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

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

COMMENTS OF TIME WARNER CABLE

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Time Warner Cable Inc. ("TWC") respectfully submits these comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned docket.[1] TWC owns or manages cable systems passing more than 26 million homes and serving more than 14 million subscribers, and accordingly has a strong interest in the Commission's examination of commercial agreements between multichannel video programming distributors ("MVPDs") and owners of multiple dwelling units ("MDUs").

INTRODUCTION AND SUMMARY

The *NPRM* seeks comment on competitive effects of exclusive contracts between MVPDs and owners of MDUs. While exclusive contracts can encourage MVPDs to invest in infrastructure and new services, they also have the potential to inhibit competition by allowing a provider to lock up customers for long periods of time. In weighing both the potential pro- and anti-competitive effects, the Commission recently determined that "marketplace forces" are adequate to "spur[] incumbent and alternative providers to innovate and improve service

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[1] *Exclusive Service Contracts for the Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Notice of Proposed Rulemaking, MB Docket No. 07-51, FCC 07-32 (rel. March 27, 2007) ("*NPRM*").

offerings," thus obviating "the need for government action on exclusive contracts."[2] The Commission should reverse course and prohibit exclusive contracts only if there is clear evidence of harm to competition and consumers.

If the Commission does prohibit or restrict exclusive MDU contracts, Commission policy and precedent require that such rules apply equally to all competing providers. DBS providers and other new MVPD entrants are competing effectively with incumbent cable operators, and the Commission should avoid conferring artificial advantages on any competitor. While temporary regulatory disparities sometimes result where incumbents are subject to legacy regulations that do not apply to new entrants, there can be no legitimate justification for *creating* such disparities by saddling incumbent cable operators alone with a newly minted ban on exclusivity. Such a lopsided approach would distort competition and introduce inefficiencies. Moreover, it would represent an arbitrary departure from the Commission's treatment of exclusive contracts in the commercial telecommunications setting, where it placed the burdens of regulation on both incumbent and competitive providers.

Another reason for caution is that there are substantial questions about the Commission's authority to regulate these private contracts. Congress has not expressly addressed the issue, and none of the provisions identified in the *NPRM* provides a strong basis for regulatory intervention in this context. At a minimum, the Commission must refrain from abrogating existing contracts. Not only did Congress fail to provide any specific authorization to abrogate contracts, but Title VI fails to confer the sort of broad "public interest" authority that could permit abrogation in other contexts. Even when applying its broader public interest authority under Title II, the

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[2] *Telecommunications Services Inside Wiring*, First Order on Reconsideration and Second Report and Order, CS Docket No. 95-184, 18 FCC Rcd 1342 (2003) ("*Inside Wiring Second Report and Order*").

Commission refrained from abrogating exclusive contracts between commercial telecommunications carriers and building owners. Taking that drastic step here would unfairly upset the settled expectations of the contracting parties, and could pose the risk of an unconstitutional taking. The Commission should not apply a new exclusivity ban retroactively unless its authority is clear and the need is compelling, and this is not such a case.

DISCUSSION

I. THERE IS NO CLEAR NEED FOR REGULATION OF EXCLUSIVE MDU CONTRACTS.

As the Commission recognized in the *Inside Wiring Second Report and Order*, the competitive effects of exclusive contracts are mixed. In some cases, an exclusive contract's guaranteed, long-term revenue stream encourages an MVPD to make the infrastructure investments required to provide service to an MDU.[3] Yet, it is possible that some exclusive contracts could inhibit competition and the development of improved video services, as MDUs and consumers locked into long-term deals would be unable to take advantage of better or more affordable packages offered by competitors.

