

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

MAR 29 2007

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

NOTICE OF PROPOSED RULE MAKING

Adopted: March 22, 2007

Released: March 27, 2007

Comment Date: June 18, 2007
Reply Comment Date: July 18, 2007

By the Commission: Chairman Martin and Commissioners Copps, Adelstein, Tate and McDowell
issuing separate statements.

I. INTRODUCTION

1. In this Notice of Proposed Rulemaking ("NPRM" or "Notice"), we solicit comment on the use of exclusive contracts for the provision of video services to multiple dwelling units ("MDUs") or other real estate developments. Greater competition in the market for the delivery of multichannel video programming is one of the primary goals of federal communications policy.1 Moreover, for many participants in the marketplace, the ability to offer video to consumers and the ability to deploy broadband networks rapidly are linked intrinsically.2 However, potential competitors seeking to enter the multichannel video programming distributor ("MVPD") marketplace have alleged that the use of exclusive contracts for the provision of video services to MDUs or other real estate developments serves as a barrier to entry. Accordingly, this Notice is designed to solicit comment on whether the use of exclusive contracts in the MDU video provider market unreasonably impedes the achievement of the interrelated federal goals of enhanced multichannel video competition and accelerated broadband deployment and, if so, how the Commission should act to address that problem.3

II. BACKGROUND

2. In 1997, the Commission issued an NPRM regarding the use of exclusive access

1 See 47 U.S.C. § 521(6) (stating that one of the purposes of Title VI is "to promote competition in cable communications").

2 Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, paras. 3, 13 (rel. March 5, 2007).

3 47 U.S.C. § 521(6) and 47 U.S.C. § 157, nt. (incorporating section 706 of the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996) (stating that the Commission shall promote competition in the local telecommunications market and shall remove barriers to infrastructure investment)).

arrangements in MDUs.⁴ The Commission stated that exclusive service contracts between MDU owners and MVPDs could be considered pro-competitive or anti-competitive, depending upon the circumstances involved.⁵ 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.⁶ In the corresponding Report and Order, the Commission declined to take any action regarding exclusive agreements, 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.⁷

3. We note that the Commission is considering MDU access with respect to other services. In the context of commercial telecommunications services, the Commission has prohibited the enforcement of exclusive access arrangements in multiple tenant environments ("MTEs").⁸ In the *Competitive Networks Order*, the Commission concluded that a ban on exclusive contracts for telecommunications service in commercial MTEs would foster competition in that market.⁹ Unlike parties in the inside wiring proceeding, no party in the competitive networks proceeding argued in support of exclusive contracts in the commercial setting. Further, in *Competitive Networks FNPRM*, the Commission sought comment on other issues related to the imposition of a nondiscriminatory access requirement, including possibly extending the *Competitive Networks Order* findings to residential MTEs.¹⁰ Also, in the *Cox Inside Wiring* proceeding, the Commission is considering issues relating to the scope of competitors' right to access incumbent LECs' inside wire in multiunit premises for purposes of offering competing telephone service.¹¹

4. The Commission recently adopted a Report and Order ("*Franchising Reform Order*") relating to Section 621 of the Act.¹² The *Franchising Reform Order* adopted several provisions to remedy unreasonable local government procedures and behavior with respect to the franchising process that result in unreasonable refusals to grant additional competitive franchises. The NPRM in that proceeding asked for comment on the specific rules or guidance that we should adopt to ensure that the

⁴ *Telecommunication Services, Inside Wiring Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 (1997) ("*Inside Wiring FNPRM*").

⁵ *Id.* at 3778.

⁶ *Id.*

⁷ *Telecommunication Services, Inside Wiring Cable Television Consumer Protection and Competition Act of 1992*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, 1369 (2003) ("*Inside Wiring Second Report and Order*").

⁸ See *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, 22996-97 (2000) ("*Competitive Networks Order*"). MTEs include both multi-unit residences and multi-establishment commercial buildings. MDUs include only multi-unit residences.

