Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.

Introduction

Charter Communications, Inc. replies to certain DBS provider and Private Cable Operator ("PCO") comments in this proceeding. DBS and PCO operators argue that they should be exempt from any ban because they need incentives to recover MDU investments or because they serve underserved properties. Charter makes far greater investments than do DBS and PCO operators in wiring rebuilds and line extensions to provide advanced services to MDUs, ,including senior citizen, assisted living, low-income, and other similar MDU properties, yet the Commission already held that this did not warrant an exemption or even a sunset to recover investment. The Commission's analysis applies equally to DBS and PCOs. If cable operators are prohibited from exclusive agreements then the Commission should not shield DBS or PCOs who seek protection from cable competition.

I. Service to Low Income Properties Does Not Justify an Exemption

In response to the Further Notice,[1] PCOs argue that they provide service to senior citizen and low-income properties and so should be exempted from the ban.[2] If this has not been

[1] *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, FCC 07-189 (rel. November 13, 2007) ("R&O" or "Further Notice").

[2] Wilco Electronic Systems Comments at 15-16.

deemed an acceptable justification for cable operators, it is no justification for a PCO exemption. Charter has placed extensive evidence in the record demonstrating that its provision of video service to senior citizen, low-income, and public housing MDUs could be harmed by a ban on exclusive access agreements.[3] As documented in this proceeding, Charter regularly invests in wiring rebuilds and line extensions to provide service to senior citizen, assisted living, low-income, and income subsidized MDUs, many of which were receiving inferior service from PCOs with limited channels, without digital cable service, and with poor or no Internet access prior to Charter's investment.[4] However, the Commission rejected or ignored Charter's arguments that low income MDU service justified an exemption.[5] The Commission's analysis of the low-income MDU market applies equally to PCOs.

II. MDU Investments Do Not Justify an Exemption

Shentel, a Virginia ILEC with affiliated PCO operations, argues that its need to recover investments to MDUs necessitates exclusive MDU access for PCOs.[6] Similarly, DBS operators Dish Network and DirecTV argue that their investment costs to serve MDUs are too high to do so profitably without exclusive access.[7] Dish Network even cites the DBS need to install receive-equipment at $50,000 per MDU as making service cost-prohibitive and claims that cable

[3] *See* October 16, 2007 Ex Parte Letter from Megan M. Delany to Marlene H. Dortch, MB 07-51, at p. 2 and Exhibit A ("Charter Ex Parte Letter").

[4] *See* Charter Ex Parte Letter at Exhibit A, "Selected Illustrated Examples of Charter MDU Investments Within Past Two Years," pp. 1-4.

[5] R&O at ¶ 18 ("This denial [of competition] will fall disproportionately on minorities and low-income families (and on programmers specializing in programming oriented to those groups), and all residents will be denied increased competition in programming among MVPD providers. We agree with Consumers Union that we should ensure that the "no segment of the population is denied the benefits of video competition.""").

[6] Shentel Comments at 18 ("Shentel could not possibly recover the deployment and operating expenditures outlined above in the absence of the *predictability afforded* by a seven- to ten-year exclusive opportunity to earn a reasonable return on its investment.") (emphasis added).

[7] Dish Network Comments at 5-8; DirecTV Comments at 2-5.

operators don't face such expenses.[8] DirecTV also mistakenly claims that cable operators do not need to rebuild wiring when entering a new MDU.[9] The record is clear that Charter routinely spends this much and more for line extensions to reach MDUs and rebuilds of antiquated PCO wiring to provide advanced service once the property is reached.[10] On a number of recent occasions Charter has made investments in the hundreds of thousands of dollars in order to provide video, voice, and Internet services to MDUs, some of which will take over five years to recover.[11] These costs are no less than those PCO or DBS operators claim.

DirecTV even acknowledges that new technologies will enable DBS operators to provide video services to MDUs without expensive headend equipment or rebuilds, further diminishing their argument.[12] For the Commission to base an exemption for PCOs like Shentel, or for Dish and DirecTV – which are now the second and third largest MVPDs in the country with 30 million combined customers[13] – to any extent based on their MDU investment would be unjustifiable. The FCC has already acknowledged and rejected the benefits of MVPD cost recovery as a sufficient policy rationale to justify video service exclusivity,[14] finding that all

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[8] Dish Network Comments at 3 ("The cost of such a head-end is prohibitive, approximately $50,000 per property. Contrast this to a traditional cable provider that is able to add an entire MDU property using the property's existing infrastructure at a small incremental cost.").

