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

In the Matter of	)	
	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-260
	)	
Cable Home Wiring	)	

REPLY COMMENTS OF AMERITECH ON SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Christopher M. Heimann
Counsel for Ameritech
Suite 1020
1401 H Street, NW
Washington, DC 20005
(202) 326-3818

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I. Introduction and Summary

Ameritech New Media, Inc. ("Ameritech") respectfully submits this reply to comments on the Commission's Second Further Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.

In its initial comments, Ameritech argued that, in seeking to resolve the issues raised in the NPRM, the Commission should always be guided by Congress's goal of ensuring that all Americans benefit from increased competition and consumer choice in the multichannel video distribution market. Ameritech maintained that application of this principle suggests that the Commission should prohibit exclusive service contracts

for MDUs to ensure that MDU tenants are not deprived of the benefits of newly competitive video markets.

Many of the parties concur that exclusive service contracts can be, and have been, used to preclude competition and consumer choice in the delivery of video programming to MDUs, but urge the Commission not to prohibit all such contracts, claiming that exclusive contracts can have various procompetitive benefits. In Ameritech's view, however, exclusive service contracts are not essential to enable new entrants to attract necessary investment and recover the cost of new installations, nor are they necessary to ensure that MDU tenants continue to receive high quality, technologically advanced services at reasonable rates. Moreover, the various proposals offered by parties to differentiate between so-called procompetitive and anticompetitive exclusive contracts would significantly delay the development of competition. Thus, the only reasonable approach to promote competition and consumer choice in the MDU marketplace is to reject these parties' proposals and prohibit MVPDs from entering into, or enforcing, exclusive contracts for MDUs. If the Commission nevertheless decides not to prohibit exclusive contracts for MDUs, it should strictly limit the duration of such contracts to the minimum period necessary for MVPDs to recover their investment costs.

As demonstrated by Ameritech's initial comments, the Commission has ample authority to adopt the restrictions Ameritech proposes. The Commission should, therefore, reject the unfounded arguments of TCI and others to the contrary.

In order to promote competition and consumer choice in the MDU marketplace, the Commission should also ensure a level playing field among all video service providers, and, therefore, apply its cable home wiring rules and inside wiring rules uniformly to all MVPDs. Finally, the Commission should not adopt at this time DIRECTV's proposal to require competing broadband service providers to share home run wiring in MDUs because the record confirms that such shared use raises significant, unresolved technical issues.

II. The Commission Should Prohibit MVPDs from Entering into, and Enforcing, Exclusive Service Contracts.

In the opening round of comments, Ameritech and several other parties argued that exclusive service contracts for MDUs are inherently anticompetitive because they permit MVPDs to lock up MDU properties and preclude competition in the delivery of multichannel video programming by denying competing MVPDs access to MDU properties.[1] As a result, such contracts effectively deprive millions of American consumers who live in MDUs of any real choice of video service provider, contrary to Congress's objectives of maximizing competition and consumer choice in the multichannel video distribution market.[2] Ameritech therefore urged the Commission to adopt a rule prohibiting all MVPDs from entering into, or enforcing, exclusive service contracts for MDUs.

Many commenters concur with Ameritech that exclusive service contracts have been used by incumbent MVPDs to preclude competition in the delivery of multichannel video services to MDUs, but nevertheless argue that the Commission should not adopt a blanket prohibition against such contracts. Rather, those parties would permit MVPDs to enter into new, or enforce existing, exclusive MDU contracts under certain circumstances, such as for limited periods, or if the relevant MVPD lacks market power. Ameritech addresses these parties' arguments and proposals below and concludes that the

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[1] *See e.g.* Bell Atlantic Comments at 1, MCI Comments at 2, RCN Comments at 3, Media Access Project Comments at 3.

[2] *See* 47 U.S.C. § 521(4) and (6).

only reasonable approach to maximize competition in the MDU market and ensure that MDU residents share in the benefits of such competition as mandated by Congress is to prohibit MVPDs from entering into, or enforcing, exclusive service contracts for MDUs.

a. Minimizing the competitive risk of certain niche service providers should not be the basis for allowing exclusive service contracts for MDUs.

In its comments, Ameritech disagreed with the Commission's assertion that exclusive service contracts for MDUs can be procompetitive by enabling new entrants to attract necessary investment and recover the cost of new installations over time. The arguments of some parties that exclusivity is essential to achieve these goals[3] are completely without foundation, and really nothing more than an attempt to minimize their investment risks and obtain a guaranteed return on investment in an increasingly competitive environment. In its comments, Ameritech demonstrated that, even without a guaranteed return on investment, efficient new entrants will continue to attract financing and install new facilities in MDUs in return for the right to provide nonexclusive service to MDU tenants. Ameritech further maintained that it would be inappropriate for the Commission to focus on whether prohibiting exclusive contracts for MDUs would make it somewhat more difficult for certain niche service providers to attract capital investment rather than on what steps are necessary to ensure that robust competition develops in all segments of the multichannel video distribution market, and that all American consumers (including MDU residents) share in the benefits of such competition.

