

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

In the Matter of)
Promotion of Competitive Networks in Local) WT Docket No. 99-217
Telecommunications Markets)

Petition for Reconsideration

I. Summary

In the “REPORT AND ORDER Adopted: March 19, 2008 Released: March 21, 2008”, the Federal Communications Commission ordered that 47CFR64.2500 be amended to provide that “[n]o common carrier”¹ may obtain, hold, or enforce certain exclusive contracts, ostensibly to afford tenants a greater selection of providers. This petition does not oppose such a prohibition in the larger context of a policy of prohibiting *all* carriers from holding exclusive contracts and guaranteeing tenants the right to select any carrier willing and able to provide service; in fact, I have previously argued in favor of such action.² However, the current order’s focus on common carriers is too selective to accomplish these goals. Instead, the regulation may even be counterproductive, in that tenants will no longer even have the choice between a landlord who grants exclusivity to a common carrier and a landlord who grants exclusivity to another provider; instead, common carrier service will be unavailable at all MTE properties whose landlords unwisely elect to offer exclusivity to providers. I therefore regrettably ask the Federal Communications Commission to reconsider its order’s differential treatment of exclusive contracts held by common carriers and other carriers.

II. Probable effects of proposed regulatory language

The current proposal to apply the prohibition only to common carriers, while allowing all other providers to continue to obtain, hold, or enforce comparable exclusive contracts, would have the following effects:

- Far from providing tenants with a choice of providers, the order will ensure that tenants whose landlords elect to enter into exclusive contracts have *no* access to common carriers whatsoever.
- There is no guarantee that any tenants would receive the ability to select a provider. Landlords of properties where common carriers now hold exclusive contracts would have the opportunity to conclude new exclusive contracts with other providers, leaving the tenants with no more choice (and possibly less) than they now have.

¹ http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-87A1.pdf, page 25

² See, inter alia, my comments previously submitted in proceeding 07-51.

- Common carriers would be at an unfair competitive disadvantage, as they would not be able to serve the residents of MTE properties whose landlords desired the commissions that they receive when entering into exclusive contracts with providers who are not common carriers.
- Other laws and regulations that apply to common carriers would no longer apply to holders of exclusive contracts. Therefore, tenants would no longer enjoy the protections of those laws, which would effectively apply only to property owners and others with the right to use a common carrier. Notably, tenants would no longer be protected by laws that prohibit discrimination by common carriers. In proceeding 07-51, two providers, neither of which appears to be a common carrier, conceded that communities with exclusive contracts would encounter discrimination based on their demographic characteristics.^{3,4} “Two Americas” would exist. Owners of single family homes would be able to receive the services available from common carriers. Many of those who reside in apartment buildings and other MTE properties would be able to receive only the services offered by those carriers who remain eligible to hold exclusive contracts.
- Tenants would lose their last remaining defense against landlords who enter into exclusive relationships with abusive providers who are not common carriers: the ability to move to another building where the exclusive provider is a common carrier.
- Tenants who wisely avoided abusive providers, by moving to buildings where providers that they find acceptable (most of whom are common carriers) held exclusive contracts now face the possibility of having to move yet again, because the FCC has voided the exclusive contracts held by those providers, thereby allowing the landlords to exclude those providers and sell exclusivity to abusive providers who are not common carriers.

The Federal Communications Commission has both the statutory authority and the statutory obligation to prevent this.⁵ Furthermore, the Constitution bars it from providing the providers who have expressed an intent to discriminate with assistance, in the form of regulations that allow them to hold exclusive contracts while prohibiting their competitors (common carriers) from doing the same, especially where the discriminating providers are able to obtain those contracts only because the Federal Communications Commission has honored their request to void certain existing contracts, without prohibiting them from entering into similar contracts.

³ Letter of Keven Coyle and Glenn Meyer, July 11, 2007, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519554365

⁴ Letter of Mark Scifres, July 11, 2007, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519558902

⁵ 47 U.S.C. §151

III. Improper reliance on the precedent of the Video Nonexclusivity Order

Although the Federal Communications Commission stated in the *Video Nonexclusivity Order*⁶ that its *immediate* action was prohibiting only providers subject to Section 628 from holding exclusive contracts, and that it was not *yet* prohibiting “DBS service providers, PCOs, and other MVPD providers not subject to Section 628” from doing so, the discussion made clear that no final decision to permit those providers to hold exclusive contracts had been made. The order in no way established a precedent to allow such differential treatment of providers to continue on a *permanent* basis.

