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

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

SECOND REPORT AND ORDER

Adopted: March 1, 2010 **Released: March 2, 2010**

By the Commission:

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I. INTRODUCTION

1. This *Second Report & Order* follows and builds on the earlier *Report & Order* in this proceeding.[1] The earlier *Report & Order* prohibited "building exclusivity" clauses[2] in contracts between Multiple Dwelling Unit ("MDU") buildings[3] and Multichannel Video Program Distributors ("MVPDs")[4] that are subject to Section 628 of the Communications Act of 1934, as amended (the "Act" or the "Communications Act").[5] The parties' discussion of that prohibition raised several related issues, on which we sought comment in the *Further Notice of Proposed Rulemaking* ("*Further Notice*")[6] that we released simultaneously with the *Report and Order*. Among those issues are whether some or all MVPDs should be prohibited from using "bulk billing" and whether some or all MVPDs should be prohibited from using "exclusive marketing" arrangements.

2. We resolve these two issues in this *Second Report & Order*. The first issue we address is bulk billing. This is an arrangement in which one MVPD provides video service to every resident of an MDU, usually at a significant discount from the retail rate that each resident would pay if he or she contracted with the MVPD individually. Bulk billing arrangements do not hinder significantly, much less prevent, a second video service provider from serving residents in the MDU. Bulk billing arrangements may deter second video service providers from providing service in such buildings because residents are already subscribed to the incumbents' services and residents would have to pay for both MVPDs' services, albeit one at a discounted rate, but the arrangement itself does not significantly hinder or prevent a second MVPD from providing its services to those residents. The record before us shows that bulk billing arrangements predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband. Based on the evidence of all the effects of bulk billing on consumers, we do not prohibit any MVPD from using bulk billing arrangements.

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[1] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, Report & Order & Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007), *affirmed, National Cable & Telecommun. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

[2] In the earlier *Report & Order*, we defined a building exclusivity clause as an agreement between a multichannel video programming distributor ("MVPD") and a multiple dwelling unit ("MDU") that grants the MVPD the exclusive right to provide any video programming service (alone or in combination with other services) in the MDU. *Report & Order*, 22 FCC Rcd at 20236, ¶ 1, n.2, 20251 ¶ 31; 47 C.F.R. § 76.2000(a).

[3] Our earlier *Report & Order* defined an MDU as follows:

> MDU shall include a multiple dwelling unit building (such as an apartment building, condominium building or cooperative) and any other centrally managed residential real estate development (such as a gated community, mobile home park, or garden apartment); provided however, that MDU shall not include time share units, academic campuses and dormitories, military bases, hotels, rooming houses, prisons, jails, halfway houses, hospitals, nursing homes or other assisted living facilities.

22 FCC Rcd at 20238-39, ¶ 7, codified at 47 C.F.R. § 76.2000(b).

[4] MVPDs are defined in 47 U.S.C. § 522(13) and 47 C.F.R. § 76.1000(e).

[5] 47 U.S.C. § 548. Specifically, the *Report & Order* applied the prohibition to cable operators (defined in 47 U.S.C. § 522(5)), common carriers or their affiliates that provide video programming directly to subscribers (*see* 47 U.S.C. § 548(j)), and operators of open video systems under 47 U.S.C. § 573(c)(1), all to the extent that they provide video programming to subscribers or consumers. *Report & Order*, 22 FCC Rcd at 20260 ¶ 51.

[6] *Report & Order*, 22 FCC Rcd at 20264-65, ¶¶ 61-66.

3. In the subsequent section of this *Second Report & Order*, we likewise decline to prohibit any MVPD from using exclusive marketing arrangements because we cannot conclude, based on the record, that they hinder significantly or prevent other MVPDs from providing service to MDU residents. Finally, ruling on a petition for clarification, reconsideration, or forbearance filed by the Shenandoah Telecommunications Company ("Shentel"), we deny the petition without prejudice. Shentel may refile a fully supported petition pursuant to Section 10 of the Communications Act[7] for forbearance from applying 47 C.F.R. § 76.2000 to the private cable operator ("PCO") operations of Shentel's affiliate, Shentel Converged.

4. Our decisions in this *Second Report & Order* are based on our view of the effects on consumers of the practices addressed herein in the current marketplace as evidenced by the record in this proceeding. We may re-examine one or both of these practices in the years ahead to see if those effects have changed. If, at that time, marketplace conditions and consumer effects appear markedly different, we will make appropriate changes in our regulations.

II. BACKGROUND

5. In the earlier *Report & Order*, we prohibited cable operators and other entities that are subject to Section 628, including certain common carriers (local exchange carriers or "LECs"), from executing or enforcing contractual provisions that give them the exclusive right to provide video programming service in MDUs.[8] Based on the record, we concluded that contracts with building exclusivity clauses can have some benefits for consumers, but that these benefits are significantly outweighed by anti-competitive harms that building exclusivity clauses cause to MDU residents. The principal harms are barring entry into MDUs by competitive providers of video service and of the "triple play" of voice, video, and Internet access services. Building exclusivity thus denies MDU residents the benefits of added competition, specifically lower prices, the availability of more channels of programming with more diverse content (from broadcast, cable, and other sources), and new communications technologies. We emphasized that these harms had increased recently, as LECs entered the markets for video services and the triple play on a large scale and found their entry blocked, especially by building exclusivity clauses executed by incumbent cable operators.[9]

6. The *Report & Order* and *Further Notice* also identified bulk billing and exclusive marketing arrangements which, some commenters argued, had the effect of significantly hindering competition. Bulk billing arrangements require the MVPD to offer service to every resident of the MDU, and the MDU owner to pay for service to all residents, although typically at a significantly discounted rate. Exclusive marketing arrangements allow one MVPD to provide marketing materials and services to an MDU or real estate development, to the exclusion of competitive MVPDs. The Commission stated that it did not have an adequate record on which to base a decision about these related practices of bulk billing and marketing exclusivity and, in order to compile a fuller record, the Commission issued the *Further Notice*.[10]

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[7] 47 U.S.C. § 160.

[8] These common carriers are common carriers or their affiliates that provide video programming directly to subscribers under Section 628(j) of the Act, and operators of open video systems under Section 653(c)(1). 47 U.S.C. §§ 522(7)(C),548(j), 573(c)(1)(A). *See Report & Order*, 22 FCC Rcd at 20254-55, ¶ 40, 20260, ¶ 51.

[9] *Id.*, 22 FCC Rcd at 20240-47, ¶¶ 9-23. For simplicity, we will refer to these entities as "common carriers" or LECs.

[10] *Id.*, 22 FCC Rcd at 20236, ¶ 2; *id.* at 20251, ¶ 32; *id.* at 20264-65, ¶¶ 61-65.

7. In response to the *Further Notice*, we received filings not only from major cable operators, their trade association, and incumbent LECs, but also from the two major DBS providers (DIRECTV and DISH Network), nine PCOs, PCOs' national trade association, their financiers, operators of new wire- or fiber-based systems that do not use public rights of way, approximately 20 real estate interests (MDU developers, builders, owners, and managers and their trade associations and consultants), several individual homeowners' associations and educational institutions that subscribe to PCOs' services, municipal governments, the National Governors Association, and just over 200 individual consumers.