⁹ 15 FCC Rcd at 22987.

¹⁰ 15 FCC Rcd at 23052. We intend to issue a public notice seeking to refresh the record in that proceeding.

¹¹ See *Cox's Petition for a Declaratory Ruling for Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carrier's Inside Wire Subloop*, WC Docket No. 01-338 (filed Oct. 27, 2004).

¹² *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311 (rel. March 5, 2007).

local cable franchising process does not unreasonably impede competitive entry.¹³ Among other issues, commenters discussed the impediment presented by the use of exclusive contracts for the provision of video services to MDUs and other real estate developments.

5. Specifically, SureWest Communications, which provides bundled offerings of voice, data, and video services, filed an *ex parte* statement asking the Commission to prohibit MVPDs from executing new, or enforcing existing, exclusive access agreements with MDUs and other real estate developments.¹⁴ SureWest argues that exclusive agreements are used by incumbent providers to undercut the competitive market for video services and states that over 25% of the MDUs that its network passes are locked into exclusive agreements, which effectively bar SureWest from offering its services to residents in those MDUs.¹⁵ Manatee County, Florida submitted comments arguing that exclusive access agreements, if permitted at all, should be of limited duration.¹⁶ Manatee County stated that exclusive long-term contracts harm competition and permit incumbent providers to become complacent, imposing antiquated systems on their subscribers.¹⁷ The County noted that it recently adopted an ordinance which prohibits any of its franchisees from entering into exclusive agreements of more than five years.¹⁸ Verizon filed *ex parte* statements arguing that the Commission should prohibit MVPDs from entering into new, or enforcing existing, exclusive access agreements with owners of MDUs.¹⁹ Verizon stated that it had “repeatedly encountered exclusive access arrangements which have prevented it from providing cable services to significant numbers of residents.”²⁰ Verizon provided examples of requests to cease and desist the marketing of its FiOS video service offerings.²¹ Verizon stated that some landlords would like to give tenants a greater variety of cable choices, but are unable to do so because of exclusive contracts.²² Further, Verizon notes that exclusive contracts do not provide video providers any incentives to upgrade equipment or improve services, which adversely impacts consumers.²³ In contrast, the National Multi-Housing Council filed an *ex parte* statement urging the Commission to reject calls for regulation of exclusive access agreements, stating that exclusive contracts give competitive providers assurance that they will be able to recover the capital costs of installing their facilities, thereby increasing the prospects

¹³ See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Notice of Proposed Rulemaking, 20 FCC Rcd 18581, 18591 (2005).

¹⁴ Letter from Paul J. Feldman, Counsel for SureWest Communications, to Marlene Dortch, Secretary, FCC, MB Docket No. 05-311 (filed August 22, 2006) (August 22 *Ex Parte*).

¹⁵ August 22 *Ex Parte* at 3.

¹⁶ Manatee County Comments, MB Docket No. 05-311, at 12.

¹⁷ *Id.*

¹⁸ *Id.* at 13.

¹⁹ Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene Dortch, Secretary, FCC, MB Docket No. 05-311 (filed July 6, 2006) (July 6 *Ex Parte*); Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 (filed August 9, 2006) (August 9 *Ex Parte*).

²⁰ July 6 *Ex Parte* at 3.

²¹ *Id.* (discussing various examples, including a cease and desist letter from Bright House Networks regarding marketing of FiOS in the River Chase apartment complex in Tampa, Florida; a letter from BDR Broadband, LLC regarding the provision of FiOS in apartment complexes in Plano and Carrollton, Texas; negotiations with Ariger Management in Maryland that have an exclusive contract with Comcast; and negotiations with Post Properties in Fairfax County, Virginia that have a perpetual contract with Cox).

²² July 6 *Ex Parte* at 4.