[9] DirecTV Comments at 7.

[10] *See* Charter Comments (filed July 2, 2007) at 3; Charter Ex Parte Letter at p. 2 and Exhibit A.

[11] Charter Ex Parte Letter at Exhibit A, "Selected Illustrated Examples of Charter MDU Investments Within Past Two Years," p. 1-4.

[12] DirecTV Comments at 6.

[13] *See Twelfth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 21 FCC Rcd. 2503, ¶ 73 (2006).

[14] R&O at ¶ 24 ("In some cases, exclusivity clauses, or at least those of limited duration, may help a MVPD to obtain financing to wire an entire building for cable and other services and to recover its investment over the term of exclusivity").

communications companies routinely must make investment decisions and that exemptions should not be granted on this basis.[15]

III. The FCC Has Authority to Regulate DBS and PCO Contracts as Much as Cable

DBS operators and PCOs argue that the Commission does not have authority to regulate their MDU agreements under Section 628(b).[16] One-time PCO operator Marcos Island Cable disagrees, stating that the Commission has "ample authority" under multiple provisions of the Act to regulate both PCO and DBS contracts with MDUs.[17] While Charter does not believe that Section 628(b) can be stretched to give the Commission authority to nullify exclusive access agreements between MDUs and cable operators, if the Commission is right, then as Charter detailed in its Comments, authority under that Section applies equally with respect to nullification of those agreements for DBS and PCOs.[18]

IV. The Rules Should Not Protect Inefficient Providers from Market Competition

Finally, MDU Communications International argues that the FCC must grant PCOs the right to keep exclusive access agreements because PCOs cannot otherwise compete with the low prices and discounts for bundled video, voice, and Internet services that cable operators and ILECs are offering to MDU residents.[19] These comments demonstrate that the Commission

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[15] R&O at ¶ 39 ("We are reluctant to grant any communications companies an artificial period of immunity from pro-competitive regulation during which the recovery of their investment is guaranteed; companies in communications markets regularly invest billions of dollars without any such guarantees.").

[16] *See* DirecTV Comments at 3; Shentel Comments at 24.

[17] Comments of Marcos Island Cable at 10.

[18] R&O at ¶¶ 52-54; Charter Comments (filed February 6, 2008) at 4-7.

[19] MDU Communications International Comments at 3 ("Franchise cable and telco providers… now routinely bundle broadband and voice services (and increasingly wireless services) with their video offerings and provide free months of service, initial discounts… [This] inhibits a PCO from obtaining the necessary penetration rates within its properties when competing with cable and telcos, sometimes to the point where providing services at all is not cost effective.").

would only be propping up PCOs that offer poorer service less efficiently with a PCO exemption, a policy which it and the courts have rejected in the past in similar circumstances.[20] It is not the Commission's role to artificially assist those companies whose technology and service offerings limit their competitive standing. Facilitating the deployment of advanced communications services at reasonable prices are the bedrock goals of the Communications Act, and if PCOs cannot provide the same level of service the Commission should certainly not grant them monopoly control over MDUs. MDU residents should not be locked into paying higher prices for poorer service to PCOs simply because PCOs cannot respond to a competitive market with improved offerings.

[20] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 2 (rel. February 4, 2005) ("In this Order, the Commission takes additional steps to encourage the innovation and investment that come from facilities-based competition…. This approach satisfies the guidance of courts to weigh the costs of unbundling, and ensures that our rules provide the right incentives for both incumbent and competitive LECs to invest rationally in the telecommunications market in the way that best allows for innovation and sustainable competition."), *affirmed.*, *Covad Communications v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

Conclusion

The DBS and PCO providers do not provide sound reasons to justify different treatment for their own exclusive access arrangements with MDUs. If cable operators are to be denied the benefits of exclusive agreements without even a limited waiver or sunset to protect low income service or recovery of past investments,[21] the Commission should require PCOs and DBS operators to compete in the MDU market on the same terms.

Respectfully submitted,

s/ Paul Glist

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[21] *See* Charter Ex Parte Letter at 2-3.