Whether the positive effects of exclusive contracts outweigh the negative, it is clear that such contracts do not disparately burden or benefit any category of MVPD. There is no evidence that overbuilders or telecommunications carriers cannot compete effectively with incumbent cable operators for exclusive video contracts with MDU owners. To the contrary, in the Commission's *Inside Wiring* proceeding, competitive video providers argued that exclusive contracts "enable alternative MVPDs to gain a foothold in the MDU market,"[4] bolstering the Commission's conclusion that the record "[did] not demonstrate that [exclusive] contracts have

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[3] *Id.* at 1366 ¶ 63.

[4] *Id.* at 1366–67 ¶ 64.

thwarted alternative providers' entrance into the MDU market" in a manner requiring regulation.[5] These observations are consistent with TWC's experience, in which new entrants and overbuilders compete head-to-head with incumbent cable operators for exclusive contracts.

In the absence of a clear need for regulation, the Commission should be hesitant about intervening in the marketplace. The case for a light regulatory touch, while always a sound approach, is particularly powerful in the video marketplace, where competition is robust.[6] Because of this vigorous competition, per-channel cable rates continue to drop, infrastructure investment continues to grow, and providers are offering more services than ever before.[7] Further, there is a risk that the Commission's regulatory scheme could invert congressional intent: While Congress generally subjects common carriers to more expansive regulatory oversight than cable operators,[8] the Commission has increasingly forborne from regulating telecommunications services in the name of regulatory parity while at the same proposing increased regulation of video services. The Commission should recognize that video

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[5] *Id.* 1369 ¶ 69.

[6] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, MB Docket No. 05-255, 21 FCC Rcd 2503, 2506 ¶¶ 5–7 (2006) ("*Twelfth Video Competition Report*").

[7] *See, e.g.,* Remarks of FCC Chairman Kevin Martin, National Cable & Telecommunications Association, Las Vegas, NV, at 1 (May 7, 2007) ("As an industry you have spent billions of dollars to upgrade your networks. Since 1996, you have spent more than 100 billion dollars on infrastructure investment. These upgrades have enabled you to deploy broadband services to millions of customers and resulted in you being a serious competitor to the incumbent telephone companies.").

[8] *See, e.g.*, Peter W. Huber, Michael K. Kellogg, & John Thorne, *Federal Telecommunications Law* § 3.11 (2d. ed. 1999) (outlining expansive common carrier obligations under Title II of the Act); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) (rejecting imposition of common carrier obligations on cable television systems because cable operators do not make "a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing").

competition is thriving and growing ever stronger. Thus, it should impose regulation only when clearly necessary to protect consumers—and only in a competitively neutral manner.

II. IF THE COMMISSION REGULATES EXCLUSIVE CONTRACTS, ITS RULES MUST NOT DISCRIMINATE AMONG COMPETING PROVIDERS.

If the Commission decides to prohibit or restrict exclusive contracts, TWC strenuously opposes any rule that would apply to incumbent cable operators, but not their competitors.[9] Such one-sided regulation would contravene the Commission's policy of "setting the rules of the road so that players can compete on a level playing-field"[10] and move it further from its goal of "crafting an analytical framework that is consistent, to the extent possible, across multiple platforms that support competing services."[11] These principles apply with full force in the context of multi-unit premises, where the Commission has sought to foster competition in a manner that does "not favor one technology or industry over another" and achieves "regulatory parity by applying a consistent regulatory framework across platforms."[12]

The dangers of departing from regulatory parity are well-known. As a general matter, the Commission seeks to "regulate like services in a similar manner" to encourage providers to

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[9] *See NPRM* ¶ 12 (seeking comment on the possibility of asymmetric regulation).

[10] Written Statement of Kevin Martin, Chairman, FCC, Before the Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, United States House of Representatives, at 3 (Mar. 14, 2007). *See also* Written Statement of Kevin Martin, Chairman, FCC, Before the Committee on Commerce, Science & Transportation, U.S. Senate, at 1 (Sept. 12, 2006) ("For example, high speed Internet access offered by a phone company should be treated the same way as high speed Internet access offered by a cable operator.").