Furthermore, the order was released with a *Further Notice of Proposed Rulemaking* stating that an expansion of the rule to apply to other providers was likely to be released within a few months. This notice that further contracts might soon be nullified made it unlikely that any new exclusive contracts would be concluded until a final decision was reached, due to the difficulty that providers would face in recovering the cost of obtaining an exclusive contract so quickly. Therefore, tenants who wished to continue receiving service from the parties that held exclusive contracts when they moved into their residences had a reasonable time to look for housing owned by a landlord willing allow tenants to choose a provider. By contrast, the order in this matter allows landlords of properties where common carriers hold exclusive contracts to enter into exclusive contracts with other providers as soon as the order takes effect, and thereby prevent tenants from continuing to receive the services of the common carriers.

IV. Selectively targeting common carriers entirely defeats the sole lawful purpose for a rule prohibiting exclusive contracts.

Prohibition of exclusive contracts is permissible when it is for the purpose of protecting the ability of consumers to select a service provider, as this falls within the Federal Communications Commission’s mandate to protect the interests of consumers seeking access to communications networks⁷. A prohibition that applies only to common carriers does not achieve this result. Instead, it simply gives the landlords of properties where common carriers now hold exclusive contracts the opportunity to conclude new exclusive contracts with other providers. This benefits only the latter providers who obtain exclusive contracts in place of the common carriers. Acting solely for the benefit of selected providers (in this case, those who are

⁶ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-189 (rel. Nov. 13, 2007)

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

not common carriers), is outside of the scope of this mandate, and is a role more appropriate for an antitrust regulator.⁸

V. Racial, etc., implications

For reasons beyond the scope of these comments, owners of single family homes are predominantly white speakers of English, while residents of apartment buildings and other MTE properties are disproportionately poor and minority. (MDU residents account for fewer than 30% of the overall population, but nearly half of the minority population⁹; a comparable difference is likely for MTE residents.) As a result, English-speaking whites would remain eligible to receive service from common carriers, while nonwhites and Hispanics would, if their landlords entered into exclusive contracts, receive only the services of the providers selected by the landlords.

VI. Unfair competition

If any providers are allowed to hold exclusive contracts, then all common carriers will be unable to serve the buildings where landlords elect to offer exclusivity to providers. Even in the buildings without exclusivity, common carriers must either provide service that is satisfactory to their customers or risk losing dissatisfied customers – as any business should. However, other providers utilizing a business model of serving *only* those properties where they hold exclusive contracts do not face this risk.

In proceeding 07-51, the pro-exclusivity commenters conceded that there is a substantial initial cost to serve a building that a provider can only recover if the provider has a reasonable assurance of being able to continue to serve the building for many years. A common carrier will not be able to make such an investment because of the threat that, at any moment, another provider may be given an exclusive contract. While all providers should run the risk that they may lose *individual* customers if a competitor offers *to the customer* something that *the customer* perceives to be superior, they should not be threatened with being entirely excluded from the market *by a third party*, and losing *all* their customers, even if those customers are satisfied and wish to continue to receive the company's services.

Because exclusivity provisions inherently remove the need to offer competitive prices or quality service to anyone other than the landlord, these buildings are the most lucrative. As a result, common carriers will be excluded from the most

⁸ 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]

⁹ Letter of Dr. Vera McIntyre,
http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519817282

profitable segment of the market and will have to offer service at low enough rates to attract customers away from their competitors, while risking being excluded by landlords, and while all other providers will be able to charge any rate that the landlord allows.

VII. Legal Authority of the FCC and Legal Obligations of the FCC

The FCC can and does regulate parties who are not common carriers, or even directly engaged in communication in any form, for the purpose of protecting commerce under its jurisdiction, for example by restricting RF emissions from microwave ovens to prevent interference with microwave communications. As a matter of decided law, the power to regulate or authorize an activity associated with interstate commerce, such as the operations of a common carrier, inherently includes the power to nullify private contracts that interfere with that interstate commerce. In the earliest case on point¹⁰, *Gibbons* held a federal “coasting” license (allowing him to transport persons by water from New Jersey to New York), but another party held a contract granting the latter party exclusivity with respect to New York-bound steam-powered vessel operation. In a ruling that was later reversed, Chancellor James Kent¹¹ held that federal power to regulate interstate commerce was concurrent with the powers of lesser entities to issue exclusive contracts. However, the United States Supreme Court instead found that the federal power to license commercial interstate operations necessarily took precedence and included the power to authorize operations otherwise proscribed by exclusive contracts.¹² Therefore, the Federal Communications Commission has the authority to protect the ability of a tenant in a New York City apartment building to use a common carrier in New Jersey, even if that tenant’s landlord grants an exclusive contract to a provider who is not a common carrier. The Federal Communications Commission has previously exercised its power to engage in “preemption” of “any private covenant, contract provision,” etc., that impairs the receipt of television programming by tenants, *even where none of the parties to the contract are otherwise subject to regulation by the Federal Communications Commission*.¹³ The same reasoning should apply to telecommunications services.