²³ *Id.*

of competition.²⁴

III. DISCUSSION

6. Potential competitive video providers have alleged that the use of exclusive contracts for MDUs or other real estate developments serves as a barrier to entry, and that these exclusive contracts unreasonably delay competitive entry. As noted in the *621 Order*, the video provider marketplace is currently undergoing a change, with the entrance of traditional phone companies that are primed to offer a “triple play” of voice, high-speed Internet access, and video services over their respective networks.²⁵ Given the interrelated federal goals of enhanced cable competition and rapid broadband deployment, we seek comment on a number of issues relating to the prevalence and use and effect of exclusive contracts in today’s marketplace.

A. Potential Competitors’ Current Ability to Obtain Access to MDUs

7. As an initial matter, we request comment on the current environment for MVPDs attempting to obtain access to MDUs or other real estate developments. To what extent do exclusive contracts impede the realization of our policy goals? How often have competitive entrants confronted exclusive access agreements, what are the terms of those agreements, and are those agreements becoming more prevalent? How has the multichannel video marketplace changed since adoption of our *Inside Wiring Report and Order*, and what effect have those changes had for consumers who live in MDUs or other real estate developments? What is the current status of state mandatory access laws and what impact do they have on the issues raised herein?

8. We also ask for additional information on the MVPDs operating pursuant to such exclusive contracts. In the *Inside Wiring Second Report and Order* we stated that exclusive contracts may benefit new entrants by reducing investment risk.²⁶ Verizon indicates, however, that incumbent providers are soliciting such exclusive contracts when a potential competitor is actively seeking a local franchise to provide service in the MDU’s franchise area.²⁷ We seek comment on whether MVPDs seek exclusive contracts in an effort to frustrate competitive entry. Do incumbent providers use the time during which new entrants are negotiating local franchises in order to obtain exclusive contracts? We also seek comment on whether, in today’s market, exclusive contracts benefit new entrants, incumbent providers, or both. We also ask whether the video providers entering into such exclusive contracts would be unable to provide service to these MDUs or other real estate developments absent the protections afforded by exclusive contracts.

²⁴ See Letter from Matt C. Ames, Miller & Van Eaton, P.L.L.C., Counsel for National Multi-Housing Council to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 at 3 (filed December 5, 2006)

²⁵ *621 Order* at para. 2.

²⁶ *Inside Wiring Second Report and Order* at 1369.

²⁷ July 6 *Ex Parte* at 4. See also August 9 *Ex Parte* at 3 (noting that Verizon contacted the owners and managers of MDU properties in and around Tampa, Florida, and found that 42% of the living units were subject to exclusive contracts with Bright House, and in 15% of the living units, the owner or manager would not reveal whether Bright House exclusive contracts were in effect); August 9 *Ex Parte* at 4 citing “Comcast Throws a Curve in Its Broadband Pitch,” *San Francisco Chronicle*, at C1 (July 19, 2006), (discussing Comcast’s recent efforts to obtain ten-year exclusive access agreements in the San Francisco area). But see Letter from Matt C. Ames, Miller & Van Eaton, P.L.L.C., Counsel for National Multi-Housing Council to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 at 3 (filed December 5, 2006) (stating that the underlying economic principles have not changed since the *Inside Wiring Report and Order*).

B. The Commission's Authority to Prohibit the Use of Exclusive Contracts

9. We tentatively conclude that the Commission has authority to regulate exclusive contracts for the provision of video services to MDUs or other real estate developments where we find that such contracts may impede competition and impair deployment of those services. We seek comment on this tentative conclusion, particularly with regard to our authority under, and the scope and applicability of, Section 628(b) of the Communications Act of 1934 and Section 706 of the 1996 Telecommunications Act. We also seek comment on the scope and applicability of Section 623, Section 1, Section 4(i), and Section 303(r) of the Communications Act of 1934 to this issue as well as other provisions that may provide us with authority to regulate exclusive contracts.²⁸ We note that Section 628(b) states

[i]t shall be unlawful for a cable operator, a satellite, cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.²⁹

We also seek comment on how we should define what constitutes "unfair methods of competition or unfair or deceptive acts or practices" under Section 628(b). We note that this language is similar to that used in the Federal Trade Commission Act.³⁰ Commenters should address the relevance to our interpretation of Section 628(b) of any interpretation of similar language by the FTC or federal courts.