[11] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 02-33, 20 FCC Rcd 14853, 14865 ¶ 17 (2005) ("*Wireline Broadband Order*").

[12] Separate Statement of Chairman Martin, *Telecommunications Services Inside Wiring Customer Premises Equipment*, CS Docket No. 95-184, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, MM Docket No. 92-260, *Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers' Inside Wire Subloop,* WC Docket No. 01-338, Report and Order and Declaratory Ruling (rel. June 8, 2007).

"make market-based, rather than regulatory-driven, investment and deployment decisions."[13] While any asymmetric regulation of video competitors threatens to distort consumer choices, the nature of exclusive contracts would make one-sided regulation particularly pernicious. If the Commission were to prohibit exclusive contracts on the ground that they limit competition, barring one category of providers from entering into such contracts would only make matters worse, as building owners would have fewer opportunities to play MVPDs against one another in an effort to strike the best deal for tenants. In other words, *eliminating* competition for exclusive contracts would be an odd way to seek the *enhancement* of competition. If the Commission determines that exclusivity is anticompetitive, the only principled response would be to prohibit or restrict such contracts for all video providers.

The Commission adhered to this common-sense principle in the *Competitive Networks* rulemaking, where it prohibited all telecommunications carriers from entering into exclusive commercial contracts, reasoning that "applying an exclusive contract prohibition only to the incumbent LEC could distort competitive outcomes and ill serve end user interests."[14] There is no reason for the Commission to depart from this precedent. A supposed market-power rationale for one-sided regulation is even less tenable now than it was in 2003, when the Commission declined to regulate exclusive contracts.[15] Since then, the video market has become even more competitive, with cable's share of subscribers dropping from 76.5 percent to 69 percent of all

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[13] *Wireline Broadband Order*, 20 FCC Rcd at 14878 ¶ 45.

[14] *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 99-217, 15 FCC Rcd 22983, 22298 ¶ 30 (2000) ("*Competitive Networks Order*").

[15] *See Inside Wiring Second Report and Order*, 18 FCC Rcd at 1369 ¶ 69 (declining to regulate exclusive contracts because cable operators' market share had declined from 80 percent to 76.5 percent in recent years).

MVPD households.[16] The Commission's most recent annual competition report explained that "almost all customers have the choice between over-the-air broadcast television, a cable service, and least two DBS providers."[17] Further, "broadband service providers continue to offer a triple play of video, voice and Internet access service, which is proving to be price competitive with cable."[18] The report catalogued the aggressive deployment plans incumbent LECs have adopted to compete in the MVPD market,[19] and also noted the emergence of Internet-based video services.[20] Thus, just as "[c]ompetitive providers are growing in [the commercial telecommunications] market, and new entrants are actively seeking to win customers,"[21] the same is true for video services. Indeed, in light of the comparable positions of competitive MVPDs and competitive LECs, abandoning competitive neutrality here would be arbitrary and capricious.[22]

More broadly, the Commission should be careful to avoid tilting the playing field in favor of the Bell operating companies and other telecommunications carriers offering video services. In the Section 621 proceeding, the Commission already has promulgated rules to remove what it saw as regulatory barriers to telecommunications providers' entry into the video market.[23] The

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[16] *See id.*; *Twelfth Video Competition Report*, 21 FCC Rcd at 2506 ¶ 7.

[17] *Twelfth Video Competition Report*, 21 FCC Rcd at 2506 ¶ 5.

[18] *Id.*

[19] *Id.* at 2561-63 ¶¶ 121-25

[20] *Id.* at 2566-69 ¶¶ 135-39.

[21] *Competitive Networks Order*, 15 FCC Rcd at 22998 ¶ 30.

[22] *See Burlington N. & Santa Fe Ry. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005) (internal citations omitted) ("Where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.").

[23] *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

Commission not only should extend similar relief to all MVPDs,[24] but also should avoid placing unique burdens on cable operators through this rulemaking.

