



Federal Communications Commission
Washington, D.C. 20554

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July 11, 2007

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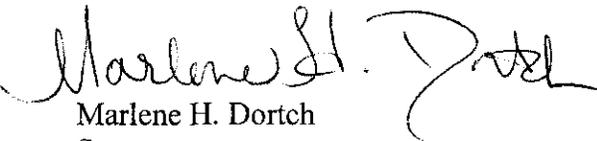
Re: Motion to Accept Filing as Timely
Filed in MB Docket No. 07-51

Dear Mr. Alvarez:

The Office of the Secretary has received your request for acceptance of the document filed by Comcast Corporation in the above-referenced proceeding as timely filed, due to technical difficulties with the Commission's Electronic Filing System.

In accordance with 47 C.F.R. Section 0.231(i), I have reviewed your request and your assertions. After considering the relevant arguments, I have determined that these filings will be accepted as timely filed on July 2, 2007. If we can be of further assistance, please contact the Office of the Secretary.

Sincerely,


Marlene H. Dortch
Secretary

MHD/gt

cc: Media Bureau

William Caton

From: Alvarez, Daniel [DAlvarez@willkie.com]
Sent: Thursday, July 05, 2007 11:42 AM
To: William Caton
Cc: Holly Saurer; John Norton
Subject: Comcast Comments in MB Dkt No 07-51
Attachments: confirmation.pdf

Bill,

As per our phone conversation this morning, please accept this request to accept the comments of Comcast Corporation in MB Dkt No. 07-51 as timely filed. These comments were due on Monday, July 2. That evening, between 9:30 PM and 10:30 PM, I made three different attempts to file the comments using ECFS, and each time I made it to the confirmation page but the only thing that showed up on the confirmation page was the FCC banner that normally appears at the top of the page. First thing on Tuesday morning, I called the ECFS help desk to see if the comments had, in fact, been accepted by the system. I was informed that they did not appear on the system, and I was advised that I should try to file them again, and then forward the confirmation number, once I received it, to the ECFS help desk with a request that the filing be shown as having been submitted on July 2. I immediately tried to upload them again, and I was eventually able to get to the confirmation page and got the confirmation number, and I forwarded that on to the ECFS help desk. I've attached to this e-mail the confirmation page from the Tuesday morning submission. I have not heard from the ECFS help desk since Tuesday morning.

As instructed, I am copying the designated Bureau contacts for this proceeding on this message.

Thank you for your assistance on this matter. If there is any more information I can provide, please do not hesitate to contact me.

Best,

Daniel

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<<confirmation.pdf>>

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The FCC Acknowledges Receipt of Comments From ...
Comcast Corporation
...and Thank You for Your Comments

Your Confirmation Number is: '200773239439 '

Date Received: Jul 3 2007

Docket: 07-51

Number of Files Transmitted: 3

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updated 12/11/03

Proceeding: **In the Matter of Exclusive Service Contracts for Provision of Video Services in**

Applicant Name: **Comcast Corporation**

Proceeding Name: **07-51** Author Name: **Daniel Alvarez** **5514690384**

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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

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July 2, 2007

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**BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.**

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)	
)	

COMMENTS OF COMCAST CORPORATION

Comcast Corporation (“Comcast”) hereby responds to the above-captioned Notice of Proposed Rulemaking (“*Notice*”) regarding the use of exclusive contracts in the provision of video services to multi-dwelling units (“MDUs”) and other real estate developments.¹ In these comments, Comcast seeks to raise the Commission’s awareness of the many complex legal, factual, and policy issues that must be assessed as the Commission considers whether it can and should intervene in the relationships among landlords, tenants, state legislatures, and providers of multichannel video services, high-speed Internet services, and voice services. These issues cast serious doubt as to whether the Commission has either the factual predicate or legal authority for the change in policy contemplated in the *Notice*. At a minimum, the Commission must (a) refrain from abrogating or otherwise affecting existing contracts, and (b) ensure that whatever rules it adopts do not tip the regulatory scales in favor of or against any particular subset of MVPDs.

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, 22 FCC Red 5935 (2007) (“*Notice*”).