8. The United State Circuit Court of Appeals for the District of Columbia Circuit affirmed the *Report & Order* in *National Cable & Telecommun. Ass'n,* 567 F.3d 659 (D.C. Cir. 2009). The Court, after finding that Section 628 gave the Commission authority to prohibit MDU exclusivity by MVPDs that were subject to Section 628, found that the prohibition was amply justified by the evidence before the Commission. The Court emphasized the *Report & Order's* factual findings, that MDU exclusivity in favor of those MVPDs had widespread anticompetitive and anticonsumer effects in the markets for both MVPD services and the triple play, and that the use of exclusivity and its harmful effects had been increasing in recent years.[11]

III. DISCUSSION

9. First, we conclude that the benefits to consumers of bulk billing arrangements outweigh their harms. The record shows that bulk billing, although it can harm some MDU residents, benefits far more of them. In the large majority of cases, bulk billing appears to lower prices, increase the volume and variety of programming, encourage high quality and innovation, and bring video, voice, and data services to MDU residents. Second, we have been able to identify no significant harmful effects that exclusive marketing arrangements have on MDU residents, and they appear to confer some benefits on MDU residents by making information about video services and any related services easily available to them. Accordingly, we do not now prohibit bulk billing or marketing exclusivity by any MVPD. We may review marketplace conditions again, however, if future events show that any of these practices is having new and significant anti-competitive effects on the whole. Finally, we deny Shentel's petition without prejudice to its later submission of a more fully documented petition for forbearance from application of the *Report & Order's* building exclusivity prohibition to Shentel's PCO operations outside its historic telephone service area.

A. Bulk Billing Arrangements

10. We decide not to prohibit MVPDs from using bulk billing arrangements in current marketplace conditions. Although it is possible that bulk billing can subject MDU residents to questionable prices, low quality, and slow innovation, bulk billing benefits many MDU residents overall, especially by significantly lowering prices. In addition, although bulk billing may make entry by other MVPDs marginally less attractive, it does not significantly hinder, much less prevent, the latter from entry. We conclude below that, on balance, banning bulk billing would harm more MDU residents than it would help. Accordingly, we will allow this practice to continue.[12]

[11] 567 F.3d at 667-70.

[12] This result is consistent with the generally favorable attitude towards "bulk discounts" expressed in 47 U.S.C. § 543(d). That Section generally requires a cable operator, if it has no effective competition, to have a uniform rate structure throughout its franchise area. Section 543(d) exempts from that requirement, however, "[b]ulk discounts to multiple dwelling units" so long as they are not predatory.

1. Use of Bulk Billing

11. In a typical bulk billing arrangement, the MDU building subscribes to the MVPD provider's service, agreeing to pay the MVPD a monthly fee. The MVPD provider then connects its service to every unit in the MDU. The MVPD typically bills its fee every month to the MDU building, which factors each unit's *pro* rata charge into the unit's rent, condominium fee, or homeowners' association dues.[13] The MDU building owner must pay the monthly fee to the MVPD provider.

12. Bulk billing arrangements vary in duration and grounds for termination.[14] They may or may not be coupled with some form of explicit exclusivity, where allowed under our rules.[15] They usually provide each MDU with the chosen MVPD's Basic or Expanded Basic video service, and sometimes also with voice, Internet access, and/or alarm service.[16] In most bulk billing arrangements, the MDU's residents receive a significant discount from the bulk billing MVPD's standard retail rate.[17] Residents may also purchase additional services, such as premium channels, directly from the MVPD provider at the regular retail rate. The record indicates that bulk billing arrangements occur in a significant number of MDUs, but not in most.[18] Verizon states that as competition in the MVPD market grows, the duration of bulk billing agreements is likely to shorten.[19]

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[13] Century of Boca Raton Umbrella Association ("Boca Raton") Comments at 12; Camden Property Trust Comments at 13; City of Weston, Florida, and The Town Foundation, Inc. ("City of Weston") Comments at 4-5; IMCC Comments at 35-38; NAHB Comments at 25-26; National Multi Housing Council, the National Apartment Association, the Institute of Real Estate Management, the National Association of Real Estate Investment Trusts, and the National Real Estate Roundtable ("NMHC *et al.*") Comments at 23; OpenBand Comments at 2; Verizon Comments at 2. *See also* Lafayette Comments, Declaration of Douglas A. Dawson ("Dawson Declaration") at ¶ 7. It appears that the MVPD provider bills individual residents rather than the MDU building in some arrangements, such as those in the Palm Cay development in Ocala, Florida. *See, e.g.,* Letters from Frank Pellicano (dated July 7, 2008), Mr. & Mrs. Richard B. Miller (received July 21, 2008) ("Miller Letter"), and other Letters in Complaint File MB-07-51-0001. Such arrangements are still considered bulk billing if every MDU resident receives and must pay for service.

[14] NAHB Comments at 34 n.28.

[15] Any such building exclusivity, if executed by a cable operator or common carrier, is prohibited by our earlier *Report & Order.*

[16] Michelle Abreu Comments; Camden Property Trust Comments at 13; Michael Ceparano Comments; City of Weston Comments at 5; NMHC *et al.* Comments at 23 (usually Expanded Basic, with the option of premium packages from the MVPD provider at extra cost).

[17] *See infra* notes 31-32.

[18] AIC Comments at 1 (nearly all members have properties covered by either exclusive marketing or bulk billing arrangements); BRE Properties Comments ("about 3% of our properties are covered by some form of bulk billing arrangement for . . . video services"); Colonial Properties Trust Comments at 1 (about 40% of its properties are covered by some form of bulk billing arrangement); Forest City Residential Group Comments at 3 ("we do not typically enter into bulk agreements"); JPI Comments at 1 ("About 25% of our properties, almost all off-campus student housing, are covered by some form of bulk billing arrangement for . . . video and data services"); NMHC *et al.* Comments at 23 ("bulk cable agreements are relatively rare in the apartment industry"); Post Apartment Homes Comments at 3 (real estate interest with 22,578 apartments has no bulk billing); Realtycom Partners Comments at 26 ("[b]ulk agreements are a very small percent of the MDU MVPD agreements in the market"); Waterton Residential Comments at 1 ("About 10% of our properties are covered by some form of bulk billing arrangement"); SureWest Reply Comments at 6. *But see* Ziletto Comments at 2 ("This practice is pervasive in the condominium community").

[19] Verizon Reply Comments at 3 n.6.

13. It appears that one of the factors that makes bulk billing at discounted rates practical for the bulk billing MVPD is that it authorizes uninterrupted service to every residential unit in the MDU building or suburban development. The MVPD provider is spared the significant expenses of selling to each resident, making credit checks and collecting deposits, managing bad debt and theft of service, and frequently sending personnel and vehicles to the building to place and remove boxes and turn service on and off in different units.

