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

DEC 23 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
 Telecommunications Services )  
 Inside Wiring )  
 )  
 )  
 Customer Premises Equipment )  
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 )  
 In the Matter of )  
 )  
 Implementation of the Cable )  
 Television Consumer Protection )  
 and Competition Act of 1992 )  
 )  
 )  
 Cable Home Wiring )

CS Docket No. 95-184

MM Docket No. 92-260

**COMMENTS OF  
GTE SERVICE CORPORATION**

GTE Service Corporation, on behalf of its  
affiliated domestic telecommunications and  
video service companies

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December 23, 1997

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## TABLE OF CONTENTS

SUMMARY .....	i
I. INTRODUCTION .....	2
II. THE FCC LACKS JURISDICTION TO INTERFERE WITH EXCLUSIVE CONTRACTS BETWEEN COMPETITIVE MVPDs AND BUILDING OWNERS.....	4
A. The FCC's Jurisdiction is Limited by the Authority Found in the Communications Act. ....	4
B. The Communications Act Generally Does Not Give the FCC Regulatory Authority Over Competitive MVPDs, Except in Limited Circumstances Not Applicable Here. ....	5
III. THE COMMISSION HAS REPEATEDLY RECOGNIZED LIMITATIONS ON ITS JURISDICTION, ABSENT A CLEAR STATUTORY DIRECTIVE, IN OTHER RELATED AREAS WHERE THERE WAS A DEMONSTRABLE IMPACT ON COMMUNICATIONS SERVICES.....	10
IV. REGULATION OF EXCLUSIVE CONTRACTS BETWEEN NEW ENTRANTS AND LANDOWNERS IS NOT NECESSARY TO FURTHER COMPETITION.....	13
V. CONCLUSION.....	15

## SUMMARY

GTE applauds the Commission's continued effort to facilitate competition among multichannel video programming distributors ("MVPDs") in the context of multiple dwelling unit ("MDU") buildings. In GTE's view, addressing the issue of exclusive contracts is an important component of ensuring that the FCC's objective of increased competition will be realized. To this end, GTE urges the Commission to consider the critical role that exclusive contracts play in giving new entrants a potent tool to gain a "toehold" in a market long-dominated by incumbent providers. At the same time, the Commission must recognize that allowing incumbent providers to retain perpetual, exclusive contracts that were secured in the absence of competition remains in the way of competitive entry.

In considering these issues, the Commission, however, cannot lose sight of the statutory distinctions among video providers made by the Communications Act. In particular, the Commission's rate regulatory authority under Section 623 does not extend to "competitive" MVPDs, such as wireless operators, Satellite Master Antenna Television ("SMATV") system providers, DBS providers, and cable operators that are subject to effective competition. Further, Sections 4(i) or 303(3), nor any other provision in the Act, gives the Commission broad statutory authority over such providers.

Accordingly, GTE maintains that the Commission is without statutory authority to adopt its proposals to limit the term of exclusive contracts as applied to competitive MVPDs. Further, regulation of exclusive contracts entered into by new entrants is not necessary to promote competition. Unlike incumbent providers, new entrants lack

market power and use exclusive contracts to address the risks associated with market entry.

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**COMMENTS OF  
GTE SERVICE CORPORATION**

GTE Service Corporation, on behalf of its affiliated domestic telephone and video service companies (collectively "GTE")<sup>1</sup> hereby files its comments in response to the *Second Further Notice of Proposed Rulemaking* issued in the above-captioned dockets.<sup>2</sup> As set forth below, GTE maintains that the Commission lacks statutory

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<sup>1</sup> GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc., GTE Communications Corporation, and GTE Media Ventures, Inc.