I. INTRODUCTION AND SUMMARY

MDUs are an important part of the video marketplace. Many consumers in high-rise apartments and condominiums, garden-style apartments, private housing developments, and other forms of MDUs benefit both in terms of lower prices and higher value from the competition between cable operators like Comcast and other MVPDs for the right to serve those consumers. It is wrong to suggest that exclusive arrangements between MDU owners and MVPDs prevent those consumers from receiving the benefits of competition; in fact, as the Commission previously found, the MDU marketplace may be “more competitive than other MVPD markets.”²

The Commission has already conducted a detailed proceeding on the question of whether to prohibit exclusive arrangements between MDUs and MVPDs, and concluded that, on balance, there was no need for the Commission to take action on the issue.³ This prior decision must be given significant deference, particularly as the Commission assesses the propriety of abrogating existing contractual relationships that were entered into based on the Commission’s previous decision not to prohibit such contracts.⁴

² See *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, 13 FCC Rcd 1034 ¶ 129 (1998) (“*Sixth Video Competition Report*”).

³ See *In the Matter of Telecommunications Services Inside Wiring and Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342 ¶ 70 (2003) (“*MDU Order*”). In light of that determination, the Commission did not find it necessary to determine whether it has the legal authority to act in this area. See *id.* ¶ 71.

⁴ *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Ins.*, 463 U.S. 29, 30 (1983) (“[A]n agency changing its course ... is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”). See also *Fox Television Stations et al v. FCC*, No. 06-1760, slip. op., at 21 (2d Cir. June 4, 2007) (the Commission must “provide a reasoned analysis for departing from prior precedent.”).

The Commission's conclusions in that proceeding were based, in part, on statements by numerous parties about the significant pro-competitive effects of exclusive agreements, as well as the risks associated with interfering in the marketplace. For example, SBC (now AT&T) and GTE (now Verizon) both argued *against* restrictions on exclusive contracts. SBC declared that:

The Commission should not dictate rules in [the area of exclusive contracts]. Whether or not to enter into an exclusive arrangement is a matter of private contract between the service provider and the property owner. The parties involved should be allowed the freedom to exercise their own choice in this area.⁵

Likewise, GTE cautioned that the Commission "should ... refuse to break with its precedent that avoids interference with private contracts, particularly where there is no FCC authority to support such action."⁶

Since the Commission last focused on these issues, the competitive landscape has changed in ways that substantially benefit consumers and increase the risks that unnecessary regulatory intervention will produce unintended adverse consequences. Competition in the video marketplace has become *more* intense; consumers -- including those living in MDUs -- have even *more* choice; and MVPDs face *greater* pressures to provide consumers better value and improved services. DBS providers are now the second and third largest MVPDs in the country, and the telcos, most notably AT&T and Verizon, are finally exploiting the freedom they have

⁵ Reply Comments of SBC Communications, Inc., filed in CS Docket No. 95-184, at 6-7 (Apr. 17, 1996).

⁶ *Ex Parte* Letter of GTE, filed in CS Docket No. 95-184, at 4 (Mar. 18, 1997). *See also* *Ex Parte* Letter of GTE, filed in CS Docket No. 95-184, at 21-23 (Mar. 31, 1997) (citing other contexts in which the Commission has found that exclusive contracts benefit both service providers and consumers).

had for over a decade to enter the video business.⁷ Further complicating the analysis that must be undertaken by the Commission, many providers today compete to provide not just one service but three -- video, voice, and broadband Internet -- over a single wire. This increases the risk that Commission intervention will have adverse consequences for competition across industries and services.

Comcast believes that the record will demonstrate that the Commission lacks both the factual predicate and the legal authority necessary to prohibit exclusive arrangements, and particularly to abrogate existing agreements. Further, Comcast is concerned that the actions proposed in the *Notice* create a serious risk of diminishing competition for video, voice, and broadband Internet services and harming consumer welfare. The marketplace for MDU consumers is already intensely competitive, and consumers are reaping the rewards of that competition. Actions that place a "thumb on the scale to give a regulatory advantage to any competitor"⁸ inevitably will result in diminished competition, and policies that displace burgeoning competition in the broadband and voice markets or distort the Commission's policy of competitive neutrality would only harm consumers.