14. A bulk billing agreement does not prevent MDU residents from obtaining services from another MVPD, assuming that another has wired or will wire the MDU, if necessary. Some residents may also place satellite dishes on their premises, depending on the physical configuration of their units.[20] Any such residents, however, must pay for both the bulk billing MVPD and the services of the other MVPD.[21]

15. As already noted, bulk billing does not physically or legally prevent a second MVPD from providing service to an MDU resident and does not prevent such an MVPD from wiring an MDU for its service, subject to the permission of the MDU owner. The arrangement may deter a second MVPD in some cases, however, because it limits the entrant's patronage to residents in the MDU who are willing to pay for the services of two MVPDs or who simply insist on receiving the services of the second MVPD for the characteristics of that service (*e.g.*, high-speed broadband for a home business).[22]

2. Benefits and Harms of Bulk Billing Arrangements

16. The chief benefits that bulk billing brings to MDU residents in most cases are lower prices, packages of programming tailored to the particular interests and needs of the MDU's residents, and avoidance of the inconvenience of establishing or disconnecting MVPD service. The chief harms that bulk billing causes to MDU residents are that it may discourage a second MVPD from entering an MDU and, even if it does not, MDU residents who want service from the second MVPD must pay for two MVPD services. After weighing these considerations carefully and examining current marketplace conditions, we conclude that the benefits of bulk billing are greater than its harms in the majority of cases. Accordingly, we will not prohibit bulk billing at this time.

17. Benefits of Bulk Billing Arrangements. PCOs and some new cable operators claim that bulk billing is essential to their health or survival, that bulk billing is necessary if they are to secure financing, continue to grow,[23] and deploy broadband in MDUs.[24] PCOs in particular state that, if their existing bulk billing arrangements were invalidated, they would be automatically in default of many loan agreements, endangering their existing businesses and making future financing for expansion very

[20] Our Over-the-Air Reception Devices rules, 47 C.F.R. § 1.4000, permit MDU residents to place DBS receiving antennas on their premises under some circumstances.

[21] Dawson Declaration at ¶ 7; MDU Commun. International, Inc. ("MDU Commun.") Comments at 2 (filed Feb. 4, 2008).

[22] Tammy Callarman Comments.

[23] Boca Raton Comments at 3 ("upstart" new entrants cannot obtain financing to wire buildings with fiber without the "reliable, long term revenue stream" that bulk billing ensures); Camden Property Trust Comments at 4; CSI Comments at 3, 8; Home Town Comments at 1 ("Bulk discount agreements are the only means by which HTC can finance . . . construction to compete with the incumbent[s]"); *id* at 6 (financing to build fiber networks requires "reliable . . . long-term revenue streams, such as through a bulk services agreement"; otherwise, financing would be doubtful); Shentel Comments at 22; Wilco Comments at 6 (Wilco "depends upon a bulk billing agreement to continue the operations of its business and service its customers"); *id.* at 19 (noting the special financing difficulties of minority-owned PCOs); WorldNet Comments at 3, 9.

[24] WorldNet Comments at 7-8.

difficult.[25] They fear that without bulk billing many of them will go out of business and the few survivors will find it difficult to expand. This harm to them, they emphasize, will harm consumers, because consumers will lose the benefits of competition, choice, and innovation (including broadband deployment) that bulk billing MVPDs can bring to MDU residents.[26]

18. MVPDs, real estate interests, and some consumers also claim that bulk billing is satisfactory to most MDU residents[27] and is even a major attraction to some MDU residents.[28] They point out that bulk billing enables lower income tenants to avoid cable rate increases (if it provides for steady prices for several years); these tenants also avoid high deposits and the limitations imposed by their own imperfect credit histories. In these ways, bulk billing can make MVPD services available to some MDU residents who otherwise would not be able to afford them.[29] Real estate interests and some others defend bulk billing, as they do building and marketing exclusivity, as a "bargaining chip" that they can give to a favored MVPD in exchange for the MVPD's paying to wire their buildings.[30]

19. Bulk billing's supporters claim that it is often awarded to the "best" MVPD in the area[31] and is sometimes coupled with enforceable standards ensuring that the bulk billing MVPD establishes prices for its services below its ordinary retail rates (and below those charged by new entrants), keeps those prices steady in contrast to major MVPDs' periodically raising rates, provides high quality service, tailors its set of channels and programs to fit the MDU residents' particular interests, and continually improves its offerings with new technology.[32] Discounts of 30% from the bulk billing

[25] IMCC Comments at 38-39; Stoneybrook Reply Comments at 7.

[26] *See, e.g.,* IMCC Comments at 40; WorldNet Comments at 7-9.

[27] Camden Property Trust Comments at 13; Colonial Properties Trust Comments at 3; JPI Comments at 2; MDU Commun. Comments at 2-3 (filed Feb. 4, 2008). *See also* National Cable & Telecommun. Ass'n ("NCTA") Comments at 6 (even if bulk billing harms the residents who have to 'pay twice,' it benefits most residents); Mary Foreman Reply Comments (her bulk billing MVPD "company provides quality channels based on our interests. . . . [T]he company provides quality service that we can count on at a very reasonable price. If a problem happens they are there to remedy it"); Gloria Gilbert Reply Comments ("we have a very good channel lineup at very competitive prices"); Sophie Shapiro Reply Comments ("Please don't do anything to change the rules so that our company becomes less competitive"). We have also received comments from several owners and managers of MDU buildings containing thousands of residents. The commenters praise PCOs' channel lineups and responsiveness, especially compared to major cable operators. *See, e.g.*, Ed Andrews, Property Manager, Wilshire Terrace, Reply Comments ("Just yesterday an electrical problem caused a . . . tv outage to the entire building. Even though it was early on a Sunday morning, they had . . . the problem resolved within an hour. That is excellent service"); Victor Mariscal, Chief Engineer, The Wilshire Condominiums, Reply Comments (PCO "gave us the best options in customized programming and a very fast Internet service. . . . No system is perfect, but we believe that most homeowners are happy with the service"); Larry D. Pfander, General Manager, Blair House Reply Comments ("Having a [PCO] we are able to have our channel line-up customized to meet the needs of the homeowners here in the building. Another important thing to our homeowners is not having to use a set top box to get our complete line-up including the HD stations").

[28] NMHC *et al.* Comments at 23.

[29] Camden Property Trust Comments at 14-15. *See also* NMHC *et al.* Comments at 24.

[30] AIC Comments at 1; Boca Raton Comments at 5; CSI Comments at 7; NCTA Comments at 5; WorldNet Comments at 4.

[31] IMCC Comments at 34-35.

[32] Apartment Investment & Management Company ("AIMCo") Comments at 2; BRE Properties Comments at 3 (bulk billing results in up to 50% discounts for the MDU building and "significant cost savings for residents"); Boca Raton Comments at 7 (25-40% lower than basic cable rates in immediately adjacent communities); Camden Property Trust Comments at 15-17 (steady rates); Charter Comments at 9 (discounts often more generous in nursing (continued....)