III. THERE ARE SERIOUS QUESTIONS REGARDING THE COMMISSION'S AUTHORITY TO REGULATE EXCLUSIVE MDU CONTRACTS

Whether or not exclusive contracts on balance have negative effects on the MVPD market, serious questions exist regarding the Commission's statutory authority to regulate these contracts. Unlike Section 201, on which the Commission relied in banning exclusive contracts between telecommunications carriers and commercial building owners, nothing in Title VI broadly authorizes the Commission to police unjust and unreasonable practices. The Commission cites Section 628(b) as a possible source of authority, but that provision is not a general grant of power to address unfair competition in the MVPD market.[25] The Commission has recognized that Section 628(b) "cannot be read in isolation. Rather [it] must be interpreted in connection with Sections 628(c)(2)(D) and 628(h) which specifically address the legality of exclusive *programming* contracts" between a cable operator and a vertically integrated programming provider.[26] Thus, relying on the statutory text and legislative history, the Commission refused to expand this narrow prohibition to contracts involving terrestrial programming and *non*-vertically integrated satellite-delivered programming.[27] The contracts at

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Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, 22 FCC Rcd 5101, 5103 ¶ 2 (2007).

[24] *See* Comments of Time Warner Cable Inc., MB Docket No. 05-311 (filed Apr. 20, 2007).

[25] *See* 47 U.S.C. § 548(b).

[26] *American Cable Co. & Jay Copeland v. Telecable of Columbus, Inc.*, Memorandum Opinion and Order, CSR 4206; CSR 4198-P, 11 FCC Rcd 10090, 10114-15 ¶ 55 (1996) (emphasis added).

[27] *See Gen. Motors Corp. & Hughes Electronics Corp.*, Memorandum Opinion and Order, MB Docket 03-124, 19 FCC Rcd 473, 600 ¶ 291 (2004); *Implementation of the Cable Television Consumer Protection And Competition Act of 1992*, Report and Order, CS Docket No. 01-290, 17 FCC Rcd 12124, 12157-58 ¶¶ 71-74 (2002).

issue here fall even farther outside Section 628(b)'s limits, leaving an exercise of authority under Section 628(b) at odds with Commission precedent, the statute, and the narrow regulatory definition of "unfair competition" for purposes of that provision.[28]

Nor can Section 706 of the 1996 Telecommunications Act[29] provide authority for regulating exclusive MDU contracts. The Commission has held that while Section 706 can guide the Commission's implementation of other provisions, is not a freestanding source of regulatory authority.[30] The text of Section 706, its legislative history, the broader statutory scheme, and Congress's policy objectives all support this sound interpretation.[31] Consequently, when the Commission has taken action pursuant to Section 706, it has invoked other explicit sources of authority while also observing that the action is *consistent* with the policy goals of Section 706.[32] Further, Section 706(b) states that the Commission is to act pursuant to this provision only if broadband services are not being deployed in a reasonable and timely fashion.

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[28] *See* 47 C.F.R. § 76.1002.

[29] 47 U.S.C. § 157 nt.

[30] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order and Memorandum Opinion and Order, Corrected, CC Docket No. 98-147, 15 FCC Rcd 3089, 3092 ¶ 5 (2000); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Docket No. 98-147, 13 FCC Rcd 24012, 24045-58 ¶¶ 69-78 (1998) ("*Advanced Services Order*").

[31] *Advanced Services Order* at 24004-45 ¶ 69. Just as the Act's explicit provisions governing forbearance prohibit the Commission from treating Section 706 as an independent grant of forbearance authority, *id.* at 24045-46 ¶¶ 72-73, the statute's specific, limited regulation of rates charged to MDUs, 47 U.S.C. § 543(d), confirms that Section 706 is not a general, unqualified source of authority over such contracts.

[32] *See, e.g.*, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Pub. Util. Comm'n*, Memorandum Opinion and Order, WC Docket No. 03-211, 19 FCC Rcd. 22404, 22414 & 22425 ¶¶ 19 & 33 (2004).