The actions contemplated in the *Notice* also raise serious statutory and constitutional issues that the Commission must fully address before it can move forward. The sources of

⁷ In fact, Verizon's video business appears to be growing so fast that it is now the 11th largest cable operator and 13th largest MVPD in the country, with over 500,000 subscribers. See Steve Donohue, "Verizon CEO Seidenberg Rips Cable Competition," *Multichannel News* (June 20, 2007) available at <http://www.multichannel.com/article/CA6453855.html>. Notably, Verizon has achieved this growth without any of the regulatory help that it claims to need in this proceeding.

⁸ See *In the Matter of 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, 22 FCC Rcd 5101 (2007) ("*Franchising Order*") (Separate Statement of Commissioner McDowell).

authority cited in the *Notice* appear to be thin reeds upon which to justify any new regulations in this area. In fact, Congress has already considered and specifically chosen *not* to give the Commission the authority the *Notice* assumes. Most important, none of the statutory provisions cited by the Commission provide the necessary authority to adopt regulations that would have the effect of abrogating existing contracts between MVPDs and MDU owners.

II. THE COMMISSION SHOULD BE WARY OF TAKING STEPS THAT WOULD DIMINISH THE BENEFITS CONSUMERS DERIVE FROM ALREADY FIERCE COMPETITION.

Comcast supports Commission policies that enable consumers to enjoy the benefits of competition, but cautions against any regulatory intervention that would upset the competition that is *already* accomplishing that goal. Comcast is concerned that, by taking the actions proposed in the *Notice*, the Commission may actually *diminish* competition -- in voice and broadband Internet, as well as video. Adopting rules that would have the effect of removing a consumer's only alternative option for broadband Internet and facilities-based voice services, or that would effectively favor one set of MVPDs over another, would actually harm consumers and would contradict existing Congressional and Commission policy.⁹

The Commission has already observed that competition in the MDU marketplace is fierce,¹⁰ and that it "is improving, even with the existence of exclusive contracts."¹¹ There is

⁹ See, e.g., *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 ¶ 1 (2003), *subsequent history omitted* (noting that the 1996 Act "was partially designed to remove the decades-old system of legal monopoly in the local exchange and open that market to competition").

¹⁰ See *Sixth Video Competition Report* ¶ 129 (competition in the MDU marketplace may be more competitive than in the MVPD marketplace at large).

¹¹ *MDU Order* ¶ 71.

nothing about the state of the marketplace today that suggests competition is any less fierce, or that consumers are benefiting any less. While there certainly will be examples of individual residents in MDUs having fewer choices in certain circumstances (such as an apartment tenant's inability to receive a DBS signal because the apartment does not face the southern sky), the record will show that MDU consumers can also accrue significant benefits from the intense competition that already occurs among MVPDs to serve them.

The *Notice* does not reflect the complexity or intensity of competition in the current MDU marketplace. For example, the *Notice* does not seem to contemplate the importance that competition amongst MDUs plays in this marketplace, or the leverage that MDU owners can exert over MVPDs. The *Notice* also does not acknowledge the wide variety of MDUs or exclusive arrangements that currently exist in the marketplace; AT&T's Operations President John Stankey said recently, "no two MDUs are alike,"¹² yet the *Notice* proposes a one-size-fits-all solution. For the Commission to make a reasoned analysis and provide adequate guidance, it must fully understand the complexities of differing arrangements, the interplay of differing regulatory structures, and the realities of multi-service, facilities-based competition.

A. Actions Taken in This Proceeding May Negatively Impact Competition and Consumer Welfare in the Voice and Broadband Marketplace.

One of the most significant changes since the Commission last sought comment on this issue is the ability of cable operators to deliver multiple services over a single wire. This innovation allowed cable to lead the way in delivering real broadband Internet and facilities-based voice competition to consumers. Today, many cable customers subscribe to more than one

¹² Webcast of the Bear Stearns 18th Annual Technology/Communications Internet Conference, at 38:07 (June 12, 2007) available at <http://www.att.com/gen/landing-pages?pid=5718>.

service from their cable company, and there is an increasing demand for “triple-play” bundles of voice, video, and broadband Internet over a single wire. Unfortunately, the benefits that consumers derive from these innovations and the resulting competition may be at risk in this proceeding.