MVPD's retail rates are common, and can be as high as 75%.[33] Century of Boca Raton Umbrella Association, for example, describes a community where bulk billed MDU residents pay $28 monthly for basic cable and the neighboring incumbent cable operator charges $48, or 70% more, for its basic service;[34] and Camden Property Trust states that each of its bulk billed MDU residents, in addition to enjoying a significant discount from the retail rates charged by competing MVPDs, also saves up to $200 on deposits and service establishment fees.[35] Bulk billers' low prices for video services enable them to charge low prices for the triple play.[36] The low prices are made possible, MVPDs and real estate interests say, by the savings in their costs that bulk billing makes possible.[37] They argue that prices for the vast majority of MDU residents subject to bulk billing will rise if bulk billing ends.[38]

20. In addition to lower-than-retail rates, supporters of bulk billing state that it often makes possible specialized services for MDU residents. The Independent Multifamily Communications Council ("IMCC") lists security channels, closed circuit monitoring, community channels (that have educated residents about, among other matters, the recent conversion of broadcast television to digital-only transmission), WiFi, and free broadband access in MDUs' common areas;[39] the National Association of Home Builders ("NAHB") mentions free cable service provided to club houses,

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homes, assisted living, and student housing); Colonial Properties Trust Comments at 3 (up to a 50% discount from regular market rates); Community Assn's Inst. ("CAI") Comments at i, 5 (savings sometimes as high as 50%); CSI Comments at 4 (20% to 50% lower than retail rates), 5-6 (tailored programming), 7 (continued improvements); Fiber-to-the-Home Council ("FTTHC") Comments at 6 (bulk billing by new entrants deploying fiber can charge 30% less than incumbent providers); Home Town Comments at 1-2 ("basic cable service for barely more than *half the price* of incumbent operators") (emphasis in original); *id.* at 4-6 (triple play, tailored programming, underground facilities); IMCC Comments at 33-35, 39-40 n.12 (MDU community channels for important health, safety, and emergency information); JPI Comments at 2 ("up to a 75% discount to regular market rates"); MDU Commun. Comments at 1-2 (filed Feb. 4, 2008) ("programming prices . . . 30-40% below retail prices," stringent service requirements, and protection of MDU residents by tenants' or homeowners' associations); NAHB Comments at 27 (free service to recreation rooms, and a "community channel"); *id.* at 28 ("[a]necdotal information indicates that discounts in the range of 20 to 30 percent are not uncommon"); *id.* at 35; NCTA Comments at 5 (lower rates); NMHC *et al.* Comments at 22 (40%-60% discount from "the price charged single family residents in the same geographic area"); OpenBand Comments at 2-5; Shentel Comments at 15 n.28; Verizon Comments at 5; Waterton Comments at 3 (rates 50% lower than regular market rates); WorldNet Comments at 4-7; Ziletto Comments at 2-3 (rates 30% lower than average retail rates in the same area). *But see* Armand Ridolfi Comments (bulk billing by Comcast without any quality standards).

[33] *See supra* note 32. *See also* Letter from Jess R. King, President of Cablevision of Marion County (dated Nov. 6, 2008), in Complaint File MB-07-51-0001, at 2 ("King Letter") (in Palm Cay, Florida, where Cablevision has bulk billing (of $10 a month), rates are 40% lower than in surrounding areas that the company serves without bulk billing.

[34] Boca Raton Comments at 7.

[35] Camden Property Trust Comments at 13-14.

[36] CSI Comments at 4; IMCC Comments at 33.

[37] Boca Raton Comments at 12. For the MVPD, the savings include those mentioned in ¶ 13 above and ¶ 21 below, as well as costs for programming because of volume discounts offered by program owners. *See* Charter Comments at 9-10 & n.18; Home Town Comments at 2-3; OpenBand Comments at 5.

[38] Boca Raton Comments at 11-14; Home Town Comments at 3; NAHB Comments at 35; OpenBand Comments at 5-6.

[39] IMCC Comments at 39-40; King Letter, *supra* note 33, at 2 (community channel).

recreation areas, and meeting rooms in MDUs;[40] and Verizon mentions "concierge service with a dedicated customer service representative from the video service provider."[41]

21. Commenters defending bulk billing also state that, by sparing individual MDU residents the decision about their MVPD service provider, they avoid placing an unwanted burden on the residents who are satisfied with the bulk billing MVPD. These residents are spared costs and inconveniences they would incur – the time to decide among competing MVPDs, the cost of deposits, the taking of a vacation day to let the installer in, and charges for installation and the establishment and disconnection of service. These savings are particularly important to lower income households and persons who are transient and value freedom from the inconvenience of establishing and terminating service repeatedly.[42]

22. Supporters of bulk billing also emphasize that, unlike building exclusivity, bulk billing does not prevent a second or third MVPD from entering and wiring an MDU building or an MDU resident from subscribing to that MVPD's service.[43] One bulk billing cable operator estimates that DBS has a 30% market share in its MDU, approximately DBS's national average.[44] They also claim that residents of MDU buildings that have bulk billing chose to live there and should not be heard to complain and seek to deprive the majority of residents who are satisfied with it.[45]

23. Defenders of bulk billing emphasize how competitive the residential real estate market is.[46] They characterize MVPD service as just another amenity of an MDU building that the owner can provide, such as a swimming pool, a fitness center, or valet services; with those amenities, some benefit from them, some do not, but all pay for them whether the assessment is itemized or not.[47]

24. Harms of Bulk Billing Arrangements. Opponents of bulk billing claim that bulk billing arrangements reduce a second MVPD's incentive to wire a building for its services (including broadband)[48] and frustrate the ability of residents of an MDU to receive the service of the second MVPD they want (by forcing such residents to pay for two MVPDs' services).[49] They argue that bulk

[40] NAHB Comments at 27.

[41] Verizon Comments at 5.

[42] AIMCo Comments at 2; Boca Raton Comments at 15 n.20; Camden Property Trust Comments at 14; JPI Comments at 2 (students); Manufactured Housing Inst. ("MHI") Comments at 2; NMHC *et al.* Comments at 23-24 (noting annual 50% average turnover in apartment buildings); Waterton Comments at 3; *see also* CSI Comments at 7 (bulk billing leads to service being available in MDUs when they open for residents, which benefits first movers-in who might otherwise have to wait for the MDU to contain a critical mass of residents to attract the first MVPD provider).

[43] CAI Comments at 6; Home Town Comments at 3 n.3; NAHB Comments at 30; NMHC *et al.* Comments at 25; Shentel Comments at 22; Verizon Comments at 2; Comcast Reply Comments at 6 .

[44] Letter from Jess R. King, President of Cablevision of Marion County (dated March 12, 2009), in Complaint File MB-07-51-0001, at 2 ("Second King Letter").

[45] Home Town Comments at 4; NMHC *et al.* Comments at 23.

[46] *See, e.g.,* NAHB Comments at 31-32; *see also* NMHC *et al.* Comments at 15; WorldNet Comments at 5.

[47] Boca Raton Comments at 3-4, 14-15 (social contract would break down if MDU residents could opt out of amenities); Home Town Comments at 3-4; IMCC Comments at 7, 36; NAHB at 26, 34; Shentel Comments at 23; Verizon Comments at 4; Ziletto Comments at 2; Comcast Reply Comments at 7.

[48] Doug Granzow Comments; SureWest Comments at 3.

[49] Dawson Declaration at ¶ 9 (bulk billing "creates an effective barrier to competition because customers . . . will rarely be willing to pay a second fee to another provider for comparable services"); SureWest Comments at 3-5. (continued....)

billing saddles MDU residents with a *de facto* exclusive provider with "no incentive to offer or maintain pricing and programming at market levels."[50] Some MDU residents subject to bulk billing arrangements object strongly to being forced to pay twice if they want to obtain service from an MVPD other than the bulk billing one.[51] The need to pay twice in order to receive the preferred service falls especially heavily on persons with limited incomes.[52]

25. Individual commenters have brought to our attention instances – suburban real estate developments of owned homes, not rentals – in which they allege that bulk billing arrangements have been entered into not by MDU residents or their elected representatives (*e.g.*, homeowners associations or "HOAs"), but by builders and developers of the developments.[53] These commenters claim that developers make bulk billing arrangements with MVPDs in which they have financial interests or from which they receive a stream of revenue.[54] There are allegations that some of these "sweetheart" arrangements last long periods, up to 75 years in one case;[55] that the arrangements were entered into

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The only court decision concerning bulk billing of which we are aware faulted it on these grounds. A Satellite Master Antenna TV provider had a bulk billing arrangement with an MDU, and a cable operator successfully argued that the arrangement violated a state statute that granted each tenant the right to receive cable service. The Court stated:

> Although it is possible for a . . . resident to decide to pay for two competing cable services, it is unreasonable to suppose that any but the strongest willed of them will do so. The monthly charge levied by the homeowners' association is the functional equivalent of a prohibition of the use of plaintiff's service. Since it attempts and accomplishes what could not be done directly, it must be invalidated.

