

investment.³⁶ Other times, MVPDs enter into these arrangements at the behest of the MDU owner, who may have decided that an exclusive arrangement will increase the attractiveness of the property to potential tenants because of discounted rates for service, or may simply prefer only to have to deal with one provider because of increased responsiveness and accountability.³⁷

At the same time, however, the Commission should be aware that many MVPDs and MDU owners enter into agreements that have the *effect* of deterring other MVPDs from providing service, even though they do not specifically grant a provider exclusive access rights. For example, bulk rate agreements can have the same effect as an exclusive access agreement. A bulk rate agreement is an agreement whereby the MVPD agrees to provide its service to the consumers in the MDU at a discounted rate, which is often paid to the MVPD by the MDU owner, who then includes video service as part of its lease benefits.³⁸ It is interesting to note that Verizon, even while pressing the Commission to eliminate exclusive contracts, has itself obtained bulk arrangements with developers of multi-thousand home private communities in order to obtain the practical benefits of exclusivity without calling it such.³⁹ Yet, from the point of view of the consumer, the effect is the same.

Property owners and developers also enter into exclusive *marketing* arrangements with MVPDs. Under these arrangements, the property owner agrees to engage in certain types of marketing for the provider in question, or to allow the provider certain unique marketing

³⁶ MDU Order ¶ 12 (noting that some MVPDs enter into exclusives to ensure that they can recoup their investment).

³⁷ Declaration of William F. Revell ¶ 9.

³⁸ Declaration of William F. Revell ¶ 7.

³⁹ Declaration of William F. Revell ¶¶ 17 - 24.

opportunities of its own, to the exclusion of any marketing for any other providers. For example, an exclusive marketing agreement may require the MDU owner to provide certain marketing documents to new tenants upon signing of the lease agreement. Depending on how a particular agreement is drafted, the arrangement may not prevent other MVPDs from providing service in the building but it may deter their ability to do so, since marketing agreements are often coupled with revenue-sharing agreements, under which the MDU owner is paid a certain percentage of revenues generated from providing whatever service(s) is covered by the agreement.⁴⁰ Where the MDU owner has a financial incentive to direct tenants to the MVPD with which it has an agreement to the exclusion of other MVPDs, it may be less economically attractive in that situation for other MVPDs to offer service in that MDU.

Yet another type of exclusive arrangement involves exclusive wiring arrangements. In this situation, the MDU owner usually contracts with an MVPD such as the franchised cable operator or other MVPD to construct the wiring throughout the building, and then takes ownership of the wiring in exchange for which the MVPD has the exclusive rights to use the wiring.⁴¹ This type of arrangement is different from the exclusive access arrangements described above because here the MVPD usually is not using its own facilities to provide the service;

⁴⁰ Declaration of William F. Revell ¶¶ 18 – 33 & Ex. F (Verizon press release announcing its “aggressive plan to bring FiOS services to apartments, condos, and other multi-dwelling unit sites,” through “an exclusive marketing arrangement with Verizon”); Ex. G (Verizon marketing materials advising developers of “Easy Money” they can receive from Verizon), Ex. H (AT&T “Smart Moves” program “is designed specifically to secure and retain AT&T California as the preferred provider of services,” and confirming that “[i]n return for exclusively marketing our products and services, AT&T . . . compensates the owner a share of the billed revenue earned at their community”); Ex. I (examples of AT&T exclusive marketing agreement with revenue sharing); Ex. K (BellSouth “Standard Marketing Agreement” for exclusive MDU marketing of voice, mobile, Internet and video services); Ex. L (Qwest “Broadband Services & Marketing Agreement” for exclusive MDU marketing of voice, mobile, Internet and video services); Ex. M (Qwest marketing materials distributed to new tenants of MDUs Qwest serves).

⁴¹ Declaration of William F. Revell ¶ 6.

rather, it is providing the service using the facilities owned by the MDU owner. As mentioned above, it may not be technically possible given existing network architectures for multiple MVPDs to simultaneously provide different services over the same wire.⁴²

Finally, numerous states already regulate access to MDUs. There are currently 18 states, encompassing some 121 million people, that have some form of state mandatory access law.⁴³ These laws cover MDUs in such major metropolitan areas as Boston, New York City, Philadelphia, Miami, Washington, DC, Chicago, Cleveland, and Las Vegas. The fact that so

⁴² See *supra* note 19. Further, as explained below, the Commission may not have the legal authority to do force the sharing of the wire.