Today, cable operators like Comcast are using their existing networks to bring real, facilities-based competition to consumers of voice and broadband Internet services, including those in MDUs. The *Notice* seems to suggest that only telcos will be offering bundled services,¹³ but that is of course untrue. While telcos may well be “*primed to offer*” such bundles, cable operators are offering these bundles *right now*, and have been doing so for a number of years. Cable companies have invested over \$100 billion in private risk capital to build networks that could handle traffic for all three services. It was *cable* that invented residential broadband, with speeds in the millions of bits per second, while telcos were insisting that 64,000 or 128,000 bits per second was the best that could be done.¹⁴ It is *cable* that has at long last brought residential

¹³ *Notice* ¶ 6 (“...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.”).

¹⁴ *See Testimony of Stagg Newman, Vice President, Network Technology and Architecture, Applied Research, Bellcore, Bandwidth Forum, Federal Communications Commission* 10, 14 (Jan. 23, 1997), available at <http://www.fcc.gov/Reports/970123.txt>. (“ISDN I think has a real role, particularly over the next five to ten years. Because as you’ll see later, getting a broadband mass network out there quickly is a tremendous challenge. And today almost all Internet services are much better over -- well, they’re all better over ISDN than over POTS modem. And actually at ISDN speeds of 150 [Kbps]. That will be adequate for most of the services people envision over the next five years. Apparently that’s the view when we talk to people like Microsoft and others. . . . I believe 128 [Kbps] today would be a tremendous step forward and that’s what ISDN gives us.”).

consumers the facilities-based alternative to *monopoly phone service* for which policymakers have waited all these years.¹⁵

Commissioner McDowell aptly recognized the importance of these developments at the outset of this proceeding: “[w]ith 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.”¹⁶ Despite the fact that cable operators provide multiple services over the wire that runs into a consumer’s home or apartment, that wire is still subject to Commission rules that assume only one service -- cable service -- is being provided on that wire. As Commissioner Adelstein recently observed in a related proceeding on the cable inside wiring rules:

Under our current rules, consumers or alternative cable providers have the option to purchase cable home wiring when the customer terminates its cable service. These rules, as written, contemplate a scenario in which only one service – a video service – could be provided over any given cable wire, and only one provider would seek to use that wire. However, technological innovations and cross-platform competition are now allowing multiple services to be provided over that same wire.¹⁷

¹⁵ Comcast Digital Voice (“CDV”) has experienced tremendous growth since it was introduced in 2005. See Comcast Corporation, Comcast Timeline, <http://www.comcast.com/corporate/about/pressroom/corporateoverview/comcasttimeline/comcasttimeline.html> (last visited June 28, 2007). Comcast had only 306,000 CDV subscribers, reflecting a penetration rate of 1.6% of available homes, at the end of 2005. One year later Comcast had 1.9 million CDV customers, or 5.7% of available homes. Compare Press Release, Comcast Corporation, Comcast Reports 2006 Results and Outlook for 2007, at 11 (Feb. 1, 2007) with Press Release, Comcast Corporation, Comcast Reports 2006 Results and Outlook for 2007, at 2 (Feb. 1, 2007). The explosive growth of CDV has continued into 2007. In the first quarter alone, Comcast added 571,000 new CDV subscribers, nearly 2.5 times more than in the same period in 2006, bringing the total number of CDV subscribers to 2.4 million, or 7% of available homes. See Press Release, Comcast Corporation, Comcast Reports First Quarter 2007 Results, Apr. 26, 2007, at 2.

¹⁶ Notice, Separate Statement of Commissioner McDowell.

¹⁷ *In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring Clarification of the Commission's Rules and Policies Regarding Unbundled Access to Incumbent* (footnote continued...)

As Commissioner Adelstein recognized, the current rules do not take account of current marketplace and technological realities. Even where the MDU resident owns the wiring, and multiple providers are authorized to serve a property, it is not possible for an MDU resident to pick and choose separate providers for video, voice, and broadband Internet services in the same manner as detached dwelling residents in overbuilt communities can do. This is because of the way the cable inside wiring rules are currently designed and interpreted (including the Commission's recent decision to convert much cable "home run wiring" into cable "home wiring"¹⁸), and because of the fact that cable wire cannot be shared by multiple providers.¹⁹ Even if a building must allow two providers to serve its property, the cable inside wiring rules allow the second provider to use the wiring of the first provider, rather than have the second provider deploy its own wiring.²⁰ Except to the extent that separate wiring pathways are

(...footnote continued)

Local Exchange Carriers' Inside Wire Subloop, Report and Order and Declaratory Ruling, FCC 07-111 (rel. June 8, 2007) ("*Sheetrock Order*") (Separate Statement of Commissioner Adelstein).