Princeton Cablevision, Inc. v. Union Valley Corp., 195 N.J. Super. 257, 273, 478 A.2d 1234, 1242 (Chancery 1983). This decision was made 27 years ago, when the MVPD market was significantly different, was not issued under the Act, and did not have the benefit of the record before us in this proceeding.

[50] City of Weston Comments at 7.

[51] *See, e.g.*, Marry Anne Karmann Comments ("Almost everyone in our neighborhood pays for an additional carrier"); Subbaro Konda Comments ("More than 50% of the people in our community subscribed for services from other providers"); Jennifer & Greg Brooks Reply Comments ("Most residents are currently utilizing other cable and Internet providers"); Miller Letter.

[52] John A. Carter Comments at 1 ("I am a senior on a fixed income. I cannot afford duplicate services from Verizon, DirectTV [sic], Brinks, etc. As a result, I am stuck with poor programming options, outages during stormy weather, slow Internet speeds (. . . 15 kb/sec . . .) and poor customer service"); Michael Ceparano Comments ("I have been forced to pay for another provider in order to work because I work from home but can not afford to have [to] pay twice"); City of Weston Comments at 5.

[53] SureWest Comments at 4 n.2 (doing business in northern California).

[54] Zuriel Cabrera Comments (concerning Live Oak Preserve in Tampa, Florida, "the company providing the services is owned by the original builder"); Charles Salas Comments (concerning Southern Walk at Broadlands in Ashburn, Virginia, "the service provider will continue to provide the developer of the community with a percentage of all fees collected from the homeowners"); Eric Steenstra Comments at 2 (in Southern Walk, "[h]igher rates at OpenBand [the MVPD] equate to greater royalties for Van Metre," the developer); Joseph Vax Comments at 1-2 (Southern Walk).

[55] *See, e.g.*, City of Weston Comments at 1-5 & n.5 at 1 (sweetheart deal could have been perpetual); Hector Castro Reply Comments at 1 (25-75 year contract in Virginia Beach, Virginia). For the context of such arrangements, see NAHB Comments at 26 n.25; Wilco Reply Comments at 2-3. *See also* Plaza Midtown Homeowners Ass'n Comments at 1 (complaining of a contract for bulk billing by "the exclusive provider at our property by right of a negotiated 'deal' with the developer"; asking for the nullification of exclusive agreements entered into before the home owners became responsible for the MDU and for affirmation of agreements entered into by home owners).

before any association of actual homeowners came into existence and cannot be nullified by the actual homeowners; and that the bulk billing MVPD is held to no performance standards, installs inferior facilities, charges high prices, and fails to innovate by deploying the triple play.[56] One City government in Florida (Weston) states that most of their residents are subject to some of these practices.[57]

3. Conclusion

26. We conclude that the benefits of bulk billing outweigh its harms. A key consideration for us is that bulk billing, unlike building exclusivity, does not hinder significantly the entry into an MDU by a second MVPD and does not prevent consumers from choosing the new entrant. Indeed, many commenters indicate that second MVPD providers wire MDUs for video service even in the presence of bulk billing arrangements and that many consumers choose to subscribe to those second video services.[58] We find it especially significant that Verizon, which more than any other commenter in the earlier proceedings argued that building exclusivity clauses deterred competition and other pro-consumer effects, makes no claim in its filings herein that bulk billing hinders significantly or, as a practical matter, prevents it from introducing its service into MDUs. Bulk billing, accordingly, does not have nearly the harmful entry-barring or -hindering effect on consumers that exists in the case of building exclusivity.

27. The incidents of consumers being subjected either to prices that they believed were not discounted or to inferior service under certain bulk billing deals are troublesome. Based on a review of the record, however, they appear to be few, isolated, and atypical of bulk billing as a whole. And even in some of these cases, a second video provider is present in the MDU and large numbers of residents subscribe to its video service.[59] Also, nearly all of these cases involve owner premises such as condominiums or suburban developments rather than rental properties. A significant number of states have statutes that, if certain requirements are satisfied, may provide some relief to such homeowners by allowing them, once they have taken control of an HOA from the developer, to void contracts that the developer has entered into.[60] Two of these states are Florida and Virginia, in which reside most of the MDU residents who have filed comments in this proceeding objecting to bulk billing. We note that legal action is not the only possible relief for MDU residents subject to bulk billed service that they find unsatisfactory. Most of the consumers' complaints in this proceeding came from a particular MDU

[56] *See, e.g.,* Satya Kondapalli Comments (in Live Oak Preserve, "video quality is very poor, no HD video"); C. Brian Beahm Reply Comments (in Southern Walk "current pricing is . . . higher than what I was paying when I had three different providers") (capitalization omitted).

[57] City of Weston Comments.

[58] *See supra* note 50; *see also* Second King Letter at 2 (in an MDU with bulk billing, DBS subscription "is approximately the same as its national market share"). Many commenters who claim that bulk billing discourages entry by a second MVPD do so in general terms, without citing any specific bulk billing arrangement that was the crucial factor in a second MVPD deciding not to serve a specific MDU. City of Weston Comments at 5; SureWest Comments at 4; Lafayette Comments at 9; Marco Island Comments at 14.

[59] *See, e.g.,* Comments of Michelle Abreu (resident of Live Oak Preserve subscribing to Verizon service as well as the bulk billing PCO), Tony Bui (same), Kurt Callarman (same), Calixto Cassas (same), and Howard Mayorga (same).

[60] Commenters cite, among others, CALIF. CODE REGS. Tit. 10, § 2792.21(b)(1)(E); COLO. REV. STAT. § 38.33.3-305; CONN. G.S.A. § 47-247; FLA. STATS. §§ 718.115, 718.302; GA. CODE ANN. 44-3-101; LA. S.A.-R.S. 9:1123.105; MAINE R.S.A. § 1603-105; MICH. C.L.A. § 559.155; ORE. R.S. § 94.221; 68 PA. C.S.A. § 3305; VERNON'S TEX. C.A., Property Code § 82.105, VA. CODE ANN. § 55-79.74 (amendments pending); WISC. S.A. § 703.35. *See also* CAI Comments at 4-5; FTTHC Reply Comments (analyzing Section 3-105 of the Uniform Condominium Act).

where the video service provider being complained of was effectively replaced by another cable operator.[61]

28. Finally, it would be a disservice to the public interest if, in order to benefit a few residents, we prohibited bulk billing, because so doing would result in higher MVPD service charges for the vast majority of MDU residents who are content with such arrangements.[62] Based on the evidence in the record before us, we choose not to take action that would raise prices for most MDU residents who are subject to bulk billing. Accordingly, we will allow bulk billing by all MVPDs to continue because, under current marketplace conditions, it is clear that it has significant pro-consumer effects.[63] As we noted above, we may re-examine the issue if marketplace conditions change.