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[3] *See e.g.* Community Association Institute Comments at 3-4; TCI Comments at 21-27; OpTel Comments at 4-5.

Other parties have reached the same conclusions. As Cox aptly observes in its comments, the claim that exclusive contracts are essential to the emergence and survival of MDU competition is belied by the record in this proceeding,[4] and by Cox's own experience in offering service to MDUs on a non-exclusive basis.[5] This evidence demonstrates that the provision of video programming services in MDUs is not the natural monopoly that proponents of exclusive service contracts contend it is, and that two-wire competition in the MDU context is indeed viable. In addition, as Cox points out, many "well-heeled" companies, like DirecTV, Echostar, OpTel and RCN, are willing and able to compete for MDU customers.[6] There is, therefore, simply no justification for the Commission to adopt a protectionist policy that shields certain MVPDs from competition, and, in the process, extirpates consumer choice in the MDU context.[7] Moreover, as Winstar correctly notes, those who argue that exclusive contracts promote competitive entry by providing MVPDs a reasonable opportunity to recover their investment costs are really asking the Commission to guarantee them a rate of

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[4] Cox Comments at 5 (noting that, as of September 1997, 247 MDUs in Manhattan have opted to allow two-wire competition, and that Cablevision reportedly provides service to at least 353 MDUs with two internal distribution systems).

[5] Cox's experience mirrors that of Ameritech and other alternative service providers, which also provide service to MDUs on a nonexclusive basis. *See e.g. Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, *Fourth Annual Report*, FCC 97-423 at para. 131-32 (rel. Jan. 13, 1998) (*Fourth Annual Report)* (noting that, as of June 1997, RCN had connected 310 buildings in New York City and 52 buildings in Boston pursuant to agreements that generally provide for non-exclusive access).

[6] Cox Comments at 6.

[7] *See also* Cox Comments at 6-7 (arguing that the Commission's task is "not to protect certain MVPDs from . . . competitive forces," but rather is "to take whatever steps it can to ensure that such forces continue to exist"), Winstar Comments at 10 (arguing that the "Commission's consideration of exclusive contracts in the [NPRM] is a misguided effort to promote competition in the video marketplace," and that the "only way to truly ensure the proverbial 'level playing field' is to prohibit exclusive contracts between MDU owners and service providers for <u>all</u> telecommunications services").

return on their investment, and, therefore, to regulate away a portion of their build out risk.[8]

In addition, the claim that exclusive contracts are the best means to ensure that MDU owners and tenants have access to advanced or high quality services at competitive prices[9] is utterly specious, and turns the concept of competition on its head. In competitive markets, service providers endeavor to attract and retain customers by offering them the most attractive mix of services, quality and prices. Even without exclusivity, MVPDs will, therefore, have an incentive to offer discounts and high quality, advanced technology services to MDUs in order to attract MDU subscribers.[10] MVPDs will, however, no longer be able to sit back complacently and offer service to captive MDU tenants on terms and conditions that are no longer competitive. Rather, they will be forced continually to improve the quality, price and other terms and conditions of their service offerings in order to retain MDU subscribers.[11] Thus, while it might superficially appear that exclusive contracts benefit MDU tenants and owners by inducing MVPDs to offer MDUs certain benefits, upon closer examination it is clear that,

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8 Winstar Comments at 8.

9 Community Association Institute Comments at 4; TCI Comments at 21-27.

10 *See* Cox Comments at 6. *See also* RCN Comments at 4 (limiting exclusivity will not undermine the interests of MDU managers in securing superior terms and conditions from MVPDs for service to the building).

11 *See also* Cox at 7 (noting that the incentive constantly to improve service over time diminishes as soon as an exclusive arrangement is finalized).

by insulating service providers from the impetus of competition, such benefits are quickly lost because service providers with exclusive access to an MDU have no incentive to improve the price and quality of their service offerings to reflect competitive conditions. Eliminating exclusive service contracts for MDUs will, therefore, create a more rigorously and enduringly competitive market.

The argument that, without exclusive service agreements, some buildings would be unable to obtain video services because no MVPD would be willing to install inside wiring[12] is equally vacuous. This argument fails to account for the fact that franchised cable operators generally are required to build out their entire franchise areas, and, therefore, cannot refuse to provide service to so-called "second tier" buildings. It is also built on the false and patently illogical premise that, without exclusivity, more than one service provider might seek to serve a building that could profitably support only one service provider. Plainly, a second service provider would only have an incentive to offer competing service to an MDU if the building could profitably support multiple providers, or if the existing provider is charging supracompetitive prices.

b. A limitation on exclusive service contracts that does not apply equally to existing and future contracts is worse than no restriction at all.

