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

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

COMMENTS OF

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NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association ("NCTA") hereby submits its comments on the Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.

NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest broadband provider of high speed Internet access after investing more than $100 billion in the past ten years to build a two-way interactive network with fiber optic technology. Cable companies also provide state-of-the-art telephone service to millions of American consumers.

INTRODUCTION AND SUMMARY

In this proceeding, the Commission is revisiting a question that it addressed only four years ago – namely, whether it should restrict the use of exclusive contracts between owners of multiple dwelling unit buildings (MDUs) and multichannel video programming distributors (MVPDs). After the Commission sought comment on this question in its rulemaking proceeding on cable inside wiring, it concluded that exclusive contracts could have both pro-competitive and anti-competitive effects, depending on the circumstances. Exclusivity, as the Commission found, can promote competition to the extent that it enables competing MVPDs to provide service more efficiently to MDU customers. It can impair competition if it forecloses a competitor's access to so many potential customers that the competitor cannot effectively compete in the marketplace.

Although several commenting parties had complained that they were prevented from competing by exclusive contracts, the Commission found no basis for taking any action. The evidence, it found, was insufficient to determine whether exclusive contracts were having any significant anticompetitive effect. But last year, in the Commission's rulemaking proceeding regarding Section 621(a)(1) of the Communications Act, which bars local franchising authorities from unreasonably refusing to grant additional franchises, several parties submitted ex parte letters alleging that the use of exclusive contracts serves as a "barriers to entry" and "unreasonably delay competitive entry."[1]

On the basis of these allegations, and in light of changes in the video marketplace related to the bundled offering of video, voice and high-speed Internet access by telephone companies and cable operators, the Commission is asking once again for comment on whether it should restrict the use of exclusive contracts in order "to ensure competitive video access to MDUs."[2] In particular, the Commission asks whether it should limit exclusive contracts "only where the video provider at issue possesses market power." It also asks whether existing "perpetual" contracts are anticompetitive and whether it should nullify or otherwise restrict the applicability of such contracts. And it asks the important threshold question: Does the Commission have any statutory authority to take such actions?

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[1] *Notice*, ¶ 6.

[2] *Id.*, Section C.

The latter question must, of course, be dispositive. Nothing in Title VI or anywhere else in the Communications Act gives the Commission authority to restrict contracts between cable operators (or other MVPDs) and owners of MDUs. Although the Commission tentatively concludes that it has such authority, its primary basis for this conclusion appears to be Section 628 – a provision squarely directed at competitive access to *programming*, not access to *premises*. Section 628 is not a catch-all grant of authority to restrict any contractual relationships that might be deemed by the Commission to restrict competition. Nor do the general provisions of Sections 706, 4(i), 303(r), 623 or Section 1 expressly or implicitly authorize the regulation of exclusive access to MDUs.

In any event, even if the Commission had such roving authority to promote competition by barring exclusive contracts, it would still have no authority – or any public policy reason – to abrogate *existing* contracts. As a matter of law, the Commission may not interfere with common law contractual rights unless it is expressly or "imperatively" required by the Communications Act. And as a matter of policy, the Commission has recognized that barring existing MDU contracts would have significant, unwarranted adverse effects on the investment interests of the parties to such contracts. Moreover, there is little reason to believe that existing exclusive contracts are thwarting the competitive entry of the incumbent local telephone companies or others in the video marketplace.

Finally, even if the Commission had authority to attempt to promote competition by restricting exclusive MDU contracts, the way to achieve such an objective in today's converging broadband marketplace would certainly not be to bar only incumbent cable operators from entering into exclusive contracts. Allowing incumbent telephone companies, who already have access to virtually all MDUs to provide telephone service, to gain exclusive access for their video service while prohibiting incumbent cable operators to do the same would create a competitive imbalance that would distort rather than promote marketplace competition. Exclusivity should either be prospectively barred for all MVPDs or for none.

I. THE COMMISSION HAS NO AUTHORITY TO REGULATE ACCESS TO MDUs

The Commission tentatively concludes that it has authority to restrict the use of exclusive MDU contracts. It asks for comments on the scope and applicability of several sections of the Communications Act, which presumably constitute the basis for its tentative conclusion. None of those provisions provide any such authority.

The principal provision relied upon by the Commission appears to be Section 628 – the "program access" provision adopted as part of the Cable Consumer Protection and Competition Act of 1992. The Commission cites Section 628(b), which provides that

> It 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*.

