

# Morgan Lewis

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April 4, 2024

## **Via ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
45 L Street, N.E.  
Washington, DC 20554

**Re: *Improving Competitive Broadband Access to Multiple Tenant Environments, GN Docket No. 17-142***

## **NOTICE OF EX PARTE COMMUNICATIONS**

Dear Ms. Dortch:

On April 4, 2024, Jonathan Adelstein and Luis Rodriguez on behalf of Optical Telecommunications Inc. ("OpticalTel"), Jonathan Friesel, Raymond Pang, and Stefan Olofsson on behalf of DigitalBridge Group Inc. ("DigitalBridge"), and Andrew Lipman, Russell Blau, and Patricia Cave as outside counsel to OpticalTel and DigitalBridge (collectively, the "Parties") met by video conference with Justin Faulb, Chief of Staff and Legal Advisor to Commissioner Geoffrey Starks, regarding the above-captioned proceeding.

The Parties discussed the importance and benefits of bulk billing arrangements as an alternative service arrangement in the multi-tenant environment ("MTE") marketplace. Through bulk billing, providers like OpticalTel are able to offer much lower prices to more customers than would be possible without bulk billing. Bulk billing arrangements are a key tool for closing the digital divide by permitting competitive providers to deploy next-generation fiber facilities to communities in reliance on a business case and minimum revenue targets that are sufficient to cover the costs of deployment and ongoing service. In many cases, bulk billing arrangements are competitively bid, enabling any provider interested in serving the residents of an MTE to craft an attractive service package and price that is tailored to each MTE. In the Parties' experience, the Commission correctly concluded in 2010 that "under current marketplace conditions, it is clear that [bulk billing] has significant pro-consumer effects[.]"<sup>1</sup>

OpticalTel described its experience providing competitive, fiber-based internet and other services to MTEs including student housing, assisted living facilities, recreational vehicle resorts, condominiums, and homeowners' associations ("HOAs") in Florida.<sup>2</sup> OpticalTel's customer base is largely comprised of middle-to-low-income and other underprivileged consumers, including senior citizens. OpticalTel explained that, through a bulk billed model, the company is able to

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<sup>1</sup> *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Second Report and Order, 25 FCC Rcd 2460, 2471, ¶ 28 (2010) ("2010 Bulk Billing Order").

<sup>2</sup> See OpticalTel, Community Services, <https://opticaltel.com/community-services/>.

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offer service to consumers (and the MTE) at a discount compared to offerings that are available from other providers on the open marketplace. OpticalTel also can provide fiber-based broadband services to communities where the incumbent provider would not be willing to deploy fiber. As depicted in the attached diagram, in many cases, OpticalTel's retail rate is less than a third of the retail rate charged by the incumbent.

The Parties discussed the unintended consequences that would result from restricting the use of bulk billing arrangements. For example, restricting or imposing opt-out conditions on bulk billing arrangements will make it impossible for providers like OpticalTel to offer service at a discounted rate and will result in some consumers seeing their costs increase by double or even more without bulk billing. The increases will be most pronounced in the context of video programming, for which content providers only offer bulk content prices if the video provider can commit to providing 100% penetration of the video programming at the MTE. Restricting bulk billing also will limit the ability for broadband providers to spread their deployment and ongoing costs across a broader base of customers, ultimately resulting in fewer fiber-based broadband deployments and increased consumer rates. Applying this retroactively to existing contracts would disruptively result in chaos and loss of service or dramatic price increases for thousands of MTE residents, many of whom are low-income and/or elderly on fixed incomes who cannot afford the inflationary impact yet who rely on the broadband and video services they enjoy today.

The Parties recommended that, before the Commission issue any proposed rules regarding bulk billing, the Commission should first issue a Notice of Inquiry to build a record upon which any proposals could be based. There is no basis in the record for tentative conclusions that there is a need to disrupt competitive services that offer lower prices than incumbent providers. The Parties also urged that, if the Commission is intent on moving forward with a proposed rulemaking in this proceeding, it should ensure that the notice of proposed rulemaking ("*NPRM*") solicits a robust record on all facets of bulk billing and service arrangements in the context of MTEs, including by soliciting public input on proposals that could facilitate the retention of known pro-consumer effects of bulk billing while still addressing other concerns the Commission may have about anti-competitive activity in the marketplace.

Specifically, the Parties requested that the *NPRM* include proposals and/or questions on the following topics:

- What impact does bulk billing have on consumer prices for video, Internet, and telephony relative to non-bulk pricing?
- Should the Commission exempt bulk billing arrangements that provide consumers with prices that are below the non-bulk price?
- What are the typical facilities provided by providers that use a bulk billing model? Are services offered through bulk billing arrangements typically fiber-based, cable, or some other technology? Do bulk providers offer higher speed (*e.g.*, 500 MB or higher) symmetrical service?
- Should "competitive" bulk billing agreement solicitations, where the community (directly or through a third-party advisor) solicits multiple bids, be exempt from any new regulations? If so, what criteria should be required for a competitively bid bulk billing arrangement to qualify for the exemption? Should bulk billing agreements be exempt if the community was represented by a bona fide advisor during negotiations with the provider?

- Should HOA and condominium communities where the resident/customer is the owner of the unit be subject to different rules than those where the resident/customer leases the unit from the MTE owner (e.g., an apartment building)?
- As the Commission has previously recognized, prohibiting bulk billing arrangements at the request of “a few residents ... would result in higher MVPD service charges for the vast majority of ... residents who are content with such arrangements.”<sup>3</sup> How (if at all) can the Commission adopt an opt-out or opt-in framework for bulk billing that avoids the unintended consequence of allowing a few customers to cause higher costs for all of an MTE’s residents? Should the Commission allow bulk billing if a majority of the residents agree to a bulk billing arrangement? Should an opt-out or opt-in threshold be a simple majority, supermajority, or some other measure of broad consensus in the community while preventing a small minority from forcing the entire community to pay higher prices?
- Can the Commission adopt rules that prohibit landlords, HOAs or condominium associations from marking up the bulk billed price charged by the service provider? How could such restrictions be imposed without regulating the MTE?
- When the Commission last amended the MTE rules in 2022, it provided a six (6) month transition period before new rules applied to existing agreements.<sup>4</sup> Would a similar transition period be sufficient for any rules that may be adopted in this proceeding, or should the Commission consider a longer transition? How would retroactive application of the rules impact existing customers?

The Parties look forward to working with the Commission and other stakeholders to ensure that this proceeding results in a well-developed record that can serve as the basis for reasoned decision-making and reflects the current state of the marketplace, including the continued importance of bulk billing as a tool to close the digital divide and reduce costs for consumers.

Please contact the undersigned if you have any questions.

Respectfully submitted,

*/s/Andrew D. Lipman*

Andrew D. Lipman

*Counsel to OpticalTel and DigitalBridge*

cc: Justin Faulb

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<sup>3</sup> *2010 Bulk Billing Order*, 25 FCC Rcd at 2471, ¶ 28.

<sup>4</sup> See *Improving Competitive Broadband Access to Multiple Tenant Environments*, Report and Order and Declaratory Ruling, 37 FCC Rcd 2448, 2463, ¶ 32 (2022) (“*2022 MTE Order*”) (providing a 180-day delayed compliance date for the prohibition on enforcing existing contracts with exclusive and graduated revenue sharing provisions).

# Retail vs Bulk ARPU Environment

