

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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

REPLY COMMENTS OF COMCAST CORPORATION

Comcast Corporation (“Comcast”) hereby replies to the comments filed in response to the above-captioned Further Notice of Proposed Rulemaking (“*Further Notice*”).¹ Those comments further underscore what an untenable situation the Commission created with its decision to prohibit some but not other multichannel video programming distributors (“MVPDs”) from entering into or enforcing exclusive access agreements with multi-dwelling units (“MDUs”) and other real estate developments. Various providers now plead that they be allowed to continue to enter into precisely the kinds of exclusive access arrangements which the Commission has ruled create an unreasonable restriction on individual consumer choice.

The Commission cannot perpetuate the current incongruity and stay remotely true to its professed principles. The *best* way to address the competitive disparities created by this decision is to rescind the *MDU Order* and re-establish the status quo ante. The *next best* way to address

¹ *In the Matter of 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, 22 FCC Rcd 20235 ¶¶ 61-66 (2007) (“*Further Notice*” or “*MDU Order*”, as appropriate).

this competitive disparity is for the Commission to establish that direct broadcast satellite (“DBS”) providers, private cable operators (“PCOs”), and other MVPDs also cannot enter into or enforce exclusive access agreements. The *worst* possible outcome would be to maintain the distorted situation created by the *MDU Order*, where many consumers will be denied the choice the Commission claimed was so important for them to have and where the Commission’s policy of technological and competitive neutrality is being violated with each passing day.

I. THE COMMISSION CAN CORRECT THE COMPETITIVE DISPARITIES IT CREATED IN THE *MDU ORDER* BY EXPANDING THE PROHIBITION TO MVPDS NOT COVERED IN THE *MDU ORDER*.

While several parties demonstrate that expanding the exclusive access prohibition will alleviate the competitive imbalance created by the *MDU Order*,² others seek to perpetuate that imbalance.³ The commenters seeking to perpetuate this imbalance are unable to make any credible argument as to why the Commission should not extend the same prohibition to DBS and other MVPDs that it imposed on cable operators. Instead, they seek to divert the Commission from its stated purpose -- individualized competition for residents of MDUs -- and they ignore the Commission’s assertion of direct and ancillary authority over these agreements.

Rather than addressing how allowing DBS providers’ and PCOs’ continued use of exclusive access agreements would meet the Commission’s objective of increasing choice for

² See, e.g., AT&T Comments at 3 (“[R]egardless of whether the incumbent MVPD at an MDU is a cable operator or a provider using some other technology (such as a DBS provider or PCO), the impact . . . is the same.”); NCTA Comments at 3 (“It is impossible to reconcile the Commission’s assertion that MDU residents are significantly harmed by this practice with a decision to allow a substantial portion of the industry (including DirecTV and DISH – the second and third largest MVPDs – and their affiliates and resellers) to continue entering into such agreements.”). Unless otherwise specified, all references to “Comments” in this pleading refer to comments filed in MB Docket No. 07-51 on or about Feb. 6, 2008.

³ See, e.g., DIRECTV Comments at 5-8; DISH Comments at 1-3.

individual MDU residents, DBS commenters divert the focus to the alleged challenges they face in serving MDUs. These challenges are not only grossly overstated but also irrelevant. The satellite companies argue their case in terms of the different technologies they use and claimed differences in the economics of their networks.⁴ For example, DIRECTV asserts that exclusive access agreements constitute “the only form of economically rational service to many MDUs.”⁵ DISH Network (“DISH”) similarly details the technological investments it has already made to serve MDUs.⁶ Unfortunately for the DBS providers, the Commission has already summarily dismissed, for better or worse, many of these arguments.⁷ These attempts to rationalize continued differential treatment can only be explained as a bid to retain the stark competitive disparities created by the *MDU Order*.

However legitimate or dubious these arguments concerning technological and economic challenges are, they miss the central point of the Commission’s decision in the *MDU Order*. The Commission’s stated purpose was to provide MDU residents with even more competition and choice in their selection of MVPD. The ban on exclusive access agreements was predicated on a

⁴ See DIRECTV Comments at 5-8; DISH Comments at 1-3. In light of the Commission’s inside wiring rules and *Sheetrock Order*, DBS’s claims that it has to expend tremendous resources to re-wire an MDU is particularly dubious. As DIRECTV acknowledges, it can and does make use of existing “home run wiring” to carry its signal to individual MDU residents. DIRECTV Comments at 6. Further, contrary to DBS’s misleading claims, DBS alone (not counting SMATV and PCOs) has already secured a non-trivial share of the MDU market. DISH claims that its MDU subscribers are “only a small fraction” of its total subscribers, but even the out-of-date and skewed statistics that it cites demonstrate that the “small fraction” is in the range of 1/3 to 1/2. See DISH Comments at 1 & n.2. DIRECTV similarly asserts, without any substantiation, that “DBS operators . . . possess a negligible share of the MDU market -- a small fraction of DBS’s overall subscriber base.” DIRECTV Comments at 2.

