

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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

**REPLY COMMENTS OF THE NATIONAL ASSOCIATION
OF TELECOMMUNICATIONS OFFICERS AND ADVISORS
AND THE NATIONAL LEAGUE OF CITIES
IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING**

I. INTRODUCTION

The National Association of Telecommunications Officers and Advisors (“NATOA”) and the National League of Cities (“NLC”) submit these Reply Comments in response to the Notice of Proposed Rulemaking (“*NPRM*”), released March 27, 2007, in the above-captioned proceeding.

NATOA’s membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer communications policy and the provision of services for the nation’s local governments.

NLC is the nation’s oldest and largest organization devoted to strengthening and promoting cities as centers of opportunity, leadership and governance. NLC is a resource and advocate for more than 1,600 member cities and the 49 state municipal leagues, representing 19,000 cities and towns and more than 218 million Americans.

II. NOTICE OF PROPOSED RULEMAKING

There is no doubt that *effective* competition in the communications marketplace can provide consumers with greater choice and better quality and affordable prices for products and services. Increased access to advanced technologies benefits both consumers and the communities in which they live. Indeed, a truly competitive communications marketplace can result in more programming and applications, enhanced customer service, and increased deployment of services to all areas of our country. With the continued migration of traditional telephony and video programming services to the Internet, the presence of multiple providers will be essential to a highly competitive converged voice, video and data marketplace.

Unfortunately, genuine competition will not develop in all communities or in all markets. But working together, federal, state and local governments can help to ensure that consumers are protected from market share abuses. As representatives of local governments, NATOA and NLC have stated their support and encouragement for the continued deployment of competitive communications services, including video and broadband, to all our residents. Local governments welcome a truly competitive marketplace, and the promise of choice, quality, and cost savings that such a market could bring to our residents. It is with a focus on competition and customer service and consumer protection that we offer these reply comments in the above-captioned proceeding.

A. Notice of Proposed Rulemaking

The Commission has noted on more than one occasion that the nation's communications policy relies increasingly on less regulation of the communications

marketplace and more on competitive forces to regulate it. Indeed, Commissioner McDowell recently stated that “regulatory certainty, regulatory parity and de-regulation are spurring an accelerating broadband penetration rate in the U.S. – and a light regulatory touch is America’s broadband policy.”¹ Therefore, it is somewhat surprising that the Commission has once again waded into the issue of exclusive video services contracts between multidwelling unit (“MDU”) owners and multichannel video programming distributors (“MVPDs”).

In the *NPRM*, the Commission makes reference to its 1997 *NPRM* that addressed this very same issue. At that time, the Commission concluded that such agreements “could be considered pro-competitive or anti-competitive, depending upon the circumstances involved. Commenters who were effectively prohibited from providing service due to the existence of exclusive contracts argued that those contracts were anti-competitive. Other commenters argued that exclusive contracts were necessary to enhance their ability to recover investment costs.”² At that time, the Commission opted to take no action, “concluding that there was insufficient evidence in the record to determine the extent of use of such exclusive contracts, and whether or not such contracts had significantly impeded access by competitive providers into the MDU market.”

Based on a review of the comments filed to date in this proceeding, it would appear that the Commission once again finds itself in the same situation it faced in 1997. Not surprisingly, among those advocating limiting the use of such agreements include

¹ http://www.netcompetition.org/BB_Policy_Summit.pdf

² *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments* (“MDU NPRM”), MB Docket No. 07-51, ¶2 (rel. March 27, 2007).

deep-pocketed competitive providers such as Verizon, AT&T, and Qwest. Among those favoring the continued use of such agreements include equally deep-pocketed incumbent providers such as Time Warner and Comcast. And, while the Commission has also heard from other various industry groups and small service providers, the one group yet to lend its voice to this debate is the American consumer – and the lack of that vital viewpoint should give the Commission pause.

B. Lack of Substantive Data

The comments filed in the proceeding show a notable absence of any substantive statistics regarding the actual use and duration of exclusive contracts in the MDU environment. Further, there is no showing, beyond mere recitals of consumer harm or benefit, as to the actual effects – both positive and negative – that these agreements have on consumers. For example, to what extent are these agreements being used in today’s marketplace? Do these agreements actually limit consumer choice, or are other market conditions to blame? Do these agreements actually result in higher or lower consumer prices? Do these agreements tie consumers to outdated technologies? Absent information about these and other issues, there is simply not enough evidence to justify the Commission taking any appropriate action. The Commission should be careful before attempting to craft a one-size-fits-all solution to a “problem” that has yet to be fully vetted by *all* interested and impacted constituencies, especially consumers. The Commission must first develop both anecdotal and statistical evidence, coupled with a sufficient finding of statutory authority,³ before deciding to act.

³ Multiple commenters have raised concerns over the FCC’s authority to act in this area, especially in regards to claims of jurisdiction under Section 706 of the 1996 Telecommunications Act. *See* Comments of Time Warner Cable, MB Docket No. 07-51, p. 9 (filed July 2, 2007) (“The Commission has held that while Section 706 can guide the Commission’s implementation of other provisions, is not a freestanding source

C. The Commission Should Make Use of Its Consumer Advisory Committee

In June 2007, the Commission rechartered both the Intergovernmental Advisory Committee (“IAC”) and the Consumer Advisory Committee (“CAC”). Both of these groups have responsibilities that tie into the area of MDU exclusive agreements. For example, the IAC has been asked to look into broadband deployment and the CAC has been tasked with examining the “bundling of services.” Indeed, on July 18, 2007, the Federal Register published a list of topics that the CAC will address, including: (1) consumer protection and education, and (2) impact upon consumers of new and emerging technologies, such as the availability of broadband, digital television, and cable. Given the directly-related nature of MDU exclusive contracts to these issues, both the IAC and CAC should be involved in developing the Commission’s record in this proceeding.