The Commission's broadband inquiries consistently have found reasonable and timely deployment of advanced services,[33] further militating against reliance on Section 706.

The NPRM's suggestion of Section 623 as a possible source of authority likewise is problematic, at best.[34] As a threshold matter, that rate-regulation provision does not have any bearing on the permissibility of exclusive contracts, particularly because they often produce lower rates.[35] Moreover, the Commission can regulate cable rates only if there is no effective competition in the video marketplace.[36] Effective competition exists in increasingly large portions of the nation, particularly with the growth of video services offered by DBS providers and telecommunications carriers.[37] The Commission thus could invoke Section 623 only with respect to certain presently undetermined portions of the nationwide marketplace. Further, even in areas where there is no "effective competition," Section 623 exempts bulk discounts to MDUs from regulation absent a showing of predatory pricing.[38] At most, then, the Commission would have to make particularized findings of predatory pricing in discrete instances before being able to regulate exclusive contracts under that provision. Absent such evidence, the Commission has no authority to regulate exclusive contracts under Section 623.

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[33] *See generally, Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, GN Docket No. 04-54 (2004).

[34] *NPRM* ¶ 9.

[35] Separate Statement of Commissioner Martin, Dissenting in Part, *Inside Wiring Second Report and Order*, 18 FCC Rcd at 1400 (noting that Section 623 has a narrow focus and does not appear to authorize regulation to address barriers to competition generally).

[36] 47 U.S.C. §§ 543(a)(2), (d). *See also Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 191 (D.C. Cir. 1995).

[37] *See, e.g.*, *Twelfth Annual Report*, 21 FCC Rcd at 2561-63 ¶¶121–25 (2006) (tracing the expanding footprint of LEC video services).

[38] 47 U.S.C. § 543(d).

Finally, Sections 1, 4(i), and 303(r) of the Act do not provide support for the Commission's regulatory authority over exclusive contracts. Rather than being independent sources of regulatory authority, these provisions, like Section 706, only provide ancillary power to fulfill primary directives located elsewhere in the statute.[39] "[W]ide latitude in the exercise of delegated powers is not the equivalent of untrammeled freedom to regulate activities over which the statue fails to confer . . . Commission authority."[40] The questionable strength of the other possible sources of authority limits the Commission's ability to use these ancillary provisions as regulatory bootstraps.

IV. EVEN IF THE COMMISSION COULD JUSTIFY PROSPECTIVE REGULATION, IT CANNOT ABROGATE EXISTING CONTRACTS

Although the Commission has asserted in limited contexts its power to abrogate or modify the terms of private contracts, it can do so, if at all, only pursuant to express statutory authority or a grant of authority to regulate "in the public interest."[41] Congress has not given the Commission general "public interest" authority under Title VI that could authorize the extreme step of abrogating private contracts.[42] Even where the Commission can rely on such public

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[39] *See, e.g., California v. FCC*, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979); Separate Statement of Commissioner Martin, Dissenting in Part, *Inside Wiring Second Report and Order*, 18 FCC Rcd at 1400 (noting that an expansive "interpretation of these provisions … offers no limitation on our authority, and thus I am not sure what this interpretation would not allow us to do. I am not as comfortable interpreting these provisions so broadly.").

[40] *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC,* 533 F.2d 601, 617–18 (D.C. Cir. 1976).

[41] *See, e.g., United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 345 (1956); *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956).

[42] Only two sections of Title VI even mention the phrase "public interest"—Sections 628 and 653. As explained above, Section 628's narrow grant of regulatory authority is not implicated in this rulemaking. The Commission has not and could not plausibly raise Section 653 as a possible a source of authority to regulate exclusive MDU contracts, for the public interest provision in that Section merely addresses the regulatory requirements the FCC considers regarding applications to provide video through an Open Video System. *See* 47 U.S.C.

interest authority under Title II (or otherwise), the barriers to doing so are very high. By the Commission's own recognition, an agency seeking abrogation must carry the "heavy burden" of satisfying a "strict public interest standard."[43] Even if the Commission determines that exclusive contracts, on balance, are bad for competition, that stringent standard cannot be met here, given the absence of express statutory authority and the robust state of MVPD competition.