10. In addition, Section 706 of the 1996 Telecommunications Act, charges the Commission to "encourage the deployment of . . . advanced telecommunications capability to all Americans."³¹ Given the relationship between a company's ability to offer video programming to customers and its ability to invest in broadband facilities, does Section 706 provide the Commission authority to address competitive concerns relating to exclusive contracts? Moreover, the Commission is empowered by Section 1 of the Act "to execute and enforce the provisions of this Act,"³² and by Section 4(i) "to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."³³ We also note that, with respect to MDU "home run" wiring,³⁴ the Commission concluded that it had authority under Title VI (particularly Section 623) in conjunction with Sections 4(i) and 303(r) to regulate the disposition of such wiring upon termination of service.³⁵ We invite commenters to address whether these provisions, or others, can or should serve as a basis for regulating exclusive contracts for the provision of video services to MDUs or other real estate developments. In addition, we ask parties to address the scope of the Commission's authority. Does the Commission have authority to regulate only exclusive contracts entered into after the effective date of the

²⁸ See 47 U.S.C. §§ 548(b), 543, 151, 154(i), 303(r), 157 nt.

²⁹ 47 U.S.C. § 548(b).

³⁰ 15 U.S.C. § 45(a)(1).

³¹ 47 U.S.C. § 157, nt. (incorporating section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996)).

³² 47 U.S.C. § 151.

³³ 47 U.S.C. § 154(i).

³⁴ "Home run" wiring in an MDU is the wiring that runs from the demarcation point to the point at which the MVPD's wiring becomes devoted to an individual subscriber or individual loop.

³⁵ See *Inside Wiring FNPRM* at 3699-3708; *Inside Wiring Second Report and Order* at 1345-46.

regulations or could it declare existing exclusive contracts void or voidable? Does the Commission have authority to regulate exclusive contracts entered into by MVPDs other than cable operators? Finally, we seek comment on the effect, if any, of state mandatory access laws or other statutory or constitutional considerations on the Commission's authority in this area.

C. Whether Commission Action Is Needed to Ensure Competitive Video Access to MDUs

11. We seek comment on the impact of exclusive contracts on consumer choice and video competition.³⁶ Does the existence of exclusive contracts within a community reduce the likelihood of competitive entry in the community? What are the typical durations of existing exclusive contracts? Are the costs associated with providing service to MDUs or other real estate developments significantly more than the costs of providing service in other areas? Is there more risk associated with serving these types of developments? Are the marketing costs higher in these areas? Is customer churn higher? How do the prices and services offered under the exclusive contracts compare to those offered to other customers? Are additional payments made to or by the MVPD in return for exclusive contracts? Do existing exclusive contracts provide the MVPD with a right of first refusal when renegotiating the contract? To the extent that some exclusive contracts can be pro-competitive and benefit consumers, we seek comment on those circumstances. If the Commission determines that it would serve the public interest to regulate exclusive contracts, we seek comment on how we should regulate such contracts.

12. We seek comment on whether the Commission should limit exclusive contracts only where the video provider at issue possesses market power. In this regard, we call for comment on how the video programming market has changed since the issue was last posed in the *Inside Wiring FNPRM*, and whether the Commission should reconsider restriction or prohibition of the use of exclusive contracts by video providers with market power.³⁷ In particular, we seek comment on how to define "market power" for these purposes. We also seek input on any other issues relevant to the analysis of market power and exclusive contracts. Does the competitive impact of exclusive contracts differ depending on whether a competing terrestrial MVPD was able to provide service to the MDU or other real estate development at the time the exclusive contract was negotiated?