<sup>2</sup> *In the Matter of Telecommunications Services Inside Wiring*, CS Docket No. 95-184, MM Docket No. 92-260 (Second Further Notice of Proposed Rulemaking) (rel. Oct. 17, 1997) ("*Further Notice*").

authority to place limits on an exclusive contract between a multiple dwelling unit ("MDU") building owner and a "competitive" multichannel video programming distributor ("MVPD"), such as a wireless operator, Satellite Master Antenna Television ("SMATV") system provider, DBS provider, or cable operator that is subject to effective competition. Neither the rate regulatory provisions of the Act, nor the Commission's limited jurisdiction under Sections 4(i) or 303(r) provide such authority over competitive MVPDs. Further, limitations on the use of exclusive contracts by new entrants is not in the public interest because it would foreclose meaningful competition from developing among MVPDs. In order to compete with incumbent cable operators, new entrants require the ability to obtain exclusive contracts to justify the substantial investment and address the business risk associated with initiating service to MDU subscribers.

## I. INTRODUCTION

In its *Further Notice*, the Commission seeks comment, among other issues, on two proposed rules governing exclusive contracts between MVPDs and MDU building owners.<sup>3</sup> With respect to exclusive contracts, the Commission proposes either to: (1) permit the enforcement of all existing and future exclusive contracts for a specified time period (*i.e.*, a "cap" approach); or (2) limit the enforcement of exclusive contracts where the MVPD has "market power."<sup>4</sup> To this end, the Commission also seeks comment on the threshold issue of its statutory authority to adopt these proposals.<sup>5</sup>

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<sup>3</sup> *Further Notice*, ¶¶ 259, 261.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* ¶ 266.

In GTE's view, the Commission's goal of fostering competition against incumbent cable providers is correct. In particular, exclusive contracts can be used by a provider with market power to perpetuate its monopoly position in a specific market and to deny consumers the benefits of emerging competition. In marked contrast, however, exclusive contracts are a potent tool that new entrants need to compete with monopolists by mitigating the substantial business risk and justifying the new investment associated with market entry. Without this opportunity to compete in a meaningful fashion, the Commission's goal of increasing competition among MVPDs in the MDU context may not be realized.

In its effort to promote competition among MVPDs, however, the Commission must not ignore the regulatory distinctions made by the Communications Act between incumbent cable operators and "competitive" MVPDs. Most notably, while the Act's rate regulatory framework applies to incumbent cable operators not subject to effective competition, it does not apply to competitive MVPDs -- such as wireless operators, SMATV system providers, DBS providers and cable operators *after* they are subject to effective competition.<sup>6</sup> Accordingly, any attempt to prospectively limit exclusive contracts between competitive MVPDs and landowners is neither supported by Section 623 of the Act, nor the Commission's limited authority under Sections 4(i) or 303(r). Further, the Commission itself has recognized that the Act must provide explicit

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<sup>6</sup> For purposes of these comments, "competitive" MVPDs refers to cable operators subject to "effective competition" under Section 623(l)(1) of the Act and all other non-cable operator MVPDs as defined by Section 602(13) of the Act. See 47 U.S.C. §§ 543(l)(1), 522(13); see also 47 C.F.R. § 76.905(d).

jurisdiction before the agency may regulate the conduct of private landowners, absent any jurisdiction over the carrier itself.

Accordingly, the Commission should not apply either of its two proposals to exclusive contracts entered into by MDU building owners and competitive MVPDs. Such regulation is neither supported by the Communications Act nor sound public policy.

## **II. THE FCC LACKS JURISDICTION TO INTERFERE WITH EXCLUSIVE CONTRACTS BETWEEN COMPETITIVE MVPDs AND BUILDING OWNERS**

### **A. The FCC's Jurisdiction is Limited by the Authority Found in the Communications Act.**

It is well-established that administrative agencies possess only the power Congress has delegated to them, and therefore, the FCC's regulatory jurisdiction is limited by the scope of the Communications Act.<sup>7</sup> For example, the D.C. Circuit has held that "the extent of [an agency's] powers can be decided only by considering the powers Congress specifically granted it."<sup>8</sup> Courts have applied this rule with equal force to the FCC, holding that "[Congress] intended that specific statutory authority, rather than general inherent equity power, should provide [an] agency with its governing

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<sup>7</sup> See Communications Act of 1934, as amended, 48 Stat. 1064 (codified at 47 U.S.C. §§ 151 *et seq.*).