If the Commission declines to adopt Ameritech's proposal, it should not, as some have proposed, limit the application of any ban or restriction on exclusive service contracts only to future contracts.[13] Indeed, it is critical to fostering competition and consumer choice in the MDU market that any limit on exclusive service contracts apply

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12 *See e.g.* Building Owners Comments at 2-3.

13 *See e.g.* Cablevision Comments at 1-4; Building Owners Comments at 7; Cox Comments at 4.

equally to existing and future contracts. A rule restricting the ability of MVPDs to enter new exclusive service contracts for MDUs without imposing a corresponding limit on their ability to enforce existing contracts would lock in the status quo, and allow incumbent service providers to maintain their stranglehold on MDU customers. Restricting exclusive service contracts only prospectively would also deprive new entrants of any of the competitive advantages of exclusivity, while continuing to bestow such advantages on incumbents. Thus, by locking in the status quo and creating a significant barrier to new entry, a prospective ban or restriction would deprive millions of MDU tenants of any choice in video service provider, and, therefore, be the worst of all possible outcomes. Because a level playing field is critical to the development of competition and consumer choice in the MDU market, any restriction on exclusive service contracts that the Commission adopts should apply to both future and existing contracts.

c. If the Commission does not ban exclusive service contracts for MDUs, it should strictly limit the duration of such contracts to the minimum period possible.

Numerous parties agree with Ameritech that exclusive service contracts have been used anticompetitively by incumbent MVPDs to deny potential competitors access to MDU properties, depriving MDU tenants of any choice in video programming.[14] These parties contend that, if the Commission concludes that exclusive service contracts are necessary to encourage competitive service providers to invest in MDU facilities, and

[14] *See e.g.* Bell Atlantic Comments at 3 (exclusivity deprives tenants of a choice of providers and, therefore, is inherently inconsistent with the Commission's policies of promoting competition); Cox Comments at i (exclusive service arrangements undermine, rather than advance, the Commission's objective of enabling MDU tenants to choose among video service providers); Media Access Project Comments at 1; DIRECTV Comments at 3 (due to long term exclusive service contracts, many MDU owners are barred from switching providers or providing residents a choice of providers).

therefore continues to permit such contracts for MDUs, it should limit the duration of such contracts to the minimum period reasonably necessary for service providers to recover their investment costs.[15] Most of the parties assert that a period of three-to-five years is sufficient to permit service providers to attract investment and recoup their investment costs.[16] A five year period is, as Bell Atlantic observes, consistent with the four-to-six year period during which Bell Atlantic, NYNEX and Pacific Bell proposed to recover their investment in their entire video networks, which entailed more extensive and costly construction than wiring a single building.[17] As Bell Atlantic further notes, the Commission expressly found that such an amortization period was "'not unreasonable.'"[18] In light of the fact that these companies proposed to enter the market as overbuilders, and, therefore, on a non-exclusive basis, it would seem reasonable to conclude that an alternative provider with an exclusive arrangement could recover its investment in an MDU in an equivalent, or even shorter, period of time.

ICTA, on the other hand, argues that, if the Commission imposes a cap on exclusive service arrangements, the Commission should permit terms of exclusivity of up

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[15] *See e.g.* Cox Comments at 8 (if the Commission continues to permit exclusive contracts, it should limit them to the shortest reasonable term, such as five years); Media Access Project Comments at 4 (arguing that, if the Commission continues to permit exclusivity, it should restrict the use of exclusive contracts to non-incumbent MVPDs, and limit them to the shortest reasonable term); MCI Comments at 2 (if the Commission does not prohibit exclusive contracts, contract terms should be limited to no more than three years); RCN Comments at 6 (supporting a cap of 5 years, which it claims will allow competing providers to obtain necessary financing, and an opportunity to recover their capital costs and earn a reasonable profit); Bell Atlantic Comments at 2-3 (exclusivity should be limited to five years unless a MVPD can show additional time is necessary), Cablevision Comments at 4 (same).

[16] MCI Comments at 2 (three years), Bell Atlantic Comments at 3 (five years), Media Access Project at 4 (same), Cox Comments at 8 (same), RCN Comments at 6 (same), Cablevision Comments at 4 (same).

[17] Bell Atlantic Comments at 3-4.