¹⁸ In finding that wiring behind sheetrock is "physically inaccessible," the Commission effectively moved the demarcation point further away from the actual MDU unit, thereby making much of what was previously considered "home run" wiring into "home" wiring. See *Sheetrock Order* ¶ 15. The Commission appears to be under the misimpression that it achieved some sort of competitive balance by pairing its *Sheetrock* decision with a decision on a Cox petition regarding access to ILEC subloops. This is incorrect for two reasons. First, the decision on the Cox petition does not have the effect of divesting the ILEC of the ownership of its property; unlike the cable operator who effectively is forced to terminate its ownership of the wiring, the ILEC continues to own the wiring it has constructed and collects a fully compensatory fee from any third party who obtains access to that wiring. Second, the decision in the Cox petition does not help cable operators, like Comcast, which do not use copper subloops to deliver their broadband Internet and digital voice services.

¹⁹ For a discussion of why it is technically infeasible for multiple providers to provide service over a single wire using existing network architectures, see Comments of National Cable Television Association, filed in MM Docket No. 92-260, at 8 (Dec. 23, 1997).

²⁰ See 47 C.F.R. § 76.802(a)(2) ("Upon voluntary termination of cable service by an individual subscriber in a multiple-unit installation, a cable operator shall not be entitled to remove the cable home wiring unless: it gives the subscriber the opportunity to purchase the wiring at the replacement cost; the subscriber declines, and neither the MDU owner nor an alternative MVPD, where permitted by the MDU owner, has provided (footnote continued...)

*constructed, the customer will be limited to a single provider for all of the services that are delivered over the one wire. Thus, prohibiting exclusive video agreements could undermine, rather than advance, the Commission's "interrelated federal goals of enhanced cable competition and rapid broadband deployment" for MDU residents.*²¹

Take, for example, a situation where Comcast has an exclusive video agreement with an MDU, and also happens to provide residents of that MDU with broadband Internet and voice service over the same wire. If the Commission acts to abrogate the existing contract, or otherwise prevent the exclusive agreement, and the building owner allows Verizon to begin providing video service to the building, and a resident decides to terminate her video service with Comcast and switch over Verizon, Verizon would then take over Comcast's wiring, and the resident will lose her ability to continue to obtain Comcast's broadband Internet and voice services. In effect, the Commission's decision would reduce competition in broadband Internet and voice services by removing the ability of the cable operator to provide those services to consumers who want them. Such a result obviously would not serve the interests of competition. Nor, as discussed below, would it be lawful.

B. Favoring One Subset of MVPDs Over Another Using Dubious Notions of "Market Power" May Actually Diminish Competition and Harm Consumer Welfare.

If the Commission decides that it can and should prohibit any or all exclusive arrangements between MVPDs and MDUs or other real estate developments, it is imperative that

(...footnote continued)

reasonable advance notice to the incumbent provider that it would purchase the cable home wiring pursuant to this section if and when a subscriber declines.").

²¹ See Notice ¶ 6.

any such rules must apply equally -- both as a matter of law and as a matter of practice -- to all competitors. Only rules that are competitively neutral would have any chance of generating the kind of competition that benefits consumers of voice, video, and broadband Internet.

Unfortunately, the Commission's suggestion that it examine whether "market power" should be a part of the analysis seems to be an attempt to allow some companies, but not others, to enter into exclusive contracts. The Commission previously contemplated such a rule, but chose not to enact it.²² Now, as then, such a rule would be contrary to good policy; it would be in direct conflict with the Commission's oft-stated goal of achieving competitive and technological neutrality,²³ and it would require the Commission to ignore marketplace realities.²⁴

The primary problem with this proposal is that it would not increase competition for consumers who live in MDUs. If the goal is to maximize the choice of video service providers that is available to each individual household in an MDU, rather than just shifting market share, there is no more reason to allow AT&T or Verizon to have an exclusive contract than to allow

²² See *In the Matter of Telecommunications Services Inside Wiring and Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 ¶ 261 (1997) ("Inside Wiring Order").

²³ See, e.g., *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (finding that broadband delivered over wireless facilities in a Title I information service); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14986 (2005) (same, for wireline networks).