⁵ DIRECTV Comments at 8.

⁶ See DISH Comments at 2-3.

⁷ See *MDU Order* ¶ 25.

policy determination that such a prohibition was necessary to “ensure that ‘*no segment of the population* is denied the benefits of video competition.’”⁸ Regardless of whether the Commission’s actions will actually result in these purported benefits, its objective clearly would be thwarted if MDUs could simply retain existing or enter new exclusive access deals with DBS providers or PCOs. DISH tries to divert the Commission by arguing that it only uses exclusive access agreements to enter markets, not “to limit the ability of rival platforms to compete” (as did cable, it asserts).⁹ This is a preposterous claim from the third largest MVPD in the country, with more customers than Time Warner, Cox, Cablevision or Charter. In any event, clearly the effect of allowing DISH to have exclusive access agreements would be to limit the ability of individual MDU residents to choose their MVPD provider. By the Commission’s reasoning, allowing DISH to have this contravenes the public interest.

To the MDU resident, there is no difference between lacking a choice of MVPD provider in an MDU accessed exclusively by a cable operator and lacking a choice of MVPD provider now or in the future in an MDU accessed exclusively by a DBS provider or PCO. In either case, the resident cannot make an individual choice of MVPD.¹⁰ For that reason alone, the playing field should be evened and the competitive imbalance corrected.¹¹ As AT&T and SureWest

⁸ *Id.* ¶ 18 (*citing* Consumers Union *Ex Parte* at 2) (emphasis added).

⁹ DISH Comments at 4.

¹⁰ In fact, adoption of DISH’s position would leave many MDU residents with *less* choice than they had if their building had previously been served by a cable operator under an exclusive access agreement. In the prior situation, those residents capable of receiving a DBS signal with an antenna authorized to be deployed under the OTARD rules still had two additional choices besides the cable service (DISH *plus* DIRECTV). Under the DISH-exclusive scenario, their options would be reduced by one (DISH *or* DIRECTV).

¹¹ *See* AT&T Comments at 3.

point out (and as Comcast observed in its initial comments),¹² an MDU exclusively accessed by a DBS provider or PCO would be especially prohibitive to new entry by wireline providers, who are the very providers who would be more willing and more able to offer advanced broadband and voice services.¹³

The legal arguments made by DBS commenters concerning the Commission's authority are notable more for what they do not say than what they do say. DIRECTV and DISH ignore the Commission's questions regarding its legal authority under Section 335 of the Act.¹⁴ Instead, they make the diversionary argument that, because Section 628 does not cover DBS, the Commission has no authority to impose the prohibition on DBS.¹⁵ Putting aside whether Section 628 gives the Commission authority to prohibit exclusive access contracts, this argument completely ignores the Commission's assertion of ancillary authority, independent of Section 628, as well as Congress's clear directive in Section 335 to the Commission to impose "public interest ... and other requirements" on DBS. As made clear by Comcast in its initial comments, and as recognized by other commenters, such as AT&T and SureWest, the Commission has at least as much ancillary authority to apply the exclusive access prohibition to those MVPDs not

¹² See Comcast Comments at 6.

¹³ See AT&T Comments at 3-4; SureWest Comments at 14.

¹⁴ See *Further Notice* ¶ 62.

¹⁵ See DIRECTV Comments at 1; DISH Comments at 5.

covered by Section 628, especially DBS, as it had to those covered by Section 628. And it has more direct authority over DBS under Title III.¹⁶

To perpetuate the current regime not only violates the stated objective of the *MDU Order* but also the Commission's long-established policy of technological and competitive neutrality.¹⁷ Having inserted itself into the marketplace, the Commission cannot logically do so only part-way. It must retreat or advance -- it cannot continue to stand where it stands today.

II. THE COMPETITIVE ISSUES RAISED BY BULK BILLING ARRANGEMENTS DO NOT WARRANT COMMISSION RULES.

As part of the *Further Notice*, the Commission also asked about whether it should regulate bulk billing or exclusive marketing agreements.¹⁸ As commenters from all sectors of the industry made clear, there is no reason for the Commission to regulate these agreements.