B. Exclusive Marketing Arrangements

29. In the following paragraphs, we decide not to prohibit MVPDs from using marketing exclusivity arrangements. We find that such arrangements have no significant effects harmful to MDU residents and have some beneficial effects. We see no reason to prohibit this practice based on the present record.

1. Use of Exclusive Marketing Arrangements.

30. We define an exclusive marketing arrangement as an arrangement between an MDU owner and an MVPD, in a written agreement or in practice, that gives the MVPD, usually in exchange for some consideration, the exclusive right to certain means of marketing its service to residents in the MDU.[64] Typically, this includes advertising in the MDU's common areas, placement of the MVPD's brand on the MDU building's web page, placement of the MVPD's brochures in "welcome packs" for new residents, sponsoring events on the premises of the MDU, and slipping brochures under residents' doors.[65]

31. The comments indicate that marketing exclusivity arrangements occur in a significant number of MDUs, but not in most of them.[66] It appears that all types of MVPDs use marketing

[61] Comments of Zuriel Cabrera (June 6, 2008, concerning Live Oak Preserve in Tampa, Florida).

[62] One bulk billing cable operator states that fewer than 5% of an MDU's residents subscribe to another video provider. It estimates that if it lost its bulk billing contract, it would raise its prices substantially for the remaining 95% because of higher programming and labor costs per customer. The combined savings for 5% of the MDU's residents would be dwarfed by the increased expenses for the 95%, making the MDU's residents significantly worse off than they were before as a whole. Home Town *Ex Parte* at 1-2 (dated June 11, 2008).

[63] We also decline to create a system in which we would adjudicate specific bulk billing arrangements. As the Commission stated in the *Report & Order* about such proposals for MDU exclusivity clauses, such adjudications – each potentially involving individual measurements of prices, quality and quantity of channels, competition, the MDU's characteristics, and other matters – are essentially local issues that would be difficult to deal with on a Commission level. *Report & Order*, 22 FCC Rcd at 20253-54, ¶¶ 38-39.

[64] *Report & Order*, 22 FCC Rcd at 20265, ¶ 63; NAHB Comments at 13, 16; Verizon Comments at 2; *see also* NMHC *et al.* Comments at 5 (marketing exclusivity agreements in effect make the MDU owner the marketing agent of the MVPD provider that has marketing exclusivity).

[65] Camden Property Trust Comments at 6-7; NAHB Comments at 11-12, 37; NMHC *et al.* Comments at 5; Verizon Comments at 2.

[66] AIC Comments at 1 (nearly all members have properties covered by either exclusive marketing or bulk billing arrangements); Camden Property Trust at 3 ("Exclusive marketing arrangements . . . are prevalent throughout the apartment industry at [Camden's] residential communities"); Colonial Properties Trust Comments at 1 (about 50% of its properties are covered by some form of exclusive marketing agreement); Forest City Residential Group Comments at 1 ("About 25% of our properties are covered by some form of exclusive marketing agreement for . . . (continued....)

exclusivity; one industry association states that such arrangements are more common in "real estate developments than multi-tenant structures."[67] The typical marketing exclusivity arrangement lasts for a few years.[68] Some MVPDs and real estate interests make widespread use of marketing exclusivity.[69] No MVPD, however, claims that marketing exclusivity is necessary for its entry into an MDU or its financial survival, or that any MVPD has failed to enter an MDU or gone out of business because another MVPD had a marketing exclusivity arrangement.

2. Benefits and Harms of Exclusive Marketing Arrangements

32. The record clearly shows that marketing exclusivity arrangements have some modest beneficial effects for consumers and no significantly harmful ones. The balance of these considerations favors allowing the continued use of marketing exclusivity arrangements.

33. Benefits of Exclusive Marketing Arrangements. Proponents of marketing exclusivity arrangements state that the arrangements provide readily accessible information to MDU residents about an MVPD provider and allow their residents to make more informed decisions.[70] In exchange for receiving marketing exclusivity, an MVPD provider may afford the MDU and its residents lower rates and other benefits.[71] The added revenue stream that can result from marketing exclusivity may also help the MDU owner or MVPD provider obtain financing to fund the expensive wiring of an MDU building.[72] Marketing exclusivity does not explicitly or in practical effect bar, or significantly hinder, other MVPD providers from wiring an MDU or prevent any residents from choosing another MVPD if they do not want service from the provider that has the exclusive marketing arrangement.[73] Real estate interests, in defense of marketing exclusivity arrangements, make the same "bargaining chip" point they made in favor of building exclusivity and bulk billing, namely that marketing exclusivity is something they can give to an MVPD in exchange for which the MVPD may pay a greater share of the wiring costs or may agree to provide better service,[74] thus benefiting MDU residents.

(Continued from previous page)
video services"); JPI Comments at 1 ("About 90% of our properties are covered by some form of exclusive marketing agreement for . . . video services"); NMHC *et al.* Comments at 6; Post Apartment Homes Comments at 1 (same as JPI); Waterton Residential Comments at 1 ("About 80% of our properties are covered by some form of exclusive marketing agreement").

[67] NAHB Comments at 14.

[68] Camden Property Trust Comments at 6 (5-10 years, with grounds for termination); NAHB Comments at 12 (often 3-5 years or the projected build-out period of the MDU).

[69] AMLI Residential Comments at 1 (95% of the properties AMLI owns are covered by some form of exclusive marketing agreement for video services); BRE Properties Comments at 1 (96%).

[70] Camden Property Trust Comments at 4-5; IMCC Comments at 46; NAHB Comments at 18; Verizon Reply Comments at 3.

[71] Verizon Comments at 6.

[72] Waterton Comments at 2; WorldNet Comments at 3, 10.

[73] Charter Comments at 8; NAHB Comments at 3, 12, 14-16, 43; Verizon Comments at 2; WorldNet Comments at 11; Comcast Reply Comments at 6.

[74] AIMCo Comments at 1-2; AMLI Residential Comments at 2; AIC Comments at 1; Camden Property Trust Comments at 5; Colonial Properties Trust Comments at 2; Forest City Residential Group Comments at 2; IMCC Comments at 45-48; JPI Comments at 1; MHI Comments at 2; NCTA Comments at 5-6 (marketing exclusivity can result in lower prices and improved customer service); Post Apartment Home Comments at 2-3 (also noting, at 2, that MDU owners are extracting high quality and low prices in exchange for marketing exclusivity); Waterton Comments at 2-3; *see also* NMHC *et al.* Comments at 13-19.