[18] *Id.* (citations omitted).

to fifteen years.[19] ICTA acknowledges that it previously argued that a private operator's base recoupment period is five-to-six years, but states that it does not support such a period as the minimum necessary to establish a reasonable profit beyond that bare recoupment.[20] If, however, the rationale for adopting a cap is to allow an MVPD to recoup its investment, any cap adopted should be limited to the minimum period necessary to achieve that end. ICTA's demand that it be permitted an exclusivity period nine to ten years *beyond* that which it contends is the minimum necessary to recoup its investment clearly demonstrates that what it is really seeking is a guaranteed profit.[21] In competitive markets, however, there is no such guarantee. Rather, a company's profitability should be based on the attractiveness and efficiency of its service offering, not on its ability to preclude competition. The Commission should, therefore, reject ICTA's fatuous proposal that MVPDs be permitted exclusivity periods of up to fifteen years, and, if it does not prohibit exclusive service contracts altogether, limit the duration of such contracts to no more than three-to-five years.

For similar reasons, the Commission should apply any cap it adopts to existing contracts, and prohibit incumbent MVPDs from enforcing exclusive access provisions

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[19] ICTA Comments at 9 (if the Commission limits exclusive contracts, it should do so only for future contracts and permit a fifteen year period).

[20] ICTA Comments at 9 n.5.

[21] *See also* OpTel Comments at 6. OpTel contends that an exclusive period of seven to ten years is the "absolute minimum required in many cases to recover the investment required to serve an MDU," but nevertheless "suggests that new entrants have at least the flexibility to enter into agreements of approximately fifteen years." *Id.* As the Media Access Project notes, however, OpTel previously asserted that it takes only 3.4 years, on average, to recover the costs of inside wiring. Media Access Project Comments at 4 (citing Letter of Henry Goldberg, Counsel for OpTel Inc., to Chairman Reed E. Hundt, February 7, 1997, in CS Docket No. 95-184).

that have been in effect longer than the cap period.[22] In such situations, an incumbent MVPD should have been able to amortize fully its investment, and the rationale for permitting exclusivity, therefore, does not apply. Even if a particular service provider has not been able to recoup fully its investment during such an extended period, the Commission should not reward inefficiency by entertaining requests to extend the cap.

The Commission also should not, as some have suggested,[23] permit MVPDs to renew or extend exclusive service contracts for MDUs beyond an initial, limited exclusivity period. Permitting MVPDs to extend such contracts if, for example, they can show that they have not fully recovered their investment costs will permit MVPDs to game the system by structuring their service offerings in such a way as to extend the term of their exclusive contracts, or by investing in new facilities that may not improve service quality or efficiency. It would, moreover, require the Commission to engage in ad hoc adjudications to determine whether, in a given case, an extension or renewal of an exclusive service contract is warranted. Limiting any cap to a single, non-renewable term would best comport with the Commission's objectives of ensuring that MVPDs have sufficient time to recover their investment costs, assuming exclusivity is necessary to permit such recovery, while, at the same time, affording MDU owners the earliest opportunity to switch service providers, and thereby promoting competition and consumer choice in the MDU market. Consistent with these objectives, the Commission should also prohibit a MVPD from enforcing an exclusive service arrangement for an

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[22] For example, if the Commission adopts a five year cap on exclusive service arrangements, an incumbent provider should not be permitted to enforce an exclusivity provision in a MDU service contract executed ten years ago.

[23] RCN Comments at 6; Cablevision Comments at 5; OpTel Comments at 6.

MDU if the MDU owner is willing to reimburse the MVPD for its unrecovered investment costs. In such a case, the rationale for permitting MVPDs a limited period of exclusivity simply does not apply.

d. A market power approach is ill-conceived and adminstratively impracticable.

A number of parties maintain that exclusive agreements should be allowed for MVPDs without market power.[24] Few, however, address the practicability of such an approach. Those that do, agree with Ameritech that a market power test is ill-conceived and administratively unworkable. RCN, for example, agrees with Ameritech that differentiating between procompetitive and anticompetitive exclusive contracts based on market power or some other quantifiable economic basis would be too cumbersome to administer because it would immerse the Commission in a flood of *ad hoc* determinations.[25] Moreover, as the Media Access Project correctly observes, such an approach would make exclusive contracts the rule rather than the exception because it would place the burden on MDU owners or alternative providers to determine whether incumbents have market power.[26] The comments therefore establish that a market power approach would be administratively unworkable.

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[24] *See e.g.* DIRECTV Comments at 7, ICTA Comments at 4, GTE Comments at 3.

[25] RCN Comments at 5.