<sup>8</sup> See, e.g., *Railway Labor Executives' Ass'n v. National Mediation Board*, 29 F.3d 655, 671 (D.C. Cir. 1994), *cert. denied sub nom., National Railway Labor Conference v. Railway Labor Executives' Ass'n*, 115 S.Ct. 1392 (1995) (quoting *American Fin. Servs. Ass'n v. FTC*, 767 F.2d 957 (D.C. Cir. 1985)).

standards."<sup>9</sup> Though courts have granted the Commission varying degrees of discretion in interpreting its authority under the Act, this latitude does not equate to "untrammelled freedom to regulate activities over which the statute fails to confer, or explicitly denies, Commission authority."<sup>10</sup>

As explained in more detail below, it is clear in this case that the Act does not expressly authorize the FCC to regulate exclusive contracts between competitive MVPDs and building owners, nor does it give the FCC general jurisdiction over such providers. Without a statutory basis for jurisdiction, a rule that restricts a competitive MVPD's ability to enter into private contracts with building owners would be beyond the permissible reach of the FCC's authority.

**B. The Communications Act Generally Does Not Give the FCC Regulatory Authority Over Competitive MVPDs, Except in Limited Circumstances Not Applicable Here.**

The Commission has no authority to regulate generally the activities of competitive MVPDs. Although Title VI of the Act provides the Commission with some limited authority over certain competitive operators in specific situations,<sup>11</sup> none of these provisions even arguably allows the Commission to assert the power to limit the term of

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<sup>9</sup> See *AT&T v. FCC*, 487 F.2d 865, 872 (2d Cir. 1973) (quotation marks and citations omitted).

<sup>10</sup> See *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 617 (D.C. Cir. 1976) ("*NARUC*").

<sup>11</sup> See, e.g., 47 U.S.C. § 531 (public, educational and government channels); 47 U.S.C. § 532 (leased access); 47 U.S.C. § 533 (ownership restrictions); 47 U.S.C. § 534 (must carry requirements); 47 U.S.C. § 535 (noncommercial channel carriage requirements).

private agreements entered into by competitive MVPDs. An attempt to weave a broad jurisdictional basis from these slender threads of regulatory authority would be similar to the statutory overreaching forbidden by the courts in the cases described above.<sup>12</sup>

In particular, the rate regulatory scheme enacted by Congress in the 1992 Cable Act, the statutory provision that most arguably permits the Commission to regulate exclusive contracts of this type, supports the conclusion that the Commission may not limit the term of agreements between competitive MVPDs and building owners.<sup>13</sup> While Congress gave the Commission broad authority to regulate cable rates under Section 623, it did not extend this authority to non-cable operator MVPDs or to cable operators *after* effective competition has been demonstrated. The plain language of Section 623(b)(1) states that the Commission's regulations "shall be designed to achieve the goal of protecting subscribers of any cable system that is *not subject* to effective competition."<sup>14</sup> Moreover, in creating this regulatory scheme, Congress expressed a clear preference to "rely on the marketplace."<sup>15</sup> Accordingly, a rule limiting the term of

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<sup>12</sup> See *AT&T*, 487 F.2d at 872-73; *NARUC*, 533 F.2d at 617-18.

<sup>13</sup> See 47 U.S.C. § 543(a)(2).

<sup>14</sup> 47 U.S.C. § 543(b)(1) (emphasis added).