34. Finally, Shentel, a PCO that concentrates on smaller markets in which it is a new entrant, states that exclusive marketing arrangements are an especially valuable means of advertising for small new entrants who cannot afford high-priced mass media advertising that large incumbent cable operators and LECs regularly use.[75] In the same vein, Verizon states that such one-building-at-a-time arrangements help a new entrant to overcome the greater name recognition of the entrenched incumbent cable operator.[76]

35. Harms of Marketing Exclusivity Arrangements. Lafayette Utilities System, Marco Island Cable, and the City of Reedsburg, Wisconsin, claim that marketing exclusivity arrangements make it difficult or costly for competitors other than the one with marketing exclusivity to communicate with MDU residents and hurt MDU residents by making it more difficult for them to find out about the other competitors.[77] None of these commenters cites any instance where marketing exclusivity has, in practical effect, excluded or hindered a competitor from entering an MDU. Residents may still subscribe to the other MVPDs' services, and MVPDs are still able to reach residents through many other channels such as television, mail, newspapers, billboards, and sponsorship of public events.[78]

3. Conclusion

36. The record does not support prohibiting or regulating exclusive marketing arrangements in order to protect competition or consumers. Although marketing exclusivity confers an advantage on the MVPD in whose favor the arrangement runs, it appears to be a slight one and there is no indication that it prevents or significantly hinders other MVPDs from providing video services in MDUs with such arrangements.[79] Neither does marketing exclusivity prevent or significantly hinder other MVPDs from reaching MDU residents via television, radio, and other media; deter MDU residents from subscribing to other MVPDs' services; slow the evolution of competing wireless technologies;[80] raise prices to consumers; or, by unfair methods, acts, or practices, have the purpose or effect of hindering significantly or preventing other MVPDs from providing programming to consumers, especially programming ordinarily found on broadcast and cable video systems.[81]

37. On the other hand, marketing exclusivity appears to have the efficiencies listed above, the benefits of which appear to flow through to MDU residents. The balance of consumer harms and benefits for marketing exclusivity is thus significantly pro-consumer. Accordingly, we find that the record does not support a prohibition or any limitation on marketing exclusivity arrangements in MDUs.

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[75] Shentel Comments at 23.

[76] Verizon Comments at 2, 6-7.

[77] Lafayette Comments at 8; Marco Island Comments at 13; City of Reedsburg Reply Comments at 4; *see also* Stephen Weinstein *Ex Parte* Comments (filed April 14, 2008).

[78] *See, e.g.,* IMCC Comments at 48; NAHB Comments at 3-4; Verizon Comments at 3; WorldNet Comments at 11; Comcast Reply Comments at 7 n.20.

[79] NMHC *et al.* Comments, Exh. B (Declaration of Terry Fulbright in Support of Comments of the Real Estate Ass'ns, dated Feb. 5, 2008) at ¶¶ 5, 11; *id.*, Exh. C (Declaration of Henry Pye, dated Feb. 4, 2008) at ¶¶ 5; NMHC *et al.* Comments at 6-7; WorldNet Comments at 11.

[80] Blue Ridge Advisory Services Group Comments; Camden Property Trust Comments at 5-8; Charter Comments at 1-2; NAHB Comments at 3, 12, 14-16; NMHC *et al.* Comments at 21; WorldNet Comments at 11.

[81] NAHB Comments at 25.

IV. PETITION FOR CLARIFICATION, OR, IN THE ALTERNATIVE, RECONSIDERATION, OF SHENANDOAH TELECOMMUNICATIONS COMPANY

38. Shenandoah Telecommunications Company ("Shentel") seeks clarification of the earlier *Report & Order* to the effect that the prohibition against exclusivity clauses for video service does not apply to any PCO, even if that PCO is a common carrier or an affiliate of a common carrier that provides video service directly to subscribers, provided that the PCO does not rely on public rights-of-way to deliver video service.[82] Alternatively, Shentel requests reconsideration of the earlier *Report & Order* to the extent necessary to exempt PCOs from the *Report & Order* prohibition.[83] Finally, Shentel asks that, if the Commission finds that Section 628(j) of the Act[84] limits its authority to grant clarification or reconsideration, the Commission invoke its forbearance authority to authorize the PCO activities of Shentel's affiliates.[85]

39. Shentel's varied operations merit a brief description. A Shentel affiliate, Shenandoah Telephone Company ("Senandoah"), is the incumbent local exchange common carrier ("LEC") in two rural counties in the Commonwealth of Virginia.[86] Elsewhere in Virginia and other southeastern and mid-Atlantic states, another Shentel affiliate, Shentel Converged Services, Inc. ("Shentel Converged"), offers video service as a PCO.[87] It appears that some of Shentel Converged's PCO operations include voice telecommunications service as part of the triple play.[88] Where it operates as a PCO, Shentel Converged does not rely on any public rights-of-way to deliver video service to any MDU it serves.[89] In their incumbent LEC operations, Shentel's affiliates are common carriers.[90]

A. Clarification and Reconsideration

40. In the earlier *Report & Order,* the Commission concluded that its prohibition on building exclusivity by cable operators applies, by operation of Section 628(j),[91] to any common carrier or its affiliate that provides video programming to subscribers.[92] Shenandoah is a common carrier. Shenandoah's affiliate, Shentel Converged, provides video programming directly to subscribers as a

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[82] Petition for Clarification, or, in the Alternative, Reconsideration, of Shenandoah Telecommun. Co. ("Petition") at 1.

[83] *Id.* at 1, 13.

[84] 47 U.S.C. § 548(j).

[85] *Id.* at 13, invoking 47 U.S.C. § 160.

[86] Petition at 5 n.14; Shentel Comments at 16. In one of those counties, another Shentel affiliate, Shenandoah Cable Television Company, is an incumbent cable operator. *Id.*

[87] Petition at 4 & 5 n.14; Shentel Comments at 1 n.1; *id.* at 17.

[88] *Id.*

[89] Petition at 5 n.14; Shentel Comments at 1 n.1.

[90] *See, e.g., Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(C) from Application of Computer Inquiry & Certain Title II Common-Carriage Requirements,* 22 FCC Rcd 19478, 19506, ¶ 57 (2007) ("Title II and the Commission's implementing rules impose economic regulation on common carriers or LECs generally regardless of whether they are incumbents or competing carriers").

[91] 47 U.S.C. § 548(j) ("Any provision that applies to a cable operator under this section *shall apply* to a common carrier or its affiliate that provides video programming by any means directly to subscribers") (italics added).

[92] *Report & Order,* 22 FCC Rcd at 20260, ¶ 51.

PCO. Therefore, pursuant to the express language of Section 628(j), the prohibition of building exclusivity in our rule 47 C.F.R. § 76.2000 applies to the PCO operations of Shentel Converged.

41. Shentel argues that Section 628(j) does not automatically subject PCOs to the prohibition[93] and that the record herein does not show that MDU exclusivity clauses used by PCOs (or their common carrier affiliates) are unfair or deceptive acts or practices within the terms of Section 628(b).[94] Shentel also suggests that we limit any allowance of MDU exclusivity to PCO operations outside of the territories of their affiliated incumbent common carrier or franchised cable operator affiliates.[95] These points founder on Section 628(j), which states that any "provision" of Section 628 that applies to a cable operator – 628(b) in this instance – "shall apply" to common carriers and their affiliates that provide video programming by any means directly to subscribers.[96] There is no room in Section 628(j) for treating common carriers or their affiliates differently based on evidence about the effects of their conduct or where they operate. Accordingly, Shentel's requests for clarification and reconsideration are denied.

B. Forbearance

42. Shentel asks, in the alternative, that we forbear from applying our building exclusivity prohibition to its PCO operations.[97] We evaluate Shentel's forbearance request under the statutory criteria of Section 10 of the Act, which provides that:

> (a) . . . the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that--
>
> > (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
> >
> > (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

[93] Petition at 10-11.

[94] *Id.* at 3; 47 U.S.C. § 548(b).

[95] *Id.* at 12.