[26] Media Access Project Comments at 7. The Media Access Project contends that a market power test is particularly ill-conceived because it believes that, whenever an incumbent MVPD has an exclusive contract, it has market power to prevent MDU dwellers from selecting an alternative MVPD that better suits their needs. *Id. See also* Bell Atlantic at 3 n.6 (arguing that an MVPD that has an exclusive contract to serve a MDU possesses market power within that MDU because it can block competitive entry).

More importantly, perhaps, a market power approach would utterly disregard the fact that the effect of exclusive service arrangements on competition and consumer choice is the same regardless of whether the arrangement is with an incumbent cable operator or a new entrant. Both arrangements would deny other new entrants access to MDU buildings, and prevent them from offering competitive video distribution services to MDU tenants. A market power approach would, therefore, limit the scope of competition and consumer choice in MDUs, contrary to Congress's objective of ensuring that the benefits of competition and consumer choice are enjoyed by all Americans. Accordingly, the Commission should reject a market power test for MDU exclusive service contracts.

e. The Commission should not adopt a fresh look for exclusive contracts.

As Ameritech showed in its initial comments, a fresh look approach for exclusive MDU contracts, which several parties support,[27] would be problematic for a number of reasons. Specifically, a fresh look triggered by a determination that a particular MVPD has market power, or upon the expiration of a cap, would create significant uncertainty about the enforceability of exclusive contracts, and spawn litigation over whether the fresh look has been triggered or expired. Additionally, a one-time fresh look, such as that proposed by OpTel, would prejudice MDU owners who do not have viable competitive alternatives, and limit the scope of competition to existing providers and

[27] *See e.g.* MCI Comments at 2; Media Access Project Comments at 6; Community Association Institute Comments at 5; OpTel Comments at 1; ICTA Comments at 4, 9.

technologies. Because no one has offered a fresh look approach that would address these concerns, the Commission should reject a fresh look for MDU exclusive contracts.

The Commission also should reject ICTA's proposal to extend a fresh look to non-exclusive perpetual contracts.[28] ICTA's proposal is based on the spurious premise that alternative service providers require exclusivity to attract investment necessary to initiate operations, and that non-exclusive perpetual service contracts for MDUs foreclose competitive entry by preventing alternative providers from obtaining such exclusivity.[29] As discussed at length above, the record in this proceeding clearly establishes that exclusivity is not necessary for efficient service providers to attract financing. ICTA's proposal is, therefore, without foundation. Moreover, and in any event, non-exclusive service contracts, including those that are perpetual, do not exclude others from offering service to MDU residents, but rather ensure that residents can have a choice of video service providers if the MDU owner decides to permit in-building competition. ICTA's proposal should therefore be rejected.

III. The Commission has Ample Legal Authority to Prohibit MVPDs from Entering into, and Enforcing, Exclusive Service Contracts for MDUs.

In its initial comments, Ameritech demonstrated that the Commission has ample legal authority under sections 4(i) and 303(r) to adopt a rule prohibiting all MVPDs from entering into, and enforcing, exclusive service contracts for the provision of video services to MDUs. Under these provisions, the Commission has authority to adopt any

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[28] ICTA Comments at 13.

[29] *See* ICTA Comments at 13-14.

regulation that is "reasonably ancillary to the effective performance of the Commission's various responsibilities" under another provision of the Act.[30] The rule Ameritech proposes is essential to fulfill Congress's objectives of ensuring that MDU residents have access to competitive video services, promoting reasonable cable rates through the introduction of competition, and promoting competition generally in cable communications.[31] Absent such a rule, entry into the MDU market may be discouraged or limited by incumbent MVPDs that have negotiated exclusive service contracts. As a result, there may, as the Commission recently recognized, "be a tendency for prices to rise above competitive levels and for product quality, innovation, and service to fall below competitive levels in . . . MDU markets."[32]

Several parties, however, contend that the Commission has no authority to restrict exclusive contracts. Specifically, these parties argue that: (1) the Commission may not abrogate or restrict contracts between private parties unless Congress has clearly authorized or directed the Commission to do so;[33] (2) the Commission has no authority to regulate building owners;[34] (3) section 623 does not provide the Commission authority

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30 *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). The Commission has, as Bell Atlantic observes, found that it had ancillary jurisdiction to issue its current cable home wiring rules and cited this authority as a basis for considering uniform inside wiring rules. Bell Atlantic Comments at 6.

31 *See* 47 U.S.C. §§ 521, 543.

32 *Fourth Annual Report*, FCC 97-423 at para. 126.

33 TCI Comments at 6-7; NCTA Comments at 3; Cox Comments at 4 (arguing that the Commission lacks authority to abrogate existing contracts), Building Owners at 5 (same).

34 Building Owners Comments at 5-6; GTE Comments at 13.

to restrict exclusive service contracts in a market where there is effective competition;[35] and (4) the Commission cannot rely on its ancillary authority under sections 4(i) and 303(r) to restrict exclusive service contracts for MDUs.[36] Ameritech addresses these arguments below.