⁴³ See, e.g., Conn. Gen. Stat. § 16-333a (2007) (prohibiting agreements which limit tenants right to choose providers, limiting payment for access to reasonable compensation, and prohibiting discrimination in rental charges based on tenants choice of cable service); Del. Code Ann. tit. 26, § 613 (2007); D.C. Code Ann. § 34-1261.01 (2007) (prohibiting agreements which limit tenants right to choose providers, limiting payment for access to adequate compensation, and prohibiting discrimination in rental charges based on tenants choice of cable service); Fla. Stat. § 718.1232 (2007) (prohibiting the denial of condominium owners or tenants access to any available franchised or licensed cable television service); 55 Ill. Comp. Stat. 5/5-1096 (2007) (providing tenant right to choose cable provider of choice, limiting payment for access at just compensation, and prohibiting discrimination in rental charges based on tenants choice of cable service); Kan. Stat. Ann. § 58-2553 (2006) (prohibiting landlords from interfering with or denying access or service to a tenant by a cable television franchisee); Me. Rev. Stat. Ann. tit. 14, § 6041 (2006) (prohibiting agreements which limit tenants right to choose providers, limiting payment for access to reasonable compensation, and prohibiting discrimination in rental charges based on tenants' choice of cable service); Mass. Ann. Laws ch. 166A, § 22 (LexisNexis 2007) (same); Minn. Stat. §§ 238.02 (2007) (prohibiting agreements which limit tenants right to choose providers, limiting payment for access, and prohibiting discrimination against tenants based on their choice of cable service); Nev. Rev. Stat. Ann. § 711.255 (2007) (same); N.J. Stat. Ann. § 48:5A-49 (West 2007); N.Y. Pub. Serv. Law § 228 (Consol. 2007) (prohibiting agreements which limit tenants right to choose providers, limiting payment for access to reasonable compensation, and prohibiting discrimination in rental charges based on tenants choice of cable service); Ohio Rev. Code Ann. §§ 4931.04, 4931.11 (LexisNexis 2007); 68 Pa. Cons. Stat. Ann. § 250.503-B (West 2007) (prohibiting a landlord from preventing a cable operator from entering and serving a building if a tenant requests service); R.I. Gen. Laws § 39-19-10 (2007) (prohibiting agreements which limit tenants right to choose providers, limiting payment for access to reasonable compensation, and prohibiting discrimination in rental charges based on tenants' choice of cable service); Va. Code Ann. § 55-248.13:2 (2007); W. Va. Code § 24D-2-1 et seq. (2007) (prohibiting agreements which limit tenants right to choose providers, limiting payment for access to just compensation, and prohibiting discrimination in rental charges based on tenants' choice of cable service); Wis. Stat. § 66.0421 (2006) (prohibiting a property owner or manager from preventing a cable operator from providing service or interfering with such service to a resident of the property).

many MDUs cannot be subject to exclusive access agreements under state law belies the perceived need for Commission action.

Further, each of these states has chosen a slightly different manner in which to address what is fundamentally a local real estate issue. For example, some state access laws prevent landlords from entering into exclusive agreements,⁴⁴ while others are styled as eminent domain provisions.⁴⁵ Some state laws expressly limit the compensation a landlord may receive for permitting access,⁴⁶ while others are silent as to compensation.⁴⁷ Some laws expressly prohibit landlords from discriminating in rental charges based on the tenants' choice of cable service provider.⁴⁸ Some laws prohibit only *de jure* exclusive access agreements, while others prohibit both *de jure* and *de facto* exclusive access agreements.⁴⁹ Some laws grant rights only to franchised cable operators, while other state laws grant mandatory access rights to all MVPDs.⁵⁰ The differences among these laws mean that the Commission cannot be sure that any actions it

⁴⁴ See, e.g., Kan. Stat. Ann. § 58-2553 (2006); N.J. Stat. Ann. § 48:5A-49 (West 2007); Va. Code Ann. § 55-248.13:2 (2007).

⁴⁵ See, e.g., Ohio Rev. Code Ann § 4931.04 and § 4931.11 (2007); Del. Code. Ann. tit. 26, § 613 (2007).

⁴⁶ See, e.g., D.C. Code Ann. § 34-1261.01 (2007); N.J. Stat. Ann. § 48:5A-49 (West 2007); N.Y. Pub. Serv. Law § 228 (Consol. 2007); Va. Code Ann. § 55-248.13:2 (2007).

⁴⁷ See, e.g., Kan. Stat. Ann. § 58-2553 (2007).

⁴⁸ See, e.g., R.I. Gen. Laws § 39-19-10 (8) (2007); D.C. Code Ann. § 34-1261.01 (2007).