[96] *See Report & Order*, 22 FCC Rcd at 20260, ¶ 51 ("Section 628(j) explicitly states that '[a]ny provision that applies to a cable operator under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers.' ... Thus, pursuant to Section 628(j) ..., our prohibition on exclusivity clauses for the provision of video services applies to ... any common carrier or its affiliate ... to the extent that these entities provide video programming to subscribers or consumers.").

[97] Shentel's Petition was not styled as a petition for forbearance under 47 U.S.C. § 160. Accordingly, the twelve-month deadline for action on forbearance petitions (47 U.S.C. § 160(c)) does not apply. *See* 47 C.F.R. § 1.53 ("In order to be considered as a petition for forbearance subject to the one year deadline, . . . any petition . . . shall be identified in the caption of such pleading as a petition for forbearance"); *see also Separate Pleadings for Petitions for Forbearance*, 15 FCC Rcd 1140, 1142, ¶ 3 (2000) ("Given the statutory deadline for Commission action on section 10(c) forbearance petitions, we are concerned that the Commission and interested parties may not have sufficient opportunity to consider these requests in a timely manner if they are not clearly identifiable as section 10(c) forbearance petitions").

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.[98]

Forbearance is warranted under Section 10(a) only if all three elements of the forbearance criteria are satisfied.[99]

43. Shentel's Petition does not satisfy the requirements of Section 10, in part because it contains no explanation of how the facts of its situation satisfy any of that Section's criteria.[100] For that reason alone, we deny Shentel's present request for forbearance.[101] We also note that Shentel maintains that any forbearance should extend to PCOs whether they are common carriers or affiliates of common carriers.[102] Section 10, however, limits the Commission's forbearance authority to telecommunications carriers and services,[103] which are terms specifically defined in Section 3 of the Act.[104] It appears, based on statements in the Petition, that Shenandoah is a telecommunications carrier providing telecommunications services.[105] On this record, however, we cannot determine whether Shentel Converged is a telecommunications carrier. Consequently, we cannot grant Shentel Converged forbearance relief under Section 10.[106]

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[98] 47 U.S.C. § 160.

[99] *See Cellular Telecommun. & Internet Ass'n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (explaining that the three prongs of section 10(a) are conjunctive and that the Commission could properly deny a petition for failure to meet any one prong); *see also Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, 22 FCC Rcd 14118, 14125, ¶ 12 (2007).

[100] Petition at ii, 13-14 (containing only very brief discussion of the merits of forbearance).

[101] Similarly, although the Commission has authority to grant forbearance on its own motion, *see Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934*, As Amended, 24 FCC Rcd 9543, 9546 ¶ 5 (2009), we see no grounds to do so here.

[102] Petition at 14 n.42 ("Any other result would make little sense in the present context").

[103] 47 U.S.C. § 160(a).

[104] *See* 47 U.S.C. § 153(10, 26, 43, 44, 46, 47).

[105] Petition at 5 n.14; Shentel Comments at 16.

[106] Shentel suggests that Shentel Converged "arguably" is a common carrier because it holds authorizations from two state regulatory commissions to provide voice services to consumers. Petition at 4. Standing alone, that evidence is insufficient to show that Shentel Converged is a common carrier. *See Verizon California, Inc. v. FCC*, 555 F.3d 270, 275 (D.C. Cir. 2009) (affirming FCC's determination that telecommunications carrier's affiliates were "telecommunications carriers" under the Act based on three facts, none of which was "compelling" by itself: (1) they "self-certified that they do and will continue to operate as common carriers, serving all similarly-situated customers equally;" (2) they entered into publicly available interconnection agreements with Verizon, something that Verizon was obligated to do only if the other entities were in fact telecommunications carriers;" and (3) "each earrier obtained a state certificate of public convenience and necessity, thereby giving public notice of its intent to aet as a common carrier").

44. For these reasons, we decline to exercise our forbearance authority at this time based on the record before us. Shentel, its affiliate(s), or another PCO may submit a forbearance request pursuant to Section 10(c) of the Act in the future. Any such petition for forbearance should address, first, the scope of Section 10 and how the petitioner and/or its PCO operations fit within that scope, especially the limitation of forbearance authority to telecommunications carriers and services. In addition, any future forbearance petition must show how that forbearance is warranted under the statutory criteria in Section 10(a)-(b).

V. MISCELLANEOUS

45. Lafayette Utilities System and Marco Island Cable request that we exempt small cable operators for a limited time from the prohibition on building exclusivity that we adopted in our earlier *Report & Order*.[107] This amounts to a petition for reconsideration of our earlier *Report & Order*, but Lafayette and Marco Island merely re-state in brief the arguments they made in the proceedings that led to that decision. This is insufficient grounds for reconsideration and, accordingly, we deny Lafayette's and Marco Island's request.

46. Several commenters have raised new issues.[108] For example, the DBS providers ask that we amend our rules for Over the Air Reception Devices in several ways.[109] Also, IMCC proposes various regulatory actions to accord PCOs the same "regulatory advantages" that franchised cable operators and common carriers have.[110] The *FNPRM* did not raise any of these issues, and we decline to address them in this proceeding.[111]

VI. PROCEDURAL MATTERS

A. Paperwork Reduction Act Analysis

47. This document does not contain new or modified information collection requirements subject to the paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burdens for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

B. Regulatory Flexibility Act

48. Because this *Second Report & Order* neither promulgates nor adopts any new or revised rules or regulations that affect small businesses, we conclude that it is not necessary to write a Final Regulatory Flexibility Analysis for it.

C. Additional Information

49. For additional information on this proceeding, please contact John W. Berresford, (202) 418-1886, of the Policy Division, Media Bureau.

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[107] Lafayette Comments at 9; Marco Island Comments at 2.

[108] Cox Commun. Inc. Comments at 2, 4-13; Lafayette Utilities System Comments at 10; Marco Island Cable Comments at 5-9; City of Reedsburg Reply Comments at 5-6; *see also* Independent MultiFamily Commun. Council ("IMCC") Comments at 28.

[109] DISH Network Comments at 6; DIRECTV Further Reply Comments at 7-8.

[110] IMCC Comments at 26-31.

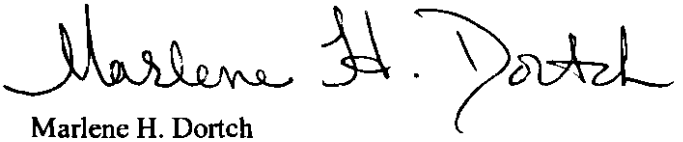
[111] Verizon Reply Comments at 5-6.

VII. ORDERING CLAUSES

50. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in Sections 1, 2 (a), 4(i) 157 nt., 201(b), 303(r),307-10, 335(a), 601(4, 6), and 628(b, c) of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151, 152(a), 154(i), 157 nt., 201 (b), 303(r), 307-10, 335(a), 521(4, 6), and 548(b, c), this *Second Report and Order* **IS ADOPTED**.

51. **IT IS FURTHER ORDERED** that, pursuant to the authority contained in Section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 160, the Petition for Clarification, or, in the Alternative, Reconsideration filed by Shenandoah Telecommunications Company concerning 47 C.F.R. § 76.2000 **IS DENIED WITHOUT PREJUDICE** to its submission of a petition for forbearance pursuant to 47 U.S.C. § 160.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary