

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)
)

**REPLY COMMENTS OF
THE NATIONAL MULTI HOUSING COUNCIL, THE NATIONAL APARTMENT
ASSOCIATION, THE INSTITUTE OF REAL ESTATE MANAGEMENT, THE
NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS, AND THE
REAL ESTATE ROUNDTABLE**

Introduction

The National Multi Housing Council, the National Apartment Association, the Institute of Real Estate Management, the National Association of Real Estate Investment Trusts, and the Real Estate Roundtable (the “Real Estate Associations” or the “Associations”) respectfully submit these Reply Comments urging the Commission to refrain from any further action in this docket. The record demonstrates that exclusive marketing agreements and bulk service contracts are not anti-competitive and should be preserved. Furthermore, extending the Commission’s ban on exclusive access to include private cable operators (“PCOs”) would harm competition.

**I. THERE IS ESSENTIALLY NO SUPPORT IN THE RECORD FOR
REGULATION OF MARKETING AGREEMENTS.**

It is clear from the record that regulation of exclusive marketing agreements is neither necessary nor desirable. Even the original proponents of this proceeding do not support such

regulation. Verizon expressly supports exclusive marketing agreements,¹ and SureWest has chosen not to address the issue at all.² In fact, commenters across industry groups support exclusive marketing agreements and question the Commission's authority to regulate them.

Marco Island Cable and the City of Lafayette do propose regulation of exclusive marketing agreements, but they offer no facts to support their position, nor a legal analysis justifying Commission action.³ There is no need for any regulation of exclusive marketing agreements, and no party has presented a legal rationale for such regulation. Consequently, the Commission should pursue this issue no further.

II. 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 benefit consumers. Only a handful of parties actually object to them,⁴ 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 authority.

Some individual commenters have objected to bulk agreements in general, based on their own specific circumstances. The vast majority of the comments opposing bulk billing 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 justify Commission

¹ Verizon Comments at 2.

² SureWest Comments.

³ Marco Island Cable Comments at 13; Lafayette Comments at 3.

⁴ 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.

intervention. As with any type of contract, there can be instances in which bulk agreements may not deliver all of the promised benefits. But the record also amply illustrates the advantages of bulk agreements, and on balance the number of cable television subscribers that benefit from bulk agreements far exceeds those with complaints. Numerous commenters have informed the Commission of the very large discounts and other benefits that are available to cable subscribers using bulk agreements.⁵ 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 apartment buildings and homeowner's associations that have already negotiated such discounts.⁶ 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.

Only three providers object to the use of bulk agreements. SureWest, the City of Lafayette, and Marco Island Cable object to "mandatory" or "take-or-pay" bulks, although they would apparently preserve bulk arrangements that are not "mandatory." We should note, however, that in practice the vast majority of bulk agreements are of this type. Bulk agreements offer providers two benefits: a guaranteed revenue stream and a high penetration rate for basic service, which makes it easier to sell additional services to residents. In the case of apartment owners, the chief benefit of a bulk arrangement is that the service is automatically and immediately available to all residents. Arrangements that allow residents to opt out of service from the bulk provider are not really bulk agreements because the service is not actually provided in "bulk" form. If residents can opt out, the advantages to the provider and the property

⁵ See, e.g., Camden Property Trust Comments, Fiber-to-the-Home Council Comments, Home Town Cable TV, LLC Comments, MDU Communications, Inc. Comments.

⁶ Boca Raton Umbrella Association Comments at 7, 9.

owner are more limited, and residents receive neither the benefit of convenience nor a discount as large as the one they would receive under a true bulk arrangement. This is because a provider will only agree to a discount that ensures an adequate return on its investment. Conversely, property owners generally cannot afford to subsidize cable service by paying for a significant number of units that choose to opt out of the bulk service, in order to preserve the provider's revenue stream. Thus, limiting bulk arrangements to those that allow residents to opt out will harm residents by reducing the size of the discount offered by the cable operator.

Furthermore, 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. As the National Association of Home Builders points out so cogently, residents of a community – whether it be an apartment building or a single family development – pay for a range of services, in the form of rent and other fees, that they may never use.⁷ 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 beyond just the right to occupy an apartment, and residents make decisions on whether to acquire the whole package based on the individual components and the total price. The property owner makes a business judgment about what to include in the entire package and how much to charge for the package, and the market will punish or reward the owner accordingly.

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 use or not use. If they prefer to pay to play golf at a private course, rather than play tennis at the apartment complex's courts, or use fitness

⁷ NAHB Comments at 26, 34; *see also* Home Town Cable Comments at 3-4.

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 a discount on their rent. Nor are they entitled to a refund on cable service that they may not use. And they most emphatically are not entitled to government intervention to disassemble a package of benefits that contains elements that their neighbors may find useful and desirable.