<sup>15</sup> 47 U.S.C. § 521 Note (b)(2); H.R. Conf. Rep. No. 862, at 51 (1992), *reprinted in*, 1992 U.S.C.C.A.N. 1231, 1233; S. Rep. No. 92, at 18 (1992), *reprinted in*, 1992 U.S.C.C.A.N. 1133, 1151 ("[i]t has been the long-standing policy of the Committee to rely, to the maximum feasible extent, upon greater competition to cure market power problems; however, the evidence demonstrates that there is no certainty that such competition to cable operators with market power will appear . . . soon"); S. Rep. No. 92, at 63, 1992 U.S.C.C.A.N. at 1196 ("[r]ate regulation is permitted only in the absence of effective competition").

competitive MVPDs' contracts with building owners would run contrary to this section and the general regulatory framework of the 1992 Cable Act.

Moreover, the Telecommunications Act of 1996 establishes as a clear policy goal that the Commission should encourage competitive entry into new markets and favor market forces over regulation. Congress explained that the purpose of the Act is "to provide for a pro-competitive, de-regulatory, national policy framework designed to accelerate rapid private sector deployment of advanced telecommunications . . . by opening all markets to competition."<sup>16</sup> If the FCC were to limit the term of exclusive contracts for competitive MVPDs, it would be inserting itself squarely into the market by affecting how these providers offer service, including rates, terms and conditions associated with their offerings. A prohibition on exclusive contracts would effectively restrict a competing provider's ability to offer efficient pricing options based on its ability to recover costs over a sufficient period of time, thereby compelling the provider to either raise its price or bear the risk that these costs would go unrecovered. This is precisely the regulation of competitive marketing arrangements that Congress intended the FCC to avoid.

The D.C. Circuit Court of Appeals has already limited Commission attempts to broaden its authority over competitive MVPDs. In *Time Warner Entertainment Co., L.P. v. FCC*, the court concluded that the FCC's "uniform rate structure" and "tier buy-through" regulations as applied to cable operators facing "effective competition"

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<sup>16</sup> See H.R. Conf. Rep. No. 104-458, at 1 (1996).

contradict the plain language, structure and legislative purpose of the 1992 Cable Act.<sup>17</sup> "Absent a requirement of uniformity . . . a cable operator would be free to charge [ ] different rates as the market would bear or uniform rates. In either event, the choice would be that of the operator, not the Commission."<sup>18</sup> The court also explained that application of such rules to providers facing "effective competition" would "undermine[ ] a hallmark purpose of the 1992 Cable Act: to allow market forces to determine the rates charged by cable systems that are subject to 'effective competition' as defined by Congress."<sup>19</sup>

Furthermore, neither Section 4(i) nor Section 303(r) of the Communications Act provide an independent basis for authority to limit the term of competitive MVPDs' contracts with building owners. Section 4(i) permits the FCC to take action or otherwise adopt rules or regulations "not inconsistent with this Act, as may be necessary in the execution of its functions."<sup>20</sup> It is well-established that the FCC cannot assert jurisdiction solely on the basis of Section 4(i) where no other authority exists,<sup>21</sup> or where

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<sup>17</sup> See *Time Warner v. FCC*, 56 F.3d 151, 190-92 (D.C. Cir. 1995), *cert. denied*, 116 S.Ct. 911 (1996).

<sup>18</sup> *Id.* at 191.

<sup>19</sup> *Id.*

<sup>20</sup> 47 U.S.C. § 154(i).

<sup>21</sup> *AT&T v. FCC*, 487 F.2d at 876-77 (2nd Cir. 1973) (holding that Section 4(i) did not authorize the FCC to require AT&T to request prior authorization before filing a revised tariff).

such action would be otherwise inconsistent with the Act.<sup>22</sup> Section 4(i) is not "infinitely elastic," and allows the FCC flexibility only "to the extent necessary to regulate effectively those matters already within [its] boundaries."<sup>23</sup> The recent decision in *Mobile Communications Corp. v. FCC* does not alter this conclusion and is distinguishable from the instant case. In that case, the court specifically held that the Commission's action was "not inconsistent" with the Act.<sup>24</sup> Here, as explained above, restricting competitive MVPDs' ability to contract with building owners would be directly inconsistent with the cable rate regulatory scheme created by Congress.