The better question is whether such action by the FCC is discretionary or obligatory. For the answer to this question, we need look no further than the legislation establishing the FCC and requiring it “to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color,” etc., access to global communications networks.¹⁴ Therefore, even if the FCC favored that the offensive system of different offerings based on “demographic” characteristics that Ygnition and Pavlov advocated in proceeding 07-51^{15,16}, it

¹⁰ *Gibbons vs. Ogden*

¹¹ The judge who heard the case at the state level

¹² *Gibbons vs. Ogden*, 1824

¹³ 47CFR Chapter I, Subchapter A, Part 1, title of Subpart S; 47CFR1.4000(a)(1)

¹⁴ 47 U.S.C. §151

¹⁵ Letter of Keven Coyle and Glenn Meyer, July 11, 2007,

http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519554365

would be obliged to ensure that no such system was implemented, unless Congress itself altered the law. Where Congress specifically instructs an agency to take an action, that agency does not have the discretion to substitute its own judgment. Finally, even if Congress itself enacted such a policy of discrimination, it would violate the Fourteenth Amendment.

VIII. Allowing any provider to hold exclusive contracts is against the policy of the United States

The Sherman Antitrust Act declares all exclusive contracts that restrain third parties from engaging in interstate commerce with each other to be illegal. Entering into such a contract is a felony, punishable by, inter alia, three years in federal prison.¹⁷ Congress has made clear its opposition to such contracts. Contracts between landlords and service providers do precisely what this law was intended to prohibit: they prevent the tenants, who are not parties to the contract, and those providers who are not parties to the contract, from engaging in interstate commerce with each other.

While individual citizens may debate the merits of this law, and may even choose to question the wisdom of Congress, the FCC is obliged to respect the views of Congress, and to refrain from substituting its own judgment for that of duly elected legislators. If citizens believe that exclusive contracts are in the public interest, they are free to petition *Congress* (not the FCC) to alter the law, but the FCC must not ignore Congress or unilaterally change national economic policy. The obligation of Presidential appointees to follow the decisions of elected legislators is what fundamentally distinguishes a democracy from a dictatorship.

IX. The arguments for allowing any exclusivity do not apply if common carriers are not among those who can hold such contracts

A. The theoretical need for defensive contracts to ensure against being excluded by contracts held by common carriers is eliminated by barring exclusive contracts held by common carriers

If common carriers could hold exclusive contracts, then an argument could be made that other carriers required exclusive contracts at those properties that they choose to serve, because common carriers had exclusive contracts at those properties that common carriers were allowed to serve. Now that the Federal Communications Commission has voided the contracts held by common carriers, these arguments no longer apply. In particular, the question of whether common carriers obtained exclusive contracts through unethical, extortionate, or illegal means, and the

¹⁶ Letter of Mark Scifres, July 11, 2007, http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519558902

¹⁷ 15 U.S.C. §1-3

argument that other providers needed their own contracts to ensure that they were not excluded, is now moot. Now that common carriers cannot hold exclusive contracts, other providers no longer risk being excluded by those contracts, and can no longer claim a need for defensive contracts. Although I do not agree that there was ever a need for defensive exclusive contracts, there is certainly not a need for some carriers to hold such contracts when others cannot

B. Any pretense of tenant choice is destroyed by voiding some contracts while allowing others

Proponents of exclusive contracts may claim that tenants in buildings with exclusive contracts have chosen to live in such properties, knowing which company held the exclusive contract, and finding it acceptable. Because contracts held by common carriers have been voided, any such hypothetical tenant who elected to live in a building where an exclusive contract was held by a common carrier and acceptable to that tenant, specifically to ensure the continued availability of service acceptable to that tenant, now faces the awarding of an exclusive contract to a different provider who the tenant finds unacceptable, and the exclusion of the common carrier who previously satisfied the tenant under the terms of the voided contract.

Ironically, by prohibiting common carriers from holding exclusive contracts, the Federal Communications Commission has unintentionally denied tenants the only defense that they ever had against abusive treatment by other providers: the tenants' former ability to move to a property where a common carrier holds the exclusive contract. As long as new exclusive contracts are permitted, moving to a building with no exclusive contract is not an adequate remedy, because the acceptable common carrier may be excluded from that building at any future time.