, but the cable industry’s pleas for “parity” are ultimately unfounded. The PCO industry is already at a disadvantage to the franchised cable industry and the telecommunications industry by virtue of size and access to capital. Were this not the case, PCOs would not need exclusivity to survive, but the fact is that they do. “Parity,” as defined by the franchised cable industry, would merely strengthen the disparity in competitive strength between the two classes of providers.

CAI does not oppose the request of certain small cable operators for an exemption from the rule so they can recover their capital investment. We reiterate, however, that all market participants should have the option of recovering their costs or seeking to allocate those costs using long-standing contractual mechanisms.

IV. THE COMMISSION HAS NO AUTHORITY TO ADDRESS "DE FACTO" EXCLUSIVITY.

RCN and Lafayette suggest the need for expanding the ban on exclusive access terms to encompass “*de facto*” or “effective” barriers to entry.¹¹ Not only have these parties failed to demonstrate that there is any sort of market failure that needs to be remedied, but the Commission has absolutely no authority to address such fanciful concerns.

RCN admits that it has no specific examples of what it calls *de facto* exclusive access arrangements, and it does not call for specific regulation at this time, but even so its observations are irrelevant. The Commission has already overreached in applying Section 628 the way that it

¹¹ RCN Letter; Lafayette Comments at 3-4.

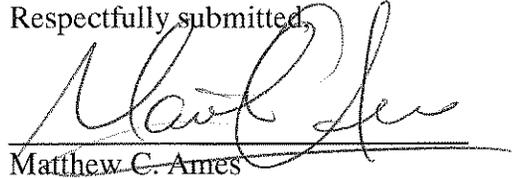
has. If RCN is suggesting that other contractual terms should be regulated because they might have an exclusive effect, it is difficult to see how the Commission could sustain the fiction that it is only regulating certain cable industry practices. Any proposal for examining the specific terms of particular contracts would involve the Commission in judgments about the rights and duties of both contracting parties, something the Commission has no power to do in the case of agreements entered into by private property owners.

Lafayette's suggestion that Section 628 permits regulation of "effective" barriers to entry, by analogy to Section 253, is equally flawed. It makes much more sense to draw parallels between the prohibition on exclusive franchises in Section 621(a)(1) and the lack of any prohibition on exclusive contracts in Section 628. Section 628 and the amendment to Section 621(a)(1) were adopted as part of the same legislation at the same time. That analogy shows quite clearly that if Congress had been concerned with addressing exclusive use of property for the provision of video service when it adopted Section 628, it knew how to do it and had a ready model at hand in the form of the amendment to Section 621(a)(1).

CONCLUSION

For all the foregoing reasons, the Commission should take no further action in connection with agreements between community associations and providers of video programming and other communications services.

Respectfully submitted,



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