Similarly, the general authority conferred on the Commission under Section 303(r) of the Communications Act does not itself constitute a jurisdictional basis for limiting the term of competitive MVPDs' exclusive contracts. Section 303 provides that the Commission may, "except as otherwise provided in this Act," prescribe regulations "not inconsistent with law, as may be necessary to carry out the provisions of [the Communications] Act."<sup>25</sup> Like Section 4(i), then, Section 303(r) cannot stand alone as a source of authority and does not expand the scope of the Commission's jurisdiction, but instead allows the Commission flexibility to issue rules where it already has authority to

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<sup>22</sup> *North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985).

<sup>23</sup> *Id.*

<sup>24</sup> *Mobile Communications Corporation of America v. FCC*, 77 F.3d 1399, 1406 (1996).

<sup>25</sup> 47 U.S.C. § 303(r).

do so.<sup>26</sup> Accordingly, Section 303(r) does not give the Commission authority in this context because a rule prospectively restricting competitive MVPDs' ability to enter into term agreements with building owners is not supported by any other provision of the Act and would be *inconsistent* with Section 623 and with the broader purposes of the Act.<sup>27</sup>

**III. THE COMMISSION HAS REPEATEDLY RECOGNIZED LIMITATIONS ON ITS JURISDICTION, ABSENT A CLEAR STATUTORY DIRECTIVE, IN OTHER RELATED AREAS WHERE THERE WAS A DEMONSTRABLE IMPACT ON COMMUNICATIONS SERVICES**

Any attempt to restrict the term of exclusive contracts between private landowners and competitive MVPDs would be inconsistent with Commission precedent. In several instances in which the Commission considered regulating private landowner activities with an impact on communications services, the Commission concluded that it lacked jurisdiction absent an explicit grant of statutory authority. Consistent with this precedent, the Commission should not attempt in this proceeding to limit the term of

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<sup>26</sup> See e.g., *In the Matter of Adoption of Supplemental Standards of Ethical Conduct for Employees of the FCC and Revision of the Commission's Employee Responsibilities and Conduct Regulations*, 11 FCC Rcd 15438 (1996) (the Commission's authority to implement the Communications Act's prohibitions on financial interests and outside employment of Commissioners and FCC employees based on Section 154(b)(2) of the Act, in combination with Section § 303(r)); *In the Matter of Implementation of Section 255 of the Telecommunications Act of 1996*, 11 FCC Rcd 19152 (1996) (the FCC's authority to select among a variety of approaches to enforcing the clear statutory directive of ensuring greater access and availability of telecommunications to Americans with disabilities based upon Section 255, in combination with Sections 303(r) and 4(i)).

<sup>27</sup> Moreover, the Commission does not have authority over common carriers' MVPD services under Sections 201 to 205 of the Act. These Title II provisions clearly only apply to common carrier services, and not MVPD services generally.

exclusive contracts between MDU owners and competitive MVPDs because it is without a clear statutory basis to do so.

The Commission has declined to regulate private landowner activities -- such as construction of a high-rise building or pole attachment agreements between cable companies and utilities -- where no such authority was clear under the Act. For example, in *Illinois Citizens Comm. For Broadcasting*, the FCC determined that the Communications Act did not extend the agency's jurisdiction over matters concerning the construction of the Sears Tower, even though the construction might affect television reception.<sup>28</sup> Along similar lines, the Commission declined to regulate pole attachment agreements until Congress specifically amended the Communications Act to provide such authority. Prior to this explicit grant now found in Section 224, the FCC concluded in *California Water and Tel. Co., et al.*, that it lacked jurisdiction over pole attachment agreements since these agreements did constitute "communication by wire or radio" and that "pole owners are not themselves involved in cable transmission at