The Commission has also recognized that declining to apply new policies to existing contracts comports with the doctrine proscribing "retroactive application of regulations absent clear congressional intent."[44] Abrogation here would trigger that very concern. From the service provider's perspective, an exclusive contract frontloads investment costs in exchange for a guaranteed, long-term revenue stream. By abrogating the contract, the Commission forces the provider to carry all the investment burden, but deprives the provider of much of its bargained-for benefit. In the *Competitive Networks* rulemaking the Commission declined to impose such hardship, notwithstanding its conclusion that such contracts were anticompetitive in the commercial context.[45] Abrogation in this functionally equivalent setting would be ill-advised, and also arbitrary and capricious.

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§ 573(a)(1). This Section is not even applicable to most MVPDs and does not come close to addressing regulation of private contracts. Thus, unlike the broad public interest power conferred in Title II, *see* 47 U.S.C. 201(b), the Commission's public interest authority over cable is tightly circumscribed and does not extend to the subject of this rulemaking.

[43] *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, Memorandum Opinion and Order, File No. E-91-94, 10 FCC Rcd 654, 657 ¶ 17 (1995).

[44] *See, e.g., Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, First Report and Order, MM Docket No. 92-265, 8 FCC Rcd 3359, 3414-15 ¶ 120 (1993) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

[45] *Competitive Networks Order*, 15 FCC Rcd at 23000 ¶ 36. States prohibiting exclusive contracts in similar settings have also declined to impose retroactive abrogation. *See, e.g.*, IND. CODE ANN. § 8-1-32.6-7(a) (grandfathering exclusive contracts between telecommunications providers and commercial multi-tenant buildings); 220 MASS. CODE. REGS. 45.03(1) (2007) (adopting rule disfavoring exclusive contracts only on a prospective basis).

Absent compensation, moreover, abrogation of contracts raises the possibility of an unconstitutional taking. It is well-established that contract rights are property,[46] and abrogation destroys the rights and benefits the parties gain from their bargain. Rather than creating the consequential harm of upsetting future expectations, the Commission would be directly targeting a vested property right and causing harm with a retroactive effect. Determining just compensation for this taking would also be extremely complex, as the Commission would have to account for the provider's investment in the MDU and the future income provided by the contract.

Taking the drastic step of abrogation is entirely unnecessary, however. As explained above, it is unclear whether regulatory intervention is needed in this arena at all. The Commission should not consider destroying private common-law rights unless its authority is certain and the need for intervention is pressing.[47] This is not such a case.

[46] *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977); *Lynch v. United States*, 292 U.S. 571, 579 (1934); *United States v. Northern Pacific Ry.*, 256 U.S. 51, 64, 67 (1921); *United States v. Central Pacific R. Co.*, 118 U.S. 235, 238 (1886). *See also Ballsteadt v. Amoco Oil Co.*, 509 F. Supp. 1095, 1097 (N.D. Iowa 1981) ("it is undeniable that contract rights are property and thus constitutionally protected.")

[47] *Cf. Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907); *Bell Tel. Co. v. FCC*, 503 F.2d 1250, 1280 (3d Cir. 1974).

CONCLUSION

On balance, the competitive effects of exclusive contracts are uncertain, and, absent a clear need for intervention, the Commission should favor free market competition over regulation. In addition, while TWC questions whether the Commission has the authority to regulate these private contracts, if the Commission decides that intervention in the market is necessary and authorized, TWC urges that any regulation be competitively neutral and forward-looking in scope.

Respectfully submitted,

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