13. We also call for comment regarding the existence of "perpetual" contracts.³⁸ Perpetual contracts present some of the same competitive issues as exclusive contracts, and were also discussed in the *Inside Wiring Report and Order*.³⁹ Are perpetual contracts currently being executed? If so, are perpetual contracts anti-competitive, as they effectively bar any competitive entry, or are there instances in which the use of perpetual contracts does not impede our policy goals of enhanced cable competition and accelerated broadband deployment? Commenters should address the Commission's authority to nullify or otherwise regulate perpetual contracts.

14. We also solicit comment on the specific rules or guidance that we should adopt to ensure that exclusive contracts do not unreasonably impede competitive video entry. Should the Commission

³⁶ We note that, in the context of telecommunications services, the Commission has prohibited the enforcement of exclusive access arrangements in commercial MDUs. See *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, 22996-97 (2000).

³⁷ *Inside Wiring FNPRM* at 3779.

³⁸ Perpetual contracts are contracts that grant the incumbent provider the right to maintain its wiring and provide service to the MDU for indefinite or very long periods of time, or for the duration of the cable franchise term, and any extensions thereof. See *Inside Wiring Second Report and Order* at 1364.

³⁹ *Inside Wiring Second Report and Order* at 1370-72.

establish explicit rules to which contracting parties must adhere or specific guidelines for MVPDs? Are there certain practices that we should find unreasonable through rules or guidelines? If so, what are these practices?

IV. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

15. As required by the Regulatory Flexibility Act,⁴⁰ the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the proposals addressed in this *Notice of Proposed Rulemaking*. The IRFA is set forth in the Appendix. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Notice*, and they should have a separate and distinct heading designating them as responses to the IRFA.

B. Initial Paperwork Reduction Act of 1995 Analysis

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

C. Ex Parte Rules

17. *Permit-But-Disclose*. This proceeding will be treated as a “permit-but-disclose” proceeding subject to the “permit-but-disclose” requirements under section 1.1206(b) of the Commission’s rules.⁴¹ *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.⁴² Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b).

D. Filing Requirements

18. *Comment Information*. Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, *interested* parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission’s Electronic Comment Filing System (ECFS), (2) the Federal Government’s eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.

⁴⁰ *See* 5 U.S.C. § 603.

⁴¹ *See* 47 C.F.R. § 1.1206(b); *see also* 47 C.F.R. §§ 1.1202, 1.1203.

⁴² *See* 47 C.F.R. § 1.1206(b)(2).

- For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

19. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.

20. *Additional Information.* For additional information on this proceeding, contact John Norton, John.Norton@fcc.gov, or Holly Saurer, Holly.Saurer@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that, pursuant to Sections 1, 4(i), 303(r), 623 and 628(b) of the Communications Act of 1934, as amended, and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 154(i), 303(r), 543, 548(b) and 157, this Notice of Proposed Rulemaking IS HEREBY ADOPTED.

22. IT IS FURTHER ORDERED that the Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

APPENDIX

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (the "RFA"),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact of the policies and rules proposed in the *Notice of Proposed Rulemaking* ("NPRM") on a substantial number of small entities.² Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *NPRM* provided in paragraphs 17-18 of the item. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").³ In addition, the *NPRM* and IRFA (or summaries thereof) will be published in the Federal Register.⁴

Need for, and Objectives of, the Proposed Rules

2. The *NPRM* initiates a proceeding to investigate the use of exclusive contracts for the provision of video services to multiple dwelling units ("MDUs") and other real estate developments, in order to further the interrelated goals of enhanced cable competition and accelerated broadband deployment. Specifically, the *NPRM* solicits comment on the existence of exclusive contracts for the provision of video services to MDUs and other real estate developments, and whether such exclusive contracts are ever pro-competitive, and if not, whether the Commission has authority to prohibit the use of such agreements.

