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

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

COMMENTS

I. Introduction

The ability to compete for the right to serve multiple dwelling units and residential developments ("MDUs") is critical to the American Cable Association's ("ACA") small and medium-sized cable operator members. ACA members generally operate in rural and low-density communities and must aggressively compete for every potential customer in their service area. This competitive environment compels many ACA members to make a significant investment to provide service to MDUs.

Accordingly, in making any rules governing MDU contracts, the Commission must take into consideration the following market realities:

- **Voiding or modifying existing MDU contracts in small and rural markets is not in the public interest; and**

- **Small and medium-sized operators lack market power and should not be put at a regulatory disadvantage when competing for the right to serve MDUs.**

About ACA. ACA represents nearly 1,100 small and medium-sized cable companies that serve more than 8 million cable subscribers, primarily in smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district. The companies range from family-run cable businesses serving a single town to multiple system operators that focus on serving smaller markets. More than half of ACA's members serve fewer than 1,000 subscribers. All ACA members face the challenges of upgrading and operating broadband networks in lower-density markets.

II. Voiding or modifying existing MDU contracts is not in the public interest

In its NPRM, the Commission asks whether it can declare existing exclusive contracts void or voidable.[1] Even if the Commission had the power to do so, it should not. Voiding or modifying existing agreements could wipe out the significant investments made by ACA members to serve MDUs and endanger these operators' financial well-being.

A. ACA members have made significant investments to serve MDUs.

Competition to serve MDUs is robust among cable operators, SMATV providers, private cable operators ("PCOs") and DBS providers in ACA members' markets. Moreover, some ACA members are already competing for MDU contracts with publicly-traded giants like Verizon and AT&T. Not surprisingly, ACA's members report making significant financial investments in order to earn the right to serve MDUs.

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[1] [1] *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, *Notice of Proposed Rulemaking*, MB Docket No. 07-51, ¶ 10 (rel. March 27, 2007) ("*NPRM*").

In this competitive environment, MDU owners can – and often do – require ACA members to bear the cost of wiring MDUs, to make upfront per-door payments, to provide free services to building managers and common areas, and to share subscriber revenues. And ACA members must often offer low bulk rates to win the right to serve an MDU.

Moreover, ACA's members' cost structure makes MDU margins even tighter. ACA's members serve mainly rural and low-density markets, and they must spread the higher cost of upgrading facilities and bringing advanced services over far fewer customers. Sharply rising operational costs further raise the expense of doing business in smaller markets. These costs include rising retransmission consent and programming fees, and costly regulatory burdens such as CableCARD-compatible set-top boxes and TTP fees for CALEA compliance.

As a result, small and medium-sized cable operators necessarily enter into MDU agreements cautiously, relying on their ability to earn a predictable return on their investments. Eliminating or modifying existing MDU contracts would cause significant hardship to small and medium-sized cable operators by wiping out the expected return on their investment.[2] Such a harsh action could put the financial stability of many small and medium-sized companies at risk.

Further, the Commission lacks the statutory authority to abrogate existing MDU agreements.

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[2] Note that many ACA's members' bulk rates have been calculated on the assumption that the operator would be providing service to the entire MDU for the term of the agreement.

B. The Commission lacks authority to abrogate existing MDU agreements. Even if it did have such authority, abrogating existing agreements would not be in the public interest in small and rural markets.

The Commission has found that it has authority to modify a private contract where explicitly granted such power by statute and where the modification serves the public interest.[3] That said, no statutory authority exists for the Commission to abrogate existing MDU agreements. Even if statutory authority did exist, such modifications would not be in the public interest in the small and rural markets served by ACA's members.

As the Commission has recognized, modifying existing exclusive MDU contracts "would have a significant effect on the investment interests of those building owners and carriers that have entered into such contracts" and the Commission must "proceed cautiously in this area."[4] This is especially true in the case of small and medium-sized cable operators. These operators have competed fiercely for their MDU agreements. Oftentimes, these operators' financial stability is significantly dependent on the integrity of their contracts to serve MDUs. The Commission must not wipe out small and medium-sized operators' investments by abrogating existing agreements without clear and convincing evidence in the record that such contracts impair the public interest.