²⁴ Of course, where Congress has directed the Commission to treat different providers of a particular service in different ways, the Commission is bound by Congress' directives. For example, Congress has established certain rules for "telecommunications carriers," certain additional rules for "local exchange carriers," other rules that apply only to "incumbent local exchange carriers" (with variations for two particular subsets of those), and certain rules that apply only to the Bell Operating Companies. See 47 U.S.C. §§ 251(a)-(c) & (f), 271-275.

Comcast to have one.²⁵ From the point of view of the consumer residing in the MDU, an MVPD that has an exclusive access arrangement to the MDU has “market power” in that MDU, regardless of how many other subscribers that MVPD may serve in the surrounding area. It does not matter whether the company providing the exclusive service is established or new to the marketplace -- the consumer still only has one choice.

Even more problematic, this “market power” proposal could actually reduce the competition to serve these developments. If the Commission should impose a prohibition only on those MVPDs it deems to possess “market power,” it would be significantly hampering some MVPDs’ ability to negotiate for and win contracts to serve MDU consumers. Without the ability to negotiate for these contracts on a level playing field with giants like AT&T and Verizon, those cable operators deemed to wield “market power” may be precluded from competing in the MDU marketplace at all. While that may be exactly what the Verizons and AT&Ts of the world would like, it would undoubtedly harm consumers. By removing potential bidders from the competition to obtain an MDU service contract, the Commission would be reducing the concessions an MDU owner could extract from the bidding MVPDs and pass along to its tenants.

Most fundamentally, the problem with the Commission’s proposal is that it implies that *any* MVPD may have “market power.” This is at odds with the facts, and with Commission precedent. As Comcast has demonstrated on numerous occasions, and as the Commission has

²⁵ See *Notice, Separate Statement of Commissioner Copps* (“There is no reason why Americans who happen to live in [MDUs] should have a narrower range of choices when it comes to video and broadband service than Americans who live in free-standing buildings.”).

*found time and again, the video marketplace is intensely competitive.*²⁶ No MVPDs have “market power” of the kind that could harm competition in the market for MDU consumers.

Furthermore, the idea of using “market power” in the video marketplace as a barometer in this context also fails to recognize the growing importance of bundled services. As detailed above, Commission action in this proceeding could impact the broadband and telephony markets in ways that the *Notice* does not seem to anticipate. Both Commissioners McDowell and Adelstein have recognized the growth -- and value -- of bundles. The fact that many companies now provide all three services over a single wire means that a decision that is intended to affect video services alone could significantly affect competition for other services, even to the point of undermining broadband competition and stifling long-awaited competition for voice services. Surely, this is not a result that the Commission desires.

Finally, the Commission should keep in mind how little an MVPD’s “market power” actually matters in the marketplace to serve MDUs and similar real estate developments. As discussed more fully below, MDU owners have significant leverage and can extract concessions from MVPDs that other customers cannot. In states without mandatory access laws, the *property owners* have the *fundamental right* to exclude any provider they want to exclude, for whatever

²⁶ See, e.g., *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 3876 ¶ 5 (2007) (“Competition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation.”); *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755 ¶ 5 (2005) (“[C]onsumers today have viable choices in the delivery of video programming, and they are exercising their ability to switch among MVPDs.”). See also Comments of Comcast Corporation, filed in MB Docket No. 06-189 (Nov. 29, 2006); Reply Comments of Comcast Corporation, filed in MB Docket No. 06-189 (Dec. 29, 2006).

reason.²⁷ The property owner makes a decision to enter into a particular relationship with an MVPD, be it exclusive or otherwise, based on his/her own conclusions about what is best for the property. The substantial number of MDUs and other properties which have chosen not to enter into exclusive arrangements serves as clear evidence that, regardless of whatever one may think about the motives behind exclusive arrangements, no MVPD has the necessary market power to force a property owner or manager to make a decision that is, in the property owner's estimation, contrary to the best interests of the property and the tenants.

C. Competition Amongst MDUs and the Leverage that MDU Owners Can Exert Over MVPDs Plays a Significant Role in the MDU Marketplace.

The Commission must also consider the extent to which competition amongst MDUs impacts video competition for consumers in MDUs, and the extent to which MDU owners can exercise leverage in their negotiations with MVPDs. These considerations reveal a marketplace that is intensely competitive, where MDU owners have the capability and sophistication to extract significant concessions from the MVPDs competing to serve MDUs.