Legal Basis

3. The *NPRM* asks whether the Commission has authority to regulate the use of exclusive contracts for the provision of video services to MDUs or other real estate developments. It specifically asks whether such authority can be found in Sections 1, 4(i), 303(r), 623 and 628(b) of the Communications Act of 1934, as amended, and Section 706 of the Telecommunications Act of 1996.⁵

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁶ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁷ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁸ A "small business

¹ The RFA, *see* 5 U.S.C. §§ 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² *See* 5 U.S.C. § 603. Although we are conducting an IRFA at this stage in the process, it is foreseeable that ultimately we will certify this action pursuant to the RFA, 5 U.S.C. § 605(b), because we anticipate at this time that any rules adopted pursuant to this *Notice* will have no significant economic impact on a substantial number of small entities.

³ *See* 5 U.S.C. § 603(a).

⁴ *See* 5 U.S.C. § 603(a).

⁵ 47 U.S.C. §§ 151, 154(i), 303(r), 543, 548(b), and 157 nt.

⁶ 5 U.S.C. § 603(b)(3).

⁷ 5 U.S.C. § 601(6).

⁸ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity

(continued...)

concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (“SBA”).⁹

5. *Small Businesses.* Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.¹⁰

6. *Small Organizations.* Nationwide, there are approximately 1.6 million small organizations.¹¹

7. *Small Governmental Jurisdictions.* The term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”¹² Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.¹³ We estimate that, of this total, 84,377 entities were “small governmental jurisdictions.”¹⁴ Thus, we estimate that most governmental jurisdictions are small.

8. The Commission has determined that the group of small entities possibly directly affected by our action consists of small governmental entities. In addition the Commission voluntarily provides, below, descriptions of certain entities that may be merely indirectly affected by any rules that may ultimately result from the *NPRM*.

Cable Operators

9. *Cable and Other Program Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material.”¹⁵ The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: all such firms having \$13.5 million or less in annual receipts.¹⁶ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.¹⁷ Of this total, 1,087 firms had annual receipts of under \$10 million, and

for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁹ 15 U.S.C. § 632.

¹⁰ See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

¹¹ Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

¹² 5 U.S.C. § 601(5).

¹³ U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

¹⁴ We assume that the villages, school districts, and special districts are small, and total 48,558. See U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

¹⁵ U.S. Census Bureau, 2002 NAICS Definitions, “517510 Cable and Other Program Distribution”; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

¹⁶ 13 C.F.R. § 121.201, NAICS code 517510.

¹⁷ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

43 firms had receipts of \$10 million or more but less than \$25 million.¹⁸ Thus, under this size standard, the majority of firms can be considered small.

10. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.¹⁹ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.²⁰ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²¹ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.²² Thus, under this second size standard, most cable systems are small.

11. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."²³ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.²⁴ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.²⁵ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,²⁶ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard

12. *Open Video Services.* Open Video Service ("OVS") systems provide subscription services.²⁷ As noted above, the SBA has created a small business size standard for Cable and Other

¹⁸ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

¹⁹ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

²⁰ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

²¹ 47 C.F.R. § 76.901(c).

²² Warren Communications News, *Television & Cable Factbook 2006*, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

²³ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

²⁴ 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

²⁵ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

²⁶ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.909(b).

²⁷ See 47 U.S.C. § 573.

Program Distribution.²⁸ This standard provides that a small entity is one with \$13.5 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.²⁹ Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by our action.

Telecommunications Service Entities

13. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”³⁰ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.³¹

14. *Wired Telecommunications Carriers.* The SBA has developed a small business size standard for wireline firms within the broad economic census category, “Wired Telecommunications Carriers.”³² Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 2,432 firms in this category that operated for the entire year.³³ Of this total, 2,395 firms had employment of 999 or fewer employees, and 37 firms had employment of 1,000 employees or more.³⁴ Thus, under this category and associated small business size standard, the majority of firms can be considered small.

Dwelling Units

15. *MDU Operators.* The SBA has developed definitions of small entities for operators of nonresidential buildings, apartment buildings, and dwellings other than apartment buildings, which include all such companies generating \$6 million or less in revenue annually.³⁵ According to the Census Bureau, there were 31,584 operators of nonresidential buildings generating less than \$6 million in revenue that were in operation for at least one year at the end of 1997.³⁶ Also according to the Census Bureau, there were 51,275 operators of apartment dwellings generating less than \$6 million in revenue

²⁸ 13 C.F.R. § 121.201, NAICS code 517510.