As an initial matter, Ameritech disagrees that the Commission lacks authority to adopt policies or rules that implicate common law rights without express delegation of such authority from Congress. While repeals of common law rights are not favored, and a statute generally will not be construed as abrogating an existing common law right, it will be so construed if a preexisting right is so repugnant to the statute as to deprive it of its efficacy and render its provisions nugatory.[37] As previously discussed, Congress has expressly charged the Commission with ensuring that MDU residents have access to competitive video services, promoting reasonable cable rates through the introduction of competition, and promoting competition generally in cable communications.[38] Failure to restrict the ability of MVPDs to enter into, or enforce, exclusive service contracts would undermine completely the Commission's ability to achieve these objectives because it

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[35] Cablevision Comments at 9-10; GTE Comments at 3, 5-6.

[36] TCI Comments at 14-15; GTE at 8-10.

[37] *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907) ("[R]epeals by implication are not favored, and indeed . . . a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless . . . the preexisting right is so repugnant to the statute that the survival of such a right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.").

[38] *See* 47 U.S.C. §§ 521(1) and (6) (stating that the purposes of Title VI are to "establish a *national* policy concerning cable communications;" and "promote competition in cable communications . . .") (emphasis added), 543. *See also* 47 U.S.C. § 151 (authorizing the Commission to regulate interstate and foreign communication by wire and radio "so as to make available . . . to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ").

would allow incumbent MVPDs to prevent competitive entry into the MDU market, and maintain their stranglehold on MDU customers. Because the restrictions Ameritech proposes are, therefore, essential to the effective performance of the Commission's responsibilities under other provisions of the Act, the Commission has authority under sections 4(i) and 303(r) to adopt such restrictions.

In addition, by adopting the rules Ameritech proposes, the Commission would not abrogate or void completely existing service contracts for MDUs, nor would it be exercising jurisdiction over building owners, as some have suggested. Rather, the Commission would be asserting jurisdiction over entities over which it plainly has authority (MVPDs) to prevent them from engaging in anticompetitive conduct (*i.e.*, denying competing MVPDs access to MDU residents over the objection of building owners or managers).[39] Under the rule proposed, MVPDs could continue to provide service to MDUs under existing contracts, albeit on a nonexclusive basis. Even if the proposed rules would have an incidental affect on MDU owners, in addition to MVPDs whom the Commission may directly regulate, such an incidental affect would not constitute impermissible regulation by the Commission of building owners. As Bell Atlantic aptly notes, any decision by the Commission to regulate a communications provider would affect third parties.[40] Moreover, eliminating exclusive service contracts

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[39] As Ameritech has previously discussed, it is not asking the Commission to adopt mandatory access for MDUs, and therefore to force MDU owners to admit MVPDs over their objection. Rather, it believes that incumbent MVPDs should not be permitted to prevent MDU owners from allowing competing video service providers to access their buildings to offer competing services to tenants if they so choose.

[40] Bell Atlantic Comments at 7. As Bell Atlantic further notes, the Commission has previously prohibited contracts for the exclusive use of antenna sites by television licensees, if such use restricts the

would not impinge on the right of MDU owners to determine who has access to their buildings, nor would it force MDU owners to change service providers or permit in-building competition. Rather, it would merely permit MDU owners to consider their options when approached by competing video service providers.

TCI's further contention that Congress "expressly determined that the Commission should not be given . . . authority" to regulate exclusive contracts between MVPDs and MDU owners[41] is patently false, and completely without foundation. In support of this inane argument, TCI asserts that Congress declined to include in the 1984 Cable Act a provision that would have granted cable operators mandatory access to MDUs for the provision of cable service.[42] While Congress's decision not to include a mandatory access provision in the 1984 Cable Act might limit the Commission's authority to require such access,[43] it simply has no bearing on the issue presented here, which is whether the Commission has authority to adopt rules regulating the terms of MVPD access to MDUs if necessary to fulfill the Commission's obligations under the

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number of stations in a particular area or unduly restricts competition among stations in that area, despite the incidental affect on private property owners. *Id.* citing 47 C.F.R. §§ 73.635, 73.239.

[41] TCI Comments at 8 (emphasis in original).

[42] Section 633(a) , which was originally included in the bill reported out of committee, expressly provided for mandatory access to MDUs. The relevant language was:

> Sec. 633(a). The owner of any multiple-unit residential or commercial building or manufactured home park may not prevent or interfere with the construction or installation of facilities necessary for a cable system, consistent with this section, if cable service or other communications service has been requested by a lessee or owner . . . of a unit in such building or park.