[3] *See, e.g., In the Matter of AT&T Corp., Order on Review,* 14 FCC Rcd. 8306, ¶ 14 (1999).

[4] *See In the Matter of Promotion of Competition Networks in Local Telecommunications Markets*, *First Report and Order*, 15 FCC Rcd. 22,983, ¶ 36 (2000) (*"2000 MDU Order"*).

Moreover, modifying or voiding existing contracts would be administratively burdensome, would create uncertainty for the parties to the contracts, and would delay delivery of services.[5] None of these results serves the public interest.

III. Small and medium-sized operators lack market power and should not be disadvantaged when competing with other operators for the right to serve MDUs.

The Commission also seeks comment on whether it should limit the ability of providers with "market power" to enter into exclusive contracts, and, if so, how to define "market power."[6] If the Commission implements rules addressing these issues, it must ensure that small and medium-sized cable operators have the same ability to compete for MDU agreements as their other competitors.

As an initial matter, small and medium-sized cable operators lack "market power," however it is defined. More than half of ACA members serve fewer than 1,000 subscribers. No ACA member serves more than 1.5% of U.S. television households.

Moreover, DBS providers have more subscribers than cable operators in rural communities,[7] and AT&T and Verizon have nationwide rollout plans. Some ACA operators are already competing with AT&T and Verizon. When the typical ACA

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[5] The Commission has refused to alter existing contracts for these very reasons. *See In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 8776, ¶ 547 (1997), *affirmed in part, reversed in part by Texas Office of Public Utility Council v. F.C.C.*, 183 F.3d 393 (5th Circuit, 1999).

[6] *NPRM*, ¶ 12.

[7] *In the Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, *Comments of the American Cable Association* at 3-4 (filed Sept. 19, 2005), *citing* Leichtman Research Group, Inc., *DBS Now the Leading Video Provider in Rural America,* Research Notes, at 3-4 (2Q 2005), *at* http://www.leichtmanresearch.com/research/notes06_2005.pdf.

member is compared against AT&T or Verizon, the competitive advantage enjoyed by these telecommunications goliaths is clear.[8]

In short, formidable competition already exists among cable operators, SMATV providers, PCOs and rural telcos in the small markets served by ACA members. The DBS giants exert significant market power over all these smaller competitors. The entry of Verizon and AT&T will only exacerbate the disparity. Accordingly, the ability of small and medium-sized operators to remain competitive requires that they not be at a regulatory disadvantage when competing for MDU contracts with their larger and better-financed competitors.

IV. Conclusion

The Commission must not jeopardize the significant investment that small and medium-sized cable operators have made to provide video, broadband and VoIP services to MDUs in low-density markets. For this reason, any rules regarding exclusive contracts should be prospective – existing contracts should not be disturbed. Further, the Commission must ensure that any rules that it adopts do not widen the disparity between small and medium-sized cable operators and the giant MVPDs with

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[8] In 2006, AT&T had gross operating revenues in 2006 of over $63 billion, 2.5 times more than Comcast's operating revenues, and orders of magnitude more than the revenues of any ACA member. *AT&T Inc. 2006 Annual Report*, available at http://www.att.com/gen/investor-relations?pid=9186 (reporting 2006 operating revenues of $63.055 billion) at 18; *Press Release*, Comcast Corporation, *Comcast Reports 2006 Results and Outlook for 2007*, *available at* http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-news (reporting 2006 operating revenues of $24.966 billion). AT&T's acquisition of Bell South will only increase these revenues.

Verizon's operating revenues were in excess of $88 billion in 2006. *Press Release*, Verizon Communications Inc., *Verizon's 4Q 2006 Results Cap Strong Year of Organic Growth in Wireless, Broadband and Business Markets*, *available at* http://investor.verizon.com/financial/quarterly (reporting 2006 operating revenue of $88.1 billion).

which they compete.

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