²⁹ See <http://www.fcc.gov/mb/ovs/csovscer.html> (visited December 19, 2006), <http://www.fcc.gov/mb/ovs/csovsrc.html> (visited December 19, 2006).

³⁰ 15 U.S.C. § 632.

³¹ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

³² 13 C.F.R. § 121.201, NAICS code 517110.

³³ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization,” Table 5, NAICS code 517110 (issued Nov. 2005).

³⁴ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

³⁵ 13 C.F.R. § 121.601 (SIC 6512, SIC 6513, SIC 6514).

³⁶ 1997 Economic Census: Comparative Statistics for the United States; 1987 SIC Basis: Financial, Insurance, and Real Estate Industries, SIC 6512.

that were in operation for at least one year at the end of 1997.³⁷ The Census Bureau provides no separate data regarding operators of dwellings other than apartment buildings, and we are unable at this time to estimate the number of such operators that would qualify as small entities.

Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

16. We anticipate that any rules that result from this action would have at most a *de minimis* compliance burden on cable operators and telecommunications service entities. Any rules that might be adopted pursuant to this *NPRM* likely would not require any reporting or recordkeeping requirements.

Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

17. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”³⁸

18. As discussed in the *NPRM*, the Commission has initiated this proceeding to ensure that use of exclusive contracts for the provision of video services to MDUs and other real estate developments are pro-competitive. As noted above, applying any rules regarding the use of exclusive contracts in the provision of video services to MDUs or other real estate developments likely would have at most a *de minimis* impact on small governmental jurisdictions. We seek comment on the impact that any rules might have on such small governmental entities, as well as the other small entities described, and on what effect alternative rules would have on those entities. For instance, should a definition of “market power,” if such a definition is appropriate, make reference to small entities? We also invite comment on ways in which the Commission might impose restrictions of the use of exclusive contracts for the provision of video services while at the same time imposing lesser burdens on small entities.

Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

19. None.

³⁷ 1997 Economic Census: Comparative Statistics for the United States; 1987 SIC Basis: Financial, Insurance, and Real Estate Industries, SIC 6513.

³⁸ 5 U.S.C. §§ 603(c)(1)-(4).

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

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

Fostering greater competition in the market for video services is a primary and long-standing goal of federal communications policy. Congress recognized that competition in the video services market benefits consumers. Indeed, one of the Communications Act's explicit purposes is to "promote competition in cable communications." Competition and choice in the video services market results resulting in lower prices, higher quality of services, and generally enhancing the consumers' experience by giving them greater control over the purchased video programming.

All of us here on the Commission have expressed concern about rising cable prices and the importance of encouraging greater competition in the delivery of multichannel video programming.

As we recently found, from 1995 to 2005, cable rates have risen 93%. In 1995 cable cost \$22.37 per month. Communications Daily has reported that prices for expanded basic are now about \$50 per month. The trend in pricing of cable services is of particular importance to consumers. Since 1996 the prices of every other communications service have declined while cable rates have risen year after year after year.

The GAO and the Commission's most recent cable price survey also found that while cable does face some competition from DBS, DBS and cable do not seem to compete on price. But when a second cable operator is present, cable prices are significantly lower - -almost 20% (\$43.33 without competition vs. \$35.94 where there is competition).