[43] Ameritech stresses that the rules it proposes would not limit, or affect in any way, the rights of MDU owners to determine to whom to grant access to their buildings. Rather, they would simply prevent incumbent MVPDs from enforcing exclusive service contracts in a manner that would prevent MDU owners from permitting in-building competition if they so choose.

Communications Act. Thus, Congress's rejection of proposed section 633(a) in no way suggests that the Commission lacks authority to regulate MVPD's efforts to forestall competition by concluding or enforcing exclusive service contracts for MDUs.[44]

For the same reason, cases cited by TCI for the proposition that the Commission lacks such authority are completely inapposite. TCI claims that courts have rejected all attempts to construe the Communications Act as restricting an MDU owner's ability to limit access to its property through the use of exclusive contracts, maintaining that the courts have recognized that Congress intended that issues relating to MVPD agreements with MDU owners be dictated by private negotiations rather than federal policy makers.[45] The cases cited by TCI do not, however, address the Commission's authority to prohibit MVPDs from concluding or enforcing exclusive contracts for MDUs, or, more generally, to regulate the terms of MVPD access to MDUs. Rather, these cases merely find that the Communications Act may not be construed as granting cable operators a right of

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[44] TCI contention that Congress reinforced its intent to limit the Commission's authority to regulate the relationship between MVPDs and MDUs in the Telecommunications Act of 1996 ("1996 Act") by exempting MDUs from uniform rate structure requirements is equally absurd. *See* TCI Comments at 10 (citing 47 U.S.C. § 543(d)). Congress's decision to grant cable operators some pricing flexibility, and not to require them to charge a uniform rate to all MDUs, does not suggest that it intended to limit the Commission's authority to prevent incumbent MVPDs from engaging in conduct intended to preclude competitive entry into the MDU market.

[45] TCI Comments at 9-10 (citing *Cable Investments, Inc. v. Woolley*, 867 F.2d 155 (3d Cir. 1989); *Media General Cable of Fairfax v. Sequoyah Condominium Council of Co-owners*, 991 F.2d 1169 (4th Cir. 1991); *Cable Holdings of Georgia v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir. 1992); *City of Lansing v. Edward Rose Realty, Inc.*, 502 N.W.2d 638 (Mich. 1993); *UAAC-Midwest, Inc. v. Occidental Development, Ltd.*, 1991 Dist LEXIS 4163 (W.D. Mich. 1991); *Century Southwest Cable Television, Inc. v. CIIF Assoc.*, 33 F.3d 1068 (9th Cir. 1994); *TCI of North Dakota v. Schriock*, 11 F.3d 812 (8th Cir. 1993)).

mandatory access to MDU buildings over the objection of building owners.[46] Consequently, they too have no bearing on the issue at hand.

Finally, the Commission should reject the argument that, to the extent it bases its authority to prohibit exclusive contracts on its rate regulation authority under section 623, such authority is lacking where there is effective competition. Even if the Commission lacks authority to regulate rates under section 623 where there is effective competition, the Commission would still have ample authority under other provisions of the Communications Act to adopt the rules Ameritech proposes.[47] Accordingly, the Commission should reject the arguments by incumbent cable operators that it lacks authority to prohibit incumbent MVPDs from entering into, or enforcing, exclusive service contracts for MDUs.

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[46] *Woolley*, 867 F.2d at 159 (holding that the deletion of section 633 suggests that "Congress made a considered decision that the Cable Act should not give cable operators the right to impose their service on owners of multi-unit dwellings who choose not to use them"); *Media General Cable of Fairfax*, 991 F.2d at 1173-74 (holding that, in light of the deletion of section 633, section 621(a)(2) could not be interpreted as allowing cable companies to force landlords or property owners' associations to permit cable companies to use easements on their private property); *Cable Holdings of Georgia*, 953 F.2d at 606-607 (same) (quoting *Woolley*, 867 F.2d at 156); *City of Lansing*, 502 N.W.2d at 642-44 (holding a city ordinance providing mandatory access invalid on the ground that the private benefit of the ordinance to Continental Cablevision predominated over the asserted public benefits of the ordinance, and noting that, "although considered, a mandatory access provision was not included in the Cable Act"); *UAAC-Midwest*, 1991 U.S. Dist. LEXIS 4163 at 7 (rejecting plaintiffs claim to a right of mandatory access to an MDU under section 621(a)(2) on the ground "Congress did not intend mandatory forced access to apartment dwellings considering Congress' deletion of § 633 of the proposed bill, which expressly provided for mandatory access to tenants within a multi-unit dwelling"); *Century Southwest Cable Television*, 33 F.3d at 1071 (vacating an injunction precluding a MDU owner from terminating a cable operator's access to the MDU on the ground that the cable operator had not established any likelihood of success on the merits of its claim of a right to access under section 621(a)); *TCI of North Dakota*, 11 F.3d at 814-17 (holding that TCI did not have a statutory right of access to a mobile home park under section 621(a)).