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<sup>28</sup> *In re Complaint of Illinois Citizens Comm. For Broadcasting*, 35 F.C.C. 2d 237, *aff'd sub nom., Illinois Citizens Comm. For Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972). In dismissing petitioner's jurisdictional claim, the Commission explained that extending its jurisdiction over any action that "may affect" radio reception would be a "leap beyond logic." *Id.* at 238. The Court of Appeals for the Seventh Circuit agreed, expressing concern that petitioner's argument would expand the FCC's authority "to include a wide range of activities, whether or not actually involving the transmission of radio or television signals." *Illinois Citizens Comm.*, 467 F.2d at 1400; *see also In the Matter of Investigation of Television Interference to be Caused by the Construction of the World Trade Center*, 10 R.R. 2d 1769 (Aug. 7, 1967) (comments of Commissioner Lee noting that the Commission has no authority to regulate the proposed construction of the World Trade Center).

all."<sup>29</sup> Noting that its powers "cannot be extended beyond the terms and necessary implications of the Act," the Commission explained that that "[i]f broader powers [are] desirable they must be conferred by Congress" and may not "be assumed administrative officers" or by the courts in the "proper exercise of their judicial functions."<sup>30</sup> In response, Congress intervened and amended the Communications Act, noting its specific intent to resolve the "jurisdictional impasse" over the regulation of pole attachment disputes.<sup>31</sup>

Similarly, the Commission has declined to exercise regulatory authority over private contractual agreements that restrict amateur radio operators' ability to erect antennas and other communications equipment. While sustaining a challenge to various state and local ordinances that restrict the placement of such antennas, the Commission declined to consider petitioner's challenge against restrictive lease

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<sup>29</sup> *California Water and Tel. Co., et al.*, 64 F.C.C. 2d 753, 758-59 (1977).

<sup>30</sup> *Id.* at 758-60 (citing *FTC v. Raladan Co.*, 283 U.S. 643, 649 (1930)).

<sup>31</sup> See 47 U.S.C. § 224; S. Rep. No. 95-580, at 14 (1978), *reprinted in*, 1978 U.S.C.C.A.N. 109, 122. The regulation of non-licensee tower owners provides another example where the scope of the FCC's jurisdiction over private landowners remained in doubt until Congressional action. Specifically, Congress in 1965 gave the FCC jurisdiction over non-licensee tower owners, noting its concern that "'abandoned towers' . . . do not appear to fall within the Commission's jurisdiction to compel continued marking or lighting." See 47 U.S.C. § 303(q); H.R. Rep. No. 1014, *reprinted in*, 1965 U.S.C.C.A.N. 3598, 3599. Subsequently, when it was unclear whether the FCC could impose a forfeiture against a non-licensee tower owner, Congress again modified the Act. See 47 U.S.C. § 503(b)(5) (extending the FCC's forfeiture authority for violations of Section 303(q) to non-licensee tower owners in certain instances).

provisions.<sup>32</sup> Explaining that "these restrictive covenants are contractual agreements between private parties," the agency found that these agreements are not "generally a matter of concern to the Commission."<sup>33</sup> While Section 207 of the Act explicitly gives the Commission authority to regulate private agreements that restrict a viewer's ability to use small dish satellite receivers and broadcast TV antennas, some question remains as to the Commission's authority to apply this section to restrictions that apply to rental property, such as MDU buildings.<sup>34</sup>

#### **IV. REGULATION OF EXCLUSIVE CONTRACTS BETWEEN NEW ENTRANTS AND LANDOWNERS IS NOT NECESSARY TO FURTHER COMPETITION**

A rule that limits a new entrant's ability to negotiate exclusive contracts with MDU owners is not necessary to further competition or to protect the interests of consumers. GTE maintains that the different competitive concerns between new entrant MVPDs and incumbent cable operators obviates the need to regulate exclusive contracts between building owners and new entrants.<sup>35</sup> Unlike incumbent cable operators, new

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<sup>32</sup> *In the Matter of Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities*, 101 F.C.C. 2d 952 (1985).

<sup>33</sup> *Id.* at 954.

<sup>34</sup> *See In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996*, 11 FCC Rcd 19276, 19314-15 (1996) (Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking).