Both the IAC and CAC should be used to investigate the effects exclusive contracts have on deployment and competition. For example, do these contracts provide small, startup providers with a needed foothold in the marketplace? Do such contracts hinder the deployment of new technologies to consumers? What effect do these agreements have on prices? Do consumers get “more bang for their buck” in terms of increased services as a result of these agreements? Are these contracts hindering competition or bringing services into areas that would possibly not be served without the ability of the provider to recoup the costs of investment? Are there other business practices, such as exclusive marketing agreements and the removal of copper wiring, that

of regulatory authority. The text of Section 706, its legislative history, the broader statutory scheme, and Congress’s policy objectives all support this sound interpretation.”)

also hinder competition? Answers to these and other questions could better help guide the Commission in this area of inquiry.

D. Data Collection

The value of a thorough data collection process cannot be overstated, as evidenced by our comments in the Commission's recent *NPRM* regarding broadband data collection.⁴ In that proceeding, we urged the Commission to engage in a detailed broadband deployment data collection process, acknowledging the benefits to be gained from a properly performed data collection.⁵ Given the absence of any substantial statistical data relating to the use of exclusive contracts, we urge the Commission to undertake a data collection in this area.

The initial comments in the current *NPRM* reflect almost no attempt to collect and present empirical information on the extent of use or impact of exclusive service contracts. SureWest Communications, whose statistics were cited in the *NPRM*,⁶ states that in a survey they conducted, 28 percent of all MDUs passed by the SureWest network are locked into exclusive contracts.⁷ SureWest goes on to state that if the non-responding MDUs are also *assumed* to be locked into exclusive contracts, the number jumps to 59 percent.⁸ While these numbers may appear significant on their face, the reality is that SureWest's survey methodology is unknown. While not meant to downplay SureWest's

⁴ Notice of Proposed Rulemaking, *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriberhip Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriberhip* (rel. April 16, 2007).

⁵ See Comments of the National Association of Telecommunications Officers and Advisors, the National Association of Counties, the U.S. Conference of Mayors, and the National League of Cities in Response to the Notice of Proposed Rulemaking, WC Docket No. 07-38 (rel. June 15, 2007), *avail. at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519529330.

⁶ MDU NPRM, ¶ 5.

⁷ See Comments of SureWest Communications, MB Docket No. 07-51, p. 3 (rel. July 2, 2007), *avail. at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519538900.

⁸ *Id.*

assertions, it is illustrative of the problem that exists pertaining to the lack of any verifiable and qualitatively consistent statistical data on the current use of exclusive service contracts.

We encourage the FCC to engage in a data collection to gain an empirical understanding of the exclusive contract environment. The FCC should gather information on a number of issues, including, but not limited to: (1) the number of exclusive contracts in use; (2) the number of consumer households affected by these contracts; (3) consumer experience in MDUs with exclusive contracts; and (4) the duration of exclusive contracts. Each piece of information will inform the FCC not just about the “nuts and bolts” of exclusive contracts, but also whether exclusive contracts are being used to: (1) foster competition, as argued by the incumbents; (2) as a defensive tactic as asserted by large competitive providers; or (3) as a means of ensuring a reasonable return on investment as claimed by small, competitive providers.

The number of current exclusive contracts is vital since this information, coupled with the number of MDUs in a collection area, will inform the FCC of the percentage of MDUs that have exclusive contracts with any one provider. Taking all providers in the aggregate will further develop the picture and establish a total percentage of MDUs that are currently locked into exclusive contracts within a collection area.

The duration of such contracts is also an important piece of information. Duration may show whether an exclusive contract has been entered into so that a company can recover capital investments or whether the contract is being used to foreclose competitive entry into the MDU marketplace.

But above all else, the Commission must obtain information from consumer groups as to the effect these contracts have on consumers. Are consumers being negatively impacted by the use of these contracts?

The FCC should solicit comments regarding how best to approach an exclusive contracts data collection and what level of granularity and detail should be collected. Taking commenter suggestions and forging a well-developed data collection plan is crucial in learning the role exclusive contracts play in the current MMU market.

III. FCC ACTION: WHEN TO ACT AND WHAT SHOULD BE DONE

After soliciting additional comment from consumers, including use of the IAC and CAC to gather evidence of the impact of exclusive contracts, and combining such findings with the statistical information gathered in a data collection, the FCC will be in a better position to determine whether action should be taken and whether it has sufficient authority to take the identified steps in regard to exclusive contracts. While we urge the Commission to give careful consideration to the arguments raised on both sides of the issue, we believe it is crucial that any balancing of factors must tip in favor of consumer interests and protections.

VI. CONCLUSION

The FCC has no empirical information in the record on which to take action regarding exclusive contracts. To remedy this, the FCC should seek additional comment and utilize both the Intergovernmental Advisory Committee and the Consumer Advisory Committee to gather evidence on the impact of exclusive contracts on competition in the MDU market and the effect of such contracts on consumers. In addition, the Commission

should undertake a data collection that will provide the Commission with concrete evidence on which to base any actions taken.

Respectfully submitted,

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