⁴⁹ Compare Fla. Stat. § 718.1232 (2007); Kan. Stat. Ann. § 58-2553 (2006); 68 Pa. Cons. Stat. Ann. § 250.503-B (West 2007); Wis. Stat. § 66.0421 (2006) with Conn. Gen. Stat. § 16-333a (2007); Me. Rev. Stat. Ann. tit. 14, § 6041 (2006); Mass. Ann. Laws ch. 166A, § 22 (LexisNexis 2007); N.Y. Pub. Serv. Law § 228 (Consol. 2007); R.I. Gen. Laws § 39-19-10 (2007); D.C. Code Ann. § 34-1261.01 (2007); W. Va. Code § 24D-2-1 et seq. (2007); 55 Ill. Comp. Stat. 5/5-1096 (2007); Minn. Stat. §§ 238.22 – 238.27 (2007); Nev. Rev. Stat. Ann. § 711.255 (2007).

⁵⁰ Compare Conn. Gen. Stat. § 16-333a (2007); D.C. Code Ann. § 34-1261.01 (2007); Kan. Stat. Ann. § 58-2553 (2006); W. Va. Code § 24D-2-1 et seq. with Del. Code. Ann. tit. 26, § 613 (2007); Ohio Rev. Code Ann. §§ 4931.04, 4931.11 (LexisNexis 2007); R.I. Gen. Laws § 39-19-10 (2007); Va. Code Ann. § 55-248.13:2 (2007).

takes in this proceeding would have the same effect in New York City, Washington, DC, or Chicago as in Miami, Boston, or Las Vegas. The potential that Commission action would create confusion and upset the MDU marketplace in these heavily populated metropolitan areas is much greater than the potential that Commission action would help consumers in MDUs.

* * * * *

In the four years since the Commission decided against intervening in the MDU marketplace, competition in the video marketplace at large, and the MDU marketplace in particular, has become even more intense, and consumers have been the ultimate beneficiaries. In the previous proceeding, as noted above, both SBC (now AT&T) and GTE (now Verizon) urged the Commission *not* to adopt rules restricting exclusive arrangements to provide video services to MDUs. Today, as then, the Commission in this proceeding must understand that any unnecessary regulatory intervention may have significant unintended consequences that could be detrimental for competition, not only in video, but also in voice and broadband Internet services.

III. SIGNIFICANT LEGAL QUESTIONS MUST BE ADDRESSED BEFORE THE COMMISSION CAN UNDERTAKE THE ACTIONS CONTEMPLATED IN THE NOTICE.

There are several significant legal hurdles the Commission must overcome before seriously entertaining the possibility of adopting any rules. First, there is very little -- if anything -- in the Communications Act on which the Commission can properly base any regulatory intervention in the relationships between MDUs and MVPDs. Second, the Commission should be especially cautious about disturbing an area of law that has always been controlled by state property and contract law. Third, the Commission must be careful not to violate Constitutional rights of MVPDs and MDU owners. Each of these concerns is discussed below.

A. None of the Statutory Provisions Cited in the Notice Provides Authority To Restrict the Freedoms of MDUs or MVPDs.

The *Notice* seems to assume that the Commission has free-ranging authority to take whatever actions the Commission believes to be necessary to facilitate video competition or prevent unfair practices. But the Commission's authority is narrowly circumscribed, and the agency must work within the framework of the laws that have been passed by Congress. As House Commerce Committee Chairman John Dingell has forcefully admonished the agency, "the FCC is not a legislative body -- that role resides here in this room with the people's elected representatives."⁵¹

Before examining the Communications Act provisions that the *Notice* cites as potential fonts of Commission authority in this area, it is instructive to note what the *Notice* does not cite -- an explicit provision in the Communications Act authorizing the agency to regulate the relationship between MDU owners and MVPDs. The lack of such a provision is no accident; in fact, Congress previously considered *and rejected* provisions that would have conferred this authority on the Commission. As the U.S. Supreme Court has recognized, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."⁵²

⁵¹ Statement of Congressman John D. Dingell, Chairman Committee on Energy and Commerce, Subcommittee on Telecommunications and the Internet, Hearing Entitled "Oversight of the Federal Communications Commission" (Mar. 14, 2007), available at http://energycommerce.house.gov/Press_110/110st21.shtml. See also Corey Boles, "House Democrats Grill FCC's Martin," *Wall St. J.* (Mar. 14, 2007) ("If reform of th[e] regulatory structure is necessary, then it is Congress's prerogative to take such action as we have done before," Dingell scolded. "It is not the role of the FCC.").

⁵² *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-3 (1987).