Potential competitors seeking to enter the video marketplace have expressed concerns that the use of exclusive contracts for "multiple dwelling units" (MDUs) are barriers to entry, preventing consumers in MDUs from receiving the benefits of video competition. This Notice of Proposed Rulemaking demonstrates the Commission's commitment to ensure that all consumers—including those living in apartments—benefit from video competition. Through this Notice, the Commission seeks to further cable competition and help ensure that lower cable prices are available to as many Americans as possible as quickly as possible.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*

I am a strong believer in the need to encourage competition and diversity in every sector of the communications marketplace. There is no reason why Americans who happen to live in multiple dwelling units (MDUs) should have a narrower range of choices when it comes to video and broadband service than Americans who live in free-standing buildings. Consumers should expect competition wherever they live. So I hope we can move forward expeditiously to ensure that *all* consumers benefit from the lower prices and improved services that competition is capable of producing. I am pleased that we re-open the record today on the economic and competitive effects of exclusive service contracts between MDUs and video service providers and I look forward to working with my colleagues and the Bureau to resolve this matter.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments

I am pleased to support this Notice of Proposed Rulemaking (NPRM) on the benefits and detriments of various exclusive agreements between multichannel video programming distributors (MVPDs) and private real estate developers and owners of multiple dwelling unit properties (MDUs) for video services. Robust and fair competition across the communications landscape, and particularly among MVPDs, remains as an important policy objective of mine, and this NPRM will allow us to examine whether certain exclusive arrangements amount to anticompetitive practices that prevent potential providers from entering the video distribution marketplace.

While the Commission considered this specific issue in 1997 and 2003, and decided against taking any action regarding exclusive agreements, it is appropriate for us to refresh the record and re-examine the issue in light of the specific allegations made by competitive providers and continued increases in cable rates. According to the Commission's most recent Cable Price Survey Report, the average monthly price for basic-plus-expanded basic service has increased by ninety-three percent over a ten-year period.³⁹ And, cable rates were seventeen percent lower where wireline cable competition was present.⁴⁰

The entry of some of the largest incumbent local exchange companies into the video marketplace is a major and positive new development. Verizon, for example, is upgrading its facilities to fiber-based platforms in many areas across the country so that it can offer a suite of video, voice, and data services. This and other investments by phone companies could bring substantial new competition into the video marketplace that could prove historic.

Equally significant is the potential for this new revenue stream to drive broadband deployment, which can benefit consumers and foster the free flow of information beyond the video marketplace. Consumers will benefit not only from more choices, better service, and lower prices, but they also stand to gain from a more robust exchange in the marketplace of ideas. If these exclusive contracts do in fact unreasonably impede the Commission's goals of enhancing multichannel video competition and accelerating the deployment of broadband, then I believe we must act.

³⁹ Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Prices for Basic Service, Cable Programming Services, and Equipment, 21 FCC Rcd 1, 15087, ¶ 2 (2006).

⁴⁰ Id. at 15090, ¶ 10.

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

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

Congress has charged the Commission with advancing the increasingly interrelated goals of increasing competition in the multichannel video programming market and accelerating the deployment of broadband services. With this item, we start the process of developing a record concerning whether the use of exclusive contracts for the provision of video services to multiple dwelling units ("MDU") unfairly impedes competitive entry and deprives residents of those MDUs of the benefits of that competition, including bundled video, voice, and data packages. I am pleased that we are addressing this important issue in a platform-neutral manner, and I look forward to reviewing the record as it develops.

**STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL**

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

In this Notice, we seek comment regarding the current market environment for video service providers with respect to obtaining access to multiple dwelling units (MDUs) and other real estate developments. Specifically, we want to uncover whether there is a need for the Commission to regulate exclusive contracts for the provision of video services and whether the Commission has the authority to craft such regulations. With the advent of the "triple play" of video, voice and high-speed Internet access services being offered by cable, telephone and other companies, it is important that the Commission's regulations treat all competitors the same when possible. I am pleased that this item examines building access issues in a platform neutral manner with respect to all video providers, be they telephone companies, incumbent cable providers, over-builders or others. Additionally, I think it is appropriate and constructive that the Commission has committed to refreshing the record in the long-pending Competitive Networks proceeding, in which we sought comment regarding MDU access and exclusive contracts for telephone service providers. I hope that competition for all services, and across all platforms, does not stop, literally, at the doorstep of apartment and office buildings across America.

I thank the Chairman for his leadership in this area and I am delighted to support this NPRM.