As Verizon notes, bulk billing and exclusive marketing arrangements do not raise any of the competitive issues cited by the Commission in the *MDU Order*.¹⁹ Neither bulk billing nor exclusive marketing arrangements impose a physical barrier to entry to the building. Instead, the primary argument in favor of regulating bulk agreements is that they sometimes place MDU residents in a position where they may have to "pay twice" for the service if they want an

¹⁶ See Comcast Comments at 6-9; see also AT&T Comments at 4-6 (noting that the Commission has such authority particularly "with respect to those incumbent MVPDs (such as DBS providers and SMATVs) offering video services pursuant to Commission authorizations (such as satellite and earth-station licenses) granted consistent with the public convenience, interest and necessity."); SureWest Comments at 14-15.

¹⁷ See Comcast Comments at 2 and n.6.

¹⁸ See *Further Notice* ¶¶ 63-65.

¹⁹ See Verizon Comments at 1-4.

alternative providers' service.²⁰ However, Verizon effectively counters this argument by pointing out that MDU residents "pay twice" for many services when they have an option either to take the service their MDU provides or use an alternative provider of the service in question.²¹ For example, residents who do not like their MDU's exercise room or swimming facilities often make their own private arrangements in addition to those for which they are being "charged" by their landlord.²² As Verizon rightly observes, multichannel video service is no different -- and it certainly is not different enough that the Commission should discern some necessity to regulate these agreements.

At the same time, it is obvious that Verizon is seeking to craft a regulatory scheme in which it can obtain maximum marketplace advantage by coupling a prohibition on existing players' enforcement of their exclusive access arrangements with continued freedom for Verizon to exploit all of its own advantages of incumbency. Commenters in this proceeding have cited various ways in which Verizon is leveraging its existing incumbency and market power in the telephony marketplace to push itself further and further into MDUs.²³ It is also particularly

²⁰ See, e.g., Lafayette Utilities Comments at 8-9. Some of these parties also argue that exclusive marketing agreements should be prohibited because providers should not be limited in their ability to communicate with MDU residents. See, e.g., *id.* at 8. But no exclusive marketing agreement can stop providers from sending mailings, producing commercials on television and the radio, engaging in direct dial marketing, or using myriad other tools that businesses routinely use to communicate with potential customers (billboards, handbills, kiosk ads, newspaper and magazine ads, Internet ads, etc.). There is no reason to prohibit these agreements.

²¹ See Verizon Comments at 4.

²² See *id.*

²³ See, e.g., Comments of Real Access Alliance, MB Dkt. No. 07-51, at 53-57 (filed July 2, 2007) (describing how Verizon is leveraging its marketplace dominance and existing regulatory schemes to place its equipment further in MDUs than ever before).

interesting that the benefits cited by Verizon -- discounted rates -- are exactly the same benefits cited by cable operators in defense of exclusive access agreements.²⁴

Finally, Comcast feels it is appropriate to respond briefly to Marco Island Cable's ("MIC's") attempt to distort the facts in an effort to accomplish via federal regulation what it could not persuade the Florida courts to do.²⁵ MIC already has significant presence in the Marco Island community -- well over 90 percent of MDUs on the island are served by MIC -- and it needs no help from the courts or the Commission. More importantly, Florida already has a mandatory access law that goes further to ensure that residents of MDUs covered by the law have MVPD choice and competition than any rule or regulation within the Commission's authority, and the Florida courts made clear that Comcast has not violated that law.²⁶ MIC's focus is not on serving MDU residents so much as on serving MDU residents the way MIC wants to serve them -- without outside competition. MIC's comments provide no reasoned basis for treating certain MVPDs differently than others in the context of regulating bulk billing arrangements.

In sum, there is no reason for the Commission to regulate either bulk billing or exclusive marketing agreements. If, however, the Commission decides to regulate either of these forms of

²⁴ See, e.g., Reply Comments of Comcast Corporation, MB Dkt. No. 07-51, at 4 (filed Aug. 1, 2007) ("Even AT&T's "Exhibit A" -- which presumably was intended to prove the existence of a problem warranting Commission intervention -- highlighted a situation where MDU residents obtained Comcast's video service for 35 percent *below* the prevailing price in the community (with discounts of 50 percent on bundled services).").

²⁵ See Marco Island Cable Comments at 3-10.

²⁶ See Fla. Stat. § 718.1232 (2007) (prohibiting the denial of condominium owners or tenants access to any available franchised or licensed cable television service)

agreement, it must do so in a competitive and technologically neutral manner, so as to not exacerbate the competitive disparity it created with the *MDU Order*.

III. CONCLUSION

The Commission cannot perpetuate the existing state of competitive disparity it created with the *MDU Order*. The Commission has two choices to restore competitive parity -- it can rescind the *MDU Order*, or it can expand the prohibition to all MVPDs. What it cannot do is punt on this opportunity to fix the competitive disparity it created, and it certainly cannot exacerbate that problem by regulating other MVPD-MDU agreements in a manner that treats some MVPDs differently than others.

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