As the emphasized language indicates – and as everyone has always understood – this provision was squarely directed at practices that unfairly denied MVPDs access to *programming*. Section 628 is not a mini-Sherman Act that gives the FCC broad authority to restrict or proscribe any acts or practices that it may deem unfair, deceptive or anticompetitive. To the contrary, as Rep. Tauzin, the sponsor of the amendment that became Section 628, made clear at the time, "[t]he Tauzin Amendment, very simply put, requires [the cable industry] to stop refusing to sell its products to other distributors of television programs."[3]

Nor do the broad general provisions of Section 1 and Section 4(i) authorize the Commission to regulate exclusive MDU contracts. Section 4(i) authorizes the Commission 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."[4] As the courts have made clear, this is not a grant of authority to do anything that the Commission wishes so long as it is not barred by or inconsistent with the Act's specific mandates. To the contrary, the exercise of authority under Section 4(i) must be "ancillary" to some other explicit grant of jurisdiction.[5] The Commission's "ancillary jurisdiction is limited to circumstances where: (1) the Commission's general jurisdictional grant under Title I covers the subject of the regulations and (2) the regulations are reasonably ancillary to the Commission's effective performance of its *statutorily mandated* responsibilities."[6] The Commission will be hard pressed to find any such basis for regulating contracts between MVPDs and building owners.

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3 Indeed, Congress specifically considered and rejected the inclusion of a provision in Title VI that would have guaranteed all cable operators access to MDUs. As Rep. Wirth, a principal House sponsor of the Cable Communications Policy Act of 1984, noted, "section 633, consumer access to cable service, was deleted [by the full Committee on Energy and Commerce] from H.R. 4103 and is not part of the legislation we will consider today…. The provision prohibited landlords from interfering with a consumer's ability to receive cable service – an increasing troublesome problem whereby landlords become the ultimate electronic editors, deciding to what sources of information, if any, a consumer shall have access." Nothing in the adoption of Section 628 eight years later remotely suggests that it was intended to give the Commission authority to deal with these same "access to premises" issues.

4 47 U.S.C. § 154(i) (emphasis added).

5 *See generally, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *FCC v. Midwest Video Corp.*, U.S. 689 (1979); *California v. FCC*, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990).

6 *American Library Association v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005). *See also Motion Picture Association Of America v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002).

As noted above, Section 628 does not embody a general mandate to promote competition – nor does such a directive exist elsewhere. One of the *purposes* of Title VI is to "promote competition in cable communications,"[7] but nothing in Title VI gives the Commission the general authority or responsibility to adopt whatever rules it may deem necessary or appropriate to promote such competition. To the contrary, the provisions of Title VI establish a comprehensive framework for "the exercise of Federal, State and local authority with respect to the regulation of cable systems."[8]

Those provisions reflect determinations by *Congress* that, in certain circumstances, regulation by State and local governments will best promote competition and the interests of consumers; in some circumstances, regulation by the Commission will best further those objectives; and, in other circumstances, competition and the public interest will best be served by no regulation at all. And they delineate – and circumscribe – the authority of each regulatory body. Nothing in that framework allocates to the Commission the explicit responsibility to promote competition in any way that it sees fit, nor does Title VI provide the Commission with any residual authority or responsibility to do so.

The idea that Section 623 – the rate regulation section of Title VI – somehow provides ancillary authority to regulate exclusive MDU contracts washes up on the shores of fiction. It's conceivable that any regulation designed to promote cable competition *could* have the ancillary effect of reducing rates – if the marketplace were not already vigorously competitive (although such competition could instead affect the quantity and quality of services provided by the

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[7] 47 U.S.C. § 521(6).

[8] 47 U.S.C. § 521(3).

competitors). But promoting competition through such regulations is neither contemplated by nor necessary to implement the Commission's responsibilities under Section 623.

To the contrary, Section 623(b)(2) specifically describes the types of regulation that Congress deemed integral and necessary to the implementation of those responsibilities – and affirmatively promoting competition through regulation is not one of them. A directive to establish rate regulation standards for cable systems that do *not* face effective competition can hardly be viewed as a mandate to take affirmative regulatory steps purportedly designed to *promote* such competition.

Finally, the Commission cites Section 706 of the Telecommunications Act of 1996 as a potential source of authority to restrict exclusive MDU contracts. That provision directs the Commission, in certain circumstances, to use certain regulatory measures to "encourage the deployment of . . . advanced telecommunications capability to all Americans."[9] The Commission asks whether, "[g]iven the relationship between a company's ability to offer video programming to customers and its ability to invest in broadband facilities," Section 706 gives it authority to regulate exclusive *video* contracts in MDUs.

Section 706 cannot be stretched to provide such authority. The Commission has made clear that Section 706 "does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods."[10] It simply "directs the Commission to use the authority *granted in other provisions* . . . to encourage the deployment of advanced services."[11]

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[9] 47 U.S.C. § 157, nt. (incorporating Section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996)).

[10] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, 13 FCC Rcd 24011, 26044 (1998).

[11] *Id.* at 24045 (emphasis added).

If there is no independent grant of authority to regulate exclusive MDU contracts elsewhere in the statute, such authority cannot be found in Section 706.

In any event, Section 706 only mandates that the Commission use the regulatory means otherwise at its disposal when it has determined that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion.[12] Yet the Commission, in each of its periodic inquiries, has repeatedly concluded that such capability *is* being deployed in a reasonable and timely fashion.[13] Thus, wholly apart from whether regulating exclusive MDU contracts for the provision of video services has any impact on the nationwide deployment of advanced telecommunications capability, Section 706 provides no basis whatever for such regulation.

II. APART FROM JURISDICTIONAL ISSUES, THERE IS NO BASIS FOR TREATING INCUMBENTS AND NEW ENTRANTS DIFFERENTLY WITH RESPECT TO EXCLUSIVE CONTRACTS

Even if the Commission could find a statutory basis for restricting exclusive MDU contracts, it would have no policy basis for imposing such restrictions only on *incumbent* operators. Exclusive contracts to serve residential MDUs, as the Commission recognized in its inside wiring rulemaking proceeding four years ago, can have "both pro-competitive and anti-competitive aspects,"[14] depending on the circumstances. Exclusivity may allow a provider to serve an MDU more efficiently (and be, in this respect, pro-competitive), or simply may protect the provider from competition (which could be anti-competitive); one is not always certain. But

[12] *See* Section 706 of Telecommunications Act of 1996, *supra. See also* Conference Report, H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 210 (1996).

[13] *See* FCC Report on High-Speed Services for Internet Access: Status as of June 30, 2004, http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1204.pdf (2004).

[14] *First Order on Reconsideration and Second Report and Order*, 18 FCC Rcd 1342, 1370 (2003).

allowing some competitors but not others to enter into exclusive contracts would virtually *always* skew the marketplace in a way that adversely affects competition and adversely affects subscribers in the MDU.

The Commission has already explained why this is so. In 2000, in its "Competitive Networks" proceeding, it concluded that, unlike the case of cable residential MDU wiring, the anti-competitive effects of exclusive *telecommunications* contracts in *commercial* buildings decisively outweighed any pro-competitive effects. Although one of the allegedly anti-competitive effects of such contracts was that they would prevent CLECs and other alternative providers from significantly diminishing the market power of entrenched incumbent local exchange carriers, the Commission nonetheless recognized that barring only incumbents from entering into exclusive contracts would distort, not promote, a competitive marketplace:

> Although competitive LECs currently hold only a relatively small share of the local telecommunications market as compared to incumbent LECs, we believe that it is necessary to prohibit both competitive and incumbent telecommunications service providers from entering into exclusive access contracts in commercial settings, *in order to ensure competitive neutrality in the market.* Competitive providers are growing in this market, and new entrants are actively seeking to win customers, especially customers in commercial office buildings, that are now served by the incumbent LEC. In this environment, applying an exclusive contract prohibition only to the incumbent LEC could *distort competitive outcomes and ill serve end user interests.* Moreover, in the case of competitive LECs, an exclusive contract may essentially constitute a device to *create* market power.[15]

In today's environment, the need to ensure competitive neutrality is even more compelling. In 2000, incumbent LECs had 82.4% of all commercial access lines, yet the Commission believed it would be wrong to prohibit only *incumbents*' exclusive contracts. Today, incumbent cable operators serve only 67% of all multichannel video customers, and the

[15] *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, 22998 (2000) (emphasis added).

Commission has recognized that the video marketplace is characterized by vigorous competition among cable operators, two national DBS providers – and, now, the incumbent LECs as well. There's much less reason to jump start competition by giving new entrants an artificial regulatory advantage in today's video marketplace than there was in the commercial telephone marketplace of 2000 – and the Commission found that there was insufficient reason to do so even then.

Moreover, competitive neutrality is even more important today because of the convergence of broadband technologies and the vigorous competition that now exists between telephone and cable companies for voice, video and high-speed Internet customers. In this marketplace, as Chairman Martin has often stated, the Commission especially needs to ensure that its efforts to promote competition are "competitively and technologically neutral," "achieve regulatory parity by applying a consistent regulatory framework across platforms," and "do not favor one technology or industry over another."[16]

Verizon has also recognized that any ban on exclusivity should apply to incumbents and new entrants alike – at least in those circumstances when *it* is the incumbent. Thus, in the "Competitive Networks" proceeding, it argued that exclusive agreements for the provision of telecommunications services in MDUs should be prohibited – but that limiting the prohibition to incumbents would be wrong:

> This restriction should not be limited to favor one set of competitors. In particular, the Commission should not prohibit exclusive access arrangements only for incumbents but then allow newer entrants to sign exclusive access contracts, as one competitor requests…. Any service provider with exclusive

[16] *In the Matter of: 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, adopted May 31, 2007 (Statement of Chairman Martin).

> access to tenants is dominant within that building, regardless of whether that provider is an incumbent or newer entrant, and any exclusive access arrangement favoring a single carrier prevents tenants from receiving service from their provider of choice.[17]

If there are efficiencies associated with exclusive contracts, those efficiencies should be equally available to all competitors of video services. If, on the other hand, the Commission concludes that MDU consumers should be allowed to choose their providers of communications services on a unit-by-unit basis, then it should bar all providers from entering into exclusive contracts. The competitive battle among providers should not be skewed by allowing some but not all competitors to gain the advantages (whether pro-competitive or anticompetitive) of exclusivity.

III. ANY PROHIBITION ON EXCLUSIVITY SHOULD APPLY PROSPECTIVELY AND SHOULD NOT ABROGATE EXISTING CONTRACTS

Whatever statutory authority the Commission might have to regulate exclusive MDU contracts prospectively – (and we have argued above that it has none) – it surely may not abrogate *existing* contracts. The Commission has already recognized that, as a matter of public policy, invalidating existing exclusive contracts would have adverse consequences that would not result from a *prospective* rule.

After prohibiting telecommunications carriers from entering into exclusive contracts with commercial building owners, it "recognize[d] . . . that the modification of existing exclusive contracts by the Commission would have a significant effect on the investment interests of those building owners and carriers that have entered into such contracts."[18] Therefore, the

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17 Reply Comments of Verizon, WT Docket No. 99-217 at 4 (Feb. 21, 2001).

18 *In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, 23053 (2000).

Commission was "inclined to proceed cautiously in this area,"[19] and it did not prohibit the enforcement of existing contracts.[20]

The same policy issues apply to existing contracts entered into by multichannel video providers. Cable operators and building owners have made investment decisions based on their agreements to enter into exclusive agreements. In particular, cable operators and other MVPDs may have made decisions regarding their investment in facilities inside MDUs, based on the size of their expected customer base.

Moreover, while abrogating existing contracts will have these "significant" adverse effects on the parties to those contracts, there's scant evidence that those contracts are serving as barriers to entry or are significantly impeding the deployment of video services by competitive providers. The ex parte filings in the Commission's recent proceeding to implement Section 621(a)(1), which the Commission cites as a reason for reopening the question of exclusivity, alleged – in the most cursory way – that such problems existed. But, as NCTA pointed out to the Commission, even the anecdotal evidence in those filings was of questionable accuracy:

> Moreover, even Verizon's sparse anecdotal evidence of the existence of exclusive MDU contracts appears to be of questionable validity. For example, Verizon asserts that it "was informed" that a particular MDU development that it sought to serve in Fairfax County, Virginia was "subject to a *perpetual* exclusive access agreement with the incumbent cable operator," Cox Communications, and that an unnamed MDU owner "in the Norfolk, Virginia area has informed Verizon that Cox is actively seeking exclusive access arrangements with some of the MDUs in that area." But Cox has asked NCTA to make clear, for the record, that notwithstanding what Verizon has been informed by others, Cox neither seeks nor is aware of having *any* exclusive MDU access agreements in these areas or elsewhere.[21]

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19 *Id.*

20 The Commission sought further comment on the question in a Further Notice of Proposed Rulemaking, *id.*, but seven years later has not acted on the Further Notice or reversed its determination.

21 Ex Parte Letter from Daniel L. Brenner to Marlene h. Dortch, Secretary, FCC, MB Docket No. 05-311 (Sept. 8, 2006) (citing and quoting Ex Parte Letter from Leora Hochstein to Marlene Dortch, July 6, 2006). The Commission cites Verizon's Ex Parte Letter in the Notice, but does not reference NCTA's response.

Besides, Verizon's allegations that existing exclusive contracts are thwarting its own competitive entry into the video marketplace seem to be at odds with Verizon's own glowing descriptions of its progress in deploying service and gaining customers. For example, Verizon's ex parte letters cite exclusive contracts in Tampa, Florida, which are allegedly serving as barriers to entry. But Verizon appears to be having no problems competing in Florida:

> The Florida market has the second highest penetration for FiOS TV adoption and the third highest penetration for FiOS Internet among the 10 states where FiOS TV is offered and 16 states where FiOS Internet is offered. Currently, DSL service is available in nearly 85 percent of Verizon's Florida service territory. Verizon's all-fiber network, which delivers FiOS services, is available to over 417,000 premises in the state, and it will be extended to a total of 685,000 single-family homes, multidwelling units and small businesses by year-end.[22]

Nor is Verizon's entry being stalled in the Texas, Maryland and Virginia communities that its letter cited.[23] Thus, there's no apparent policy reason for the Commission to tamper with existing MDU contracts.

In any event, the Commission has no *authority* to abrogate the contracts entered into by MVPDs and MDU building owners. The Commission's authority to undo existing common law contractual rights is even more narrowly circumscribed than its "ancillary jurisdiction" under Section 4(i). As discussed above, the Commission's Section 4(i) jurisdiction extends to actions that are reasonably ancillary to the performance of a specific statutory responsibility (which, in

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22 "Hiring Continues for New Consumer Sales Consultants at Verizon to Meet Increased Consumer Demand in Florida for Company's Broadband Products; *Company Seeks 40 New Employees to Serve Tampa Bay Region; Adds Positions to Hiring Wave That Started Earlier This Year*," Verizon Press Release, May 22, 2007.

23 *See, e.g.*, FiOS Fact Sheet, posted on Verizon PolicyBlog, http://policyblog.verizon.com/policyblog/blogs/policyblog/czblogger1/290/fios-fact-sheet.aspx, May 13, 2007: "At the end of March 2007, Verizon's all-digital FiOS TV service was available to 3.1 million premises in 10 of the states where the company is building FTTP: California, Delaware, Florida, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Texas and Virginia…. As of March 31, 2007, Verizon had over 760 local video franchises. When the company begins selling its video services in all of the localities covered by the franchises, FiOS TV will be available to about 10 million households."

this case, does not exist). But, under longstanding Supreme Court doctrine, a statute will not be deemed to authorize the abrogation of existing common law rights "unless that result is *imperatively required*" by the statute, to the extent that that preserving the contractual rights would "render its provisions nugatory."[24]

There is no statutory provision that authorizes, much less *compels*, the abrogation of existing exclusive contracts in MDUs. Indeed, as one court held in 1974, nothing in the Communications Act at the time authorized abrogation of *any* existing contracts:

> The Communications Act contains no express statement of an intention to authorize unilateral modification or abrogation of privately negotiated contracts. Nor do the various provisions of the Act "imperatively require" that [a court] imply such authorization.[25]

And nothing in the subsequently enacted Title VI, which defines the Commission's regulatory powers and responsibilities over cable systems, provides any such authority.

In sum, there's no evident need to reopen or abrogate existing contracts, and to do so would unduly interfere with the investment interests of the parties to those contracts. But even if the policy considerations did not weigh decisively against taking such a step, the Commission would be without authority to do so.

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[24] *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 246, 437 (1907). *See also Bauers v. Heisel*, 361 F.2d 581, 587 (3d Cir. 1966 (en banc), *cert. denied*, 386 U.S. 1021 (1967) ("a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment.").

[25] *Bell Telephone Co. of Pa. v. FCC*, 503 F.2d 1250, 1280 (3d Cir. 1974).

CONCLUSION

Even if the Commission had authority to deal with exclusive contracts between MVPDs and MDU building owners, any rule prohibiting or restricting such contracts should apply equally to all platforms and all providers. To do otherwise would be at odds with the sound public policy imperative of competitive neutrality. Furthermore, any such rule should apply prospectively and should not disrupt and interfere with established investment expectations and interests. But the Commission does *not* have authority to address the issue of exclusive MDU contracts – and it certainly lacks the express or implied authority it would need to abrogate *existing* contracts.

Respectfully submitted,

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