[47] *See e.g.* 47 U.S.C. §§ 151, 154(i), 303(r), 521, 548.

IV. The Commission Should Apply its Cable Home Wiring and Inside Wiring Rules to All MVPDs.

As discussed in Ameritech's initial comments, the Commission should apply its cable home wiring and MDU inside wiring rules to all MVPDs because the competitive concerns that led the Commission to adopt those rules pertain regardless of who installed a subscriber's or MDU's inside wiring. For the same reason, the Commission should apply whatever rules it adopts in this proceeding uniformly to all MVPDs, regardless of whether they are franchised cable operators, SMATV operators, MMDS operators, or some other alternative provider of video services to MDU residents. By ensuring a level playing field among all video service providers, such uniformity will promote the Commission's goals of promoting greater consumer choice and competition in the MDU marketplace.

Although Cablevision forcefully argues that any rules adopted in this proceeding "must be uniform and apply to all MVPDs providing service to MDUs,"[48] it incongruously suggests that different rules should apply to local telephone companies that seek to provide video programming services in their local service area.[49] Cablevision attempts to justify its proposal on the ground that "the potential abuse of exclusivity in a situation of captive local exchange service is extraordinarily high."[50]

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[48] Cablevision Comments at 13-14 ("for the subscribers to multichannel video service residing within MDUs to receive the greatest choice possible, [the] proposed Rules must be uniform and apply to all MVPDs providing service to MDUs"), and iii ("Uniformity of the rules will assist in accomplishing the goal of greater consumer choice in providers of these services and of competition on a level playing field.").

[49] Cablevision Comments at 5-6.

[50] *Id.*

Unlike Cablevision, however, local telephone companies are new entrants into the video distribution market, and have largely been locked out of the MDU market by exclusive service contracts. The Commission should, therefore, reject Cablevision's suggestion that different rules should apply to local telephone companies that offer video distribution services in their local service areas, and apply any rules adopted in this proceeding uniformly to all MVPDs.

V. The Record Confirms that Simultaneous Use of Home Run Wiring Raises Significant Technical Issues.

In its comments, Ameritech asserted that it did not, in principle, object to DIRECTV's proposal to require competing broadband service providers to share home run wiring in MDUs, but maintained that the Commission had to resolve a broad range of operational and technical issues before mandating such shared use. Most of the parties that addressed this issue agree that simultaneous use of home run wiring raises significant issues, and contend that such use is not feasible at this time.[51]

In contrast, DIRECTV asserts that sharing of inside wiring is technically feasible and will not cause interference with or reduce the quality of cable television signals.[52] DIRECTV, however, significantly understates the technical and operational difficulties associated with mandatory simultaneous use of home run wiring. For example, DIRECTV asserts that transmitting two signals on a single cable will not inherently cause

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[51] Cablevision Comments at 11-14; NCTA Comments at 8-10; Time Warner Comments at 20-24; and US WEST at 8-9.

[52] DIRECTV Comments at 9-14.

signal interference, if there is sufficient frequency spacing.[53] DIRECTV fails to consider, however, that, if the combined signals are amplified, distortion products created by one signal beating against itself or the other signal can fall within the frequency band of one or both signals, causing interference and signal degradation. This affect may be compounded if the combined signals must pass through multiple amplifiers. Moreover, the level of distortion products produced by an amplifier would be difficult to control because neither party would control the level of the other's signal (distortion increases as the signal level transmitted into an amplifier is increased).

DIRECTV also does not address the fact that the bandwidth capacity of existing cable plant does not appear to be sufficient to support shared use of home run wiring. Existing coaxial cable and associated connectors are, at best, capable of carrying between 5 MHz and 1 GHz of spectrum, while amplifiers are currently capable of carrying only 5 MHz to 750 MHz of bandwidth, or, in some cases, 1 GHz.[54] Beyond 1 GHz, signal attentuation can be severe, shielding poor, and distortion products high. Although equipment manufacturers are constantly increasing the capacity of equipment, equipment or components capable of carrying signals up to 1.5 GHz of bandwidth are unlikely to be available in the near term. As a result, shared use of home run wiring does not appear to be technically feasible at this time because of the capacity of available equipment. Such shared use would, moreover, require widespread network upgrades when equipment capable of carrying the necessary bandwidth becomes available.

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[53] *Id.* at 10.

[54] Many older cable systems use equipment that is even more limited, capable of carrying no more than 550 MHz of spectrum.