<sup>35</sup> However, the Commission should recognize that, even after an incumbent cable operator becomes subject to effective competition, its actual market power will remain for an extended period of time, particularly where the effective competition showing is made due to local exchange carrier entry into the franchise area. *See* 47 U.S.C. § 543(l)(1). Accordingly, a "fresh look" policy as applied to exclusive contracts entered into between *incumbent cable operators* that were not subject to effective competition  
(Continued...)

entrants lack the market power to limit competition for MDU subscribers. Indeed, a new entrant almost always will be providing service to MDU residents because it has offered those residents a competitive alternative to the incumbent operator's service. Where this is the case, competitive forces will adequately protect the interests of consumers since the building owner will undoubtedly be able to provide for a smooth transition to a new provider on its own, if it so chooses at a later time. Accordingly, it follows that there is no concern that new entrants will impede competition and limit consumer choice by denying access to MDUs in the same manner that incumbent cable operators foreclosed access to new entrants.

Indeed, the Commission has acknowledged in its *Further Notice* that exclusive contracts can be pro-competitive in certain circumstances.<sup>36</sup> As GTE and other parties have argued before in this proceeding, the ability to enter into exclusive contracts is necessary to jump start competition between MVPDs.<sup>37</sup> Because of the high cost of initiating service within an area, or to a particular MDU, a new entrant must be allowed to seek some assurance that it will be able to recover these entry costs. Without this

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(...Continued)

when the contract was signed and landowners would be a permissible and necessary means to ensure "reasonable" cable rates under Section 623 of the Act.

<sup>36</sup> See *Further Notice*, ¶ 258.

<sup>37</sup> See, e.g., GTE *Ex Parte* Letter (dated May 15, 1997); Comments of the Independent Cable and Telecommunications Association, MM Docket No. 92-260 (filed Mar. 19, 1996); Comments of OpTel, Inc., CS Docket No. 95-184, MM Docket No. 92-260 (filed Oct. 6, 1997).

assurance, new entrants simply will be unable to justify entry into a market dominated by entrenched incumbents.

Further, the Commission has recognized the benefits of exclusive contracts in certain other contexts as a means of fostering competition.<sup>38</sup> For example, the FCC has chosen not to limit the ability of common carriers to enter into long-term leases for space on satellite transponders, recognizing instead the benefits of allowing carriers the flexibility to structure leases that meet their customers' needs.<sup>39</sup> The FCC also has determined that long-term and exclusive contracts could enhance competition in the telecommunications marketplace, provided the carrier lacked market power.<sup>40</sup>

## V. CONCLUSION

As set out above, the Commission lacks authority to apply its proposed regulations limiting the term of exclusive contracts to competitive MVPDs. The Communications Act provides no jurisdictional basis for these rules as applied to such providers, and adopting rules that restrict a competitive MVPD's ability to compete runs contrary both to Section 623 and to the general deregulatory tenor of the 1996 Act. In

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<sup>38</sup> Unlike the immediate case involving competitive MVPDs, in these other instances the Commission has had clear authority to regulate the terms of contracts entered into by the carrier.

<sup>39</sup> See, e.g., *RCA American Communications*, 84 F.C.C.2d 353, 358 (1980), modified, *In the Matter of RCA American Communications*, 86 F.C.C.2d 1197 (1981), *aff'd*, *RCA American Communications, Inc. v. FCC*, 731 F.2d 996 (D.C. Cir. 1984) (FCC noted that privately negotiated contracts between carriers and customers "generally, in the absence of market power, conclude in a more efficient bargain than that which our regulatory process would artificially impose").

<sup>40</sup> See *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services*, 77 F.C.C.2d 308, 337 (1979).

addition, limiting new entrants' contracts is not necessary to further competition and would merely add to the competitive hurdles faced by these providers. Accordingly, the Commission should not seek to limit the term of exclusive contracts entered into between competitive MVPDs and MDU building owners.

Respectfully submitted,

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