When the Commission previously sought comment on this issue, it recognized that "MVPDs competing for the right to serve the building generally will have to offer the mix of video service quality, quantity and price that will best help the MDU owner compete in the marketplace."²⁸ And, as the Commission previously explained, exclusive arrangements among MVPDs and MDU owners may reflect the competitive dynamic in the MDU marketplace:

²⁷ See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982) ("[T]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); see also *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (the "right to exclude" is commonly held to be a fundamental element of property rights).

²⁸ MDU Order ¶ 11.

[M]arket forces will compel MDU owners in competitive real estate markets to take their tenants' desires into account.... MDU owners must compete with rival owners to keep current residents and attract additional residents. In this context, an MDU owner that agrees to an exclusive contract in exchange for a monetary payment but does not somehow flow that payment through to its residents (e.g., a new swimming pool, a security system, or discounting the rent below the competitive level) is vulnerable to competition from similarly situated MDUs offering a more attractive mix of price and amenities to prospective tenants. If the MDU owner tries to simply keep the payment, new tenants will not be as attracted to the building and existing tenants will have an additional reason to relocate to another MDU (e.g., an otherwise similar residence where, to attract tenants, the owner has utilized its exclusive access payment to reduce rent or improve amenities).²⁹

The Commission cannot ignore these previous conclusions. The facts suggest that overturning these conclusions will not be an easy thing to accomplish.

MDU owners and managers are sophisticated market participants, and understand the nuances of the agreements to which they bind themselves. MDU owners have a choice of whether to enter into any kind of exclusive arrangement, subject to *state* law. Many MDUs choose not to enter into exclusive arrangements because they have made a decision that doing so will allow them to better attract tenants, while others decide that the calculus favors some form of exclusivity. MDU owners who do believe some form of exclusivity would help them attract tenants invariably have at least three MVPD options -- the established cable operator and the two DBS providers -- and often a fourth, fifth, or even sixth option in the form of a SMATV provider, an overbuilder, or, more recently, an ILEC that provides cable service, such as AT&T or Verizon.

²⁹ *Inside Wiring Order* ¶ 61. See also *id.* ¶ 42 ("We disagree that the building-by-building procedural mechanism does not benefit consumer choice because it merely substitutes one MVPD for another ... Generally, MVPDs encounter an environment in which the MDU owner must compete with similarly-situated MDU owners to attract and retain tenants ... MVPDs competing for the right to serve the building generally will have to offer the mix of video service quality, quantity and price that will best help the MDU owner compete in the marketplace.").

MDU owners' leverage in this situation is also enhanced by the fact that some service providers concentrate their subscriber acquisition efforts on MDUs. Often, "alternative" MVPDs focus on particular MDU properties or developments because such properties offer high numbers of potential subscribers in concentrated areas, allowing these providers to gain higher returns on their capital investments compared to serving non-MDU consumers. More importantly, these providers can focus on MDU consumers because they often do not have to abide by many of the regulatory constraints, such as build-out requirements, under which many established cable operators must operate. For example, in a majority of the states where AT&T and Verizon have obtained state video franchising legislation, the legislation prohibits the imposition of build-out requirements.³⁰ This frees AT&T and Verizon to focus their video service deployment in any given community on high-density MDU properties, if they so choose. As a result, in some circumstances, there may be more competition to serve MDUs in a particular community than to serve the detached dwellings in that same community.

In previous proceedings, some of the cable industry's strongest competitors in the MDU marketplace recognized the important role played by competition among MDUs. For example, the Independent Cable & Telecommunications Association said that "[c]ompetition in the MDU market will best be advanced if the MDU owner, through the exercise of its private property rights, is allowed to determine which provider(s) will service its property and is allowed

³⁰ Eleven states have enacted state video franchise legislation explicitly prohibiting state and/or local governments from imposing mandatory build-out requirements on state video franchise holders. *See, e.g.*, Fla. Stat. § 610.107; Kan. Stat. § 12-2023(f); Ga. Code § 36-76-10; Ind. Code § 8-1-34-17(b)(1); Iowa Code § 477A.5(1)(a); Mich. Stat. § 484.3303(8); Rev. Stat. Mo. § 67.2705(9); N.C. Stat. § 66-356(d); Act of June 4, 2007, No. 526, § 29(3)(b), 2007 Nev. ALS 326 (to be codified at title 58 of chap. 711 of the Nevada Revised Statutes); S.C. Code § 58-12-350; Tex. Stat. § 66.007.

to grant a chosen provider exclusive access ...”³¹ Nothing has happened in the intervening years to diminish the incentives of MDU owners to reach agreements that increase the attractiveness of their properties to current and potential tenants. To the contrary, the increasing number of MVPDs with the desire and ability to offer video services to MDUs enhances the MDU owners’ ability to negotiate agreements that serve their and *their tenants’* best interests.

D. The Commission Must Account for the Complexities and Intricacies of the MDU Marketplace.

MVPDs of all sizes, from giants like AT&T and Verizon to smaller open video system (“OVS”) providers like OpenBand,³² invest significant amounts of capital for the right to serve MDU consumers. As it considers the level of competition in this segment of the MVPD marketplace, the Commission should carefully consider the numerous types of MDUs and other real estate developments that may be implicated by this proceeding, the various types of arrangements that MVPDs enter into with MDUs, and the various legislative decisions embodied in relevant state landlord-tenant and mandatory access laws.

There is a wide variety of MDUs and “other real estate developments” that could be affected by any actions the Commission takes in this proceeding. Is this proceeding limited only to high-rise apartments? Does it cover garden-style apartments as well? How about condominiums? Townhouses? Gated communities? Privately developed sub-divisions?

³¹ *Ex Parte* Letter of Independent Cable & Telecommunications Association, filed in CS Docket No. 95-184, at 1 (Feb. 27, 1997).

³² OpenBand is a “converged telecommunications company” that, among other things, “teams with land developers and builders to design and build Smart Neighborhoods.” *See* OpenBand Residential Services, available at <http://www.openband.net/res/res.htm>. *See also* Kim Hart, “In Suburbs, Locked Into a High-Tech Lure,” *Wash. Post*, A01 (May 21, 2007) (detailing some of OpenBand’s experience in suburban Washington, DC).

Privatized military housing? Universities? Long-term care communities? Each of these types of real estate developments seems to be swept into the Commission's inquiry, but each implicates different issues that the Commission must consider and which the *Notice* fails to contemplate. For example, different MDUs use different wiring construction techniques and building materials that affect whether and how other providers can deliver their services to consumers in those buildings. Even within similar types of real estate developments (e.g., condominiums), one might find significant differences, such as different arrangements for collective governance.³³

The *Notice* also fails to account for the fact that there are numerous types of exclusive arrangements, even within a particular type of MDU or real estate development. The type of arrangement that seems most at issue in this proceeding is a contract between an MDU owner and an MVPD by which the MVPD is the exclusive provider of video services in the particular building or real estate development.³⁴ As far as Comcast can tell, MVPDs of all sizes have entered into these types of agreements, and continue to do so.³⁵ These are done for a variety of reasons. Sometimes, the MVPD wants to ensure that it has a reasonable opportunity to recoup its

³³ As the Commission has recognized, "many MDU owners are tenant-based condominium associations and cooperative boards that cannot be presumed to be non-representative of their tenants' interests." *MDU Order* ¶ 14. The Commission should also be aware of many other differences that may exist. For example, some condominiums include the cable fee in the condo fees, and, in that subset of condominiums, some allow the tenants to choose another provider and do not charge tenants the cable portion of the condo fee, while others require the tenant to pay the cable portion of the condo fee regardless of whether the tenant actually subscribes to the service. This is not an issue over which MVPDs have any control, but it is an issue which affects the competitive aspects of the marketplace.

³⁴ As discussed below, even where a cable, satellite, or SMATV provider has such an arrangement, individual tenants generally have the right to install, maintain, and use satellite dishes that are less than one meter in diameter, television antennas, and wireless cable antennas in such areas where the consumer has exclusive use of the area, such as a balcony or patio. *See* 47 C.F.R. § 1.4000.

³⁵ *See* Declaration of William F. Revell ¶¶ 8, 11 – 16 & Exs. A - E (various exclusive access and exclusive service agreements); Declaration of William F. Revell ¶ 28 (exclusive access agreement of AT&T).