In 1984, Congress expressly chose *not* to include a provision that would have mandated access to MDUs for providing cable service. The language that Congress specifically considered, but ultimately did *not* adopt, was as follows:

Sec. 633(a). The owner of any multiple-unit residential or commercial building or manufactured home park may not prevent or interfere with the construction or installation of facilities necessary for a cable system, consistent with this section, if cable service or other communications service has been requested by a lessee or owner ... of a unit in such a building or park.⁵³

As articulated by Congressman Jack Fields, one of the primary authors of the Cable Act of 1984, Congress chose not to include this provision because the goal of “mak[ing] cable service available to the greatest number of individuals . . . can be achieved in a better, more orderly manner through a negotiated agreement between the cable operator and the property owner, and not by legislative fiat as this legislation had provided.”⁵⁴ In light of this legislative history, courts have rejected attempts to construe the Act as restricting an MDU owner’s ability to limit access to its property through the use of exclusive contracts.⁵⁵

More recently, Congress did adopt a more tailored provision that called for the Commission to adopt regulations “to prohibit restrictions that impair a viewer’s ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite

⁵³ *Cable Investments, Inc. v. Wooley*, 867 F.2d 151, 156 (3rd Cir. 1989) (citing H.R. No. 4103, 98th Cong., 2d Sess. § 633 (1984), reprinted in H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 13).

⁵⁴ 16 Cong. Rec. H10444 (daily ed. Oct. 1, 1984) (statement of Rep. Fields).

⁵⁵ *See, e.g., Cable Investments, Inc. v. Woolley*, 867 F.2d at 159 (rejecting attempt by cable operator to invoke the Communications Act in order to override the MDU owner’s exclusive contract with a competing MVPD); *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600 (11th Cir. 1992) (the Communications Act cannot be used to usurp the right of MDU owners to exclude MVPDs from their premises).

services.”⁵⁶ Congress intended that this provision would be used by the Commission to preempt various impediments, including “restrictive covenants or homeowners association rules,” to the widespread adoption of over-the-air reception devices (“OTARD”).⁵⁷ Congress clearly understood the competitive situation resulting from the various types of agreements prevalent in various real estate developments, including MDUs, and chose to address that situation *only* through Section 207’s prohibition on OTARD restrictions. This simply reinforces the fact that Congress was aware that it was not giving the Commission the kind of authority it seeks to assert in this proceeding.

Because there is no provision of the Act that prohibits exclusive arrangements between MDUs and MVPDs, the *Notice* looks to sundry provisions of the Communications Act to cobble together authority. However, these provisions raise more questions than answers about the Commission’s authority. This approach is one that then-Commissioner Martin has previously criticized. In his first opportunity to vote on FCC regulation of cable operators’ MDU wiring, then-Commissioner Martin dissented from the 2003 *First Order on Reconsideration and Second Report and Order* on grounds that he was “not persuaded” that the FCC has the statutory authority to regulate in this area.⁵⁸ Congress has done nothing since then to expand the Commission’s jurisdiction to regulate any aspect of multichannel video service competition within MDUs; the Commission’s attempt to cobble together authority is no more convincing now than it was in 2003.

⁵⁶ See Telecommunications Act of 1996, Pub. L. 104-104, § 207, 110 Stat. 56, 114 (1996).

⁵⁷ See H.R. Rep. No. 104-204 (I), at 124 (1995).

⁵⁸ *MDU Order*, Separate Statement of Commissioner Martin (noting that, “the interpretation of these provisions in this item offers no limitation on [the Commission’s] authority.”).

The Notice looks primarily to Section 628(b) of the Communications Act as a potential source of authority,⁵⁹ but this provision is irrelevant to the question at hand. It grants the Commission no authority to address the contractual relationships between MVPDs and MDUs. Section 628 is an articulation of Congress's desire to encourage further competition in the video marketplace by addressing issues pertaining to MVPDs' access to cable-affiliated, satellite-delivered *programming*.⁶⁰ This provision was added to Title VI of the Communications Act as Section 16 of the Cable Television Consumer Protection and Competition Act of 1992.⁶¹ This provision was originally an amendment introduced by Congressman Billy Tauzin, who said that "[t]he Tauzin Amendment, very simply put, requires [the cable industry] to stop refusing to sell its products to other distributors of television programs."⁶² Nothing in the text, structure, history, or purpose of this provision suggests that it applies to issues other than access to programming.

Further complicating any suggestion that Section 628(b) gives the Commission general rulemaking authority is Section 628(d), which says:

⁵⁹ 47 U.S.C. § 548(b). The notion that Section 628 may be somehow relevant to the issue of exclusive access agreements was originally suggested by Bell Atlantic in the Commission's previous exclusive access proceeding. See Comments of Bell Atlantic, filed in CS Docket No. 95-184, at 5 (Dec. 23, 1997). More recently, in its *ex parte* in the Franchising Proceeding, Verizon repeated this argument. See *