Most commenters that address the Commission's legal authority to regulate bulk agreements recognize that Congress approved the use of bulk agreements in Section 623(d) as a way of lowering prices.⁸ No commenter offers a 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 Section 601, 4(i), 303 and 706. These provisions have no specific content: they are of no use to SureWest or 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 at least 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

⁸ See, e.g., Verizon Comments at 5; Boca Raton Comments at 9-11; Home Town Cable Comments at 7-9; Camden Comments at 11-12.

⁹ Lafayette Comments at 8-9.

¹⁰ Marco Island Cable Comments at 13-14.

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 a predatory action 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.

There is no fact in the record, no policy rationale, and no legal argument that would justify Commission regulation of bulk agreements.

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.¹¹ Even if some competitors could survive without exclusive access rights, the industry – already small – would be seriously harmed by extending the new ban to include private cable operators. 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 the Commission, consumers, or the apartment industry, 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.

¹¹ See IMCC Comments at 24-26.

The Real Estate Associations do 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.¹² 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 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, raises the same concerns. Even if Section 628 applies, it applies only to “unfair methods of competition” and “unfair or deceptive acts or practices,” and it confers no

¹² RCN Letter; Lafayette Comments at 3-4.

authority over property owners or transactions granting the right to use real estate. If parallels are to be drawn, it makes much more sense – as we have suggested in our Comments – to compare 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, and if Congress had been concerned with addressing exclusive use of property for the provision of video service when it adopted Section 628, it had a ready model at hand in the form of the amendment to Section 621(a)(1).

V. THE COMMISSION’S ABILITY TO ADDRESS OTHER INSIDE WIRING ISSUES IS CONSTRAINED BY THE LACK OF AUTHORITY FROM CONGRESS.

Various commenters propose amending the Commission’s cable inside wiring rules in ways that they believe would advance competition.¹³ Some of these proposals may have merit; others clearly do not. All suffer from the problem that the Commission’s authority in this area is limited because Congress has not seen fit to address the issue comprehensively. There are real and clear conflicts between the Commission’s rules governing telephone inside wiring and cable inside wiring, which result in uncertainty and confusion about the rights of property owners and service providers, and which have effects on competition in the real world. There are also real disparities arising from the competitive position and sometimes anticompetitive behavior of the incumbent telephone carriers that bear on the issues being addressed in this docket. In comments earlier in this proceeding, the Real Access Alliance noted some of these problems,¹⁴ and

¹³ See, e.g., City of Lafayette Comments at 9-10; Cox Comments at 7-13. DISH Network also proposes expanding the OTARD rule to include common areas. DISH Network Comments at 7. Not only has the Commission already rejected this approach for sound Constitutional reasons, but the issue was not raised by the FNPRM and is not appropriate for discussion in this docket.

¹⁴ Comments of the Real Access Alliance (filed July 2, 2007) at 44-59.

suggested that rather than rushing to address the claims of one sector, the Commission might serve its cause better if it took a more comprehensive look at issues involving access to wiring and buildings. Having ignored this advice, the Commission should not now repeat that error and engage in further piecemeal regulation. If regulation is appropriate, it should be adopted only after the Commission has identified specific issues and given interested parties fair notice of what it proposes to do.

Furthermore, we note that the conflicts between the cable and telephone rules have arisen because the capabilities of the two types of networks have converged, whereas the rules were established before convergence had taken place. Indeed, the Commission's authority is derived from statutes that were adopted without convergence in mind, and often aimed at very narrow concerns. For example, the cable inside wiring rules are based entirely on Congress's direction to the Commission to adopt rules "concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber." 47 U.S.C. § 624(i). The Commission has already stretched this authority to its limits, if not beyond. On the other hand, the telephone inside wiring rules are based on the premise that telephone inside wiring is not a common carrier service and its installation and maintenance should be open to competition. In other words, the Commission has acted to deregulate telephone inside wiring, and its authority over such wiring when not provided or owned by a common carrier is questionable.

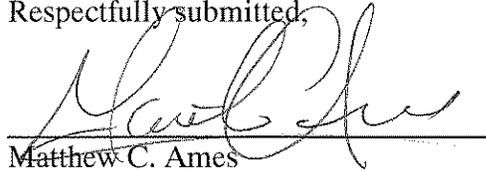
It could well prove difficult, and perhaps impossible, to harmonize two sets of rules based on such different premises without congressional action. While further action by the Commission may be possible, it is not advisable if the Commission's authority permits only half measures. It is simply unfair to market participants for the Commission to address individual

issues at the behest of particular industries without developing a full understanding of the relevant marketplace.

CONCLUSION

For all the foregoing reasons, the Commission should refrain from any regulation of exclusive marketing agreements or bulk video service agreements.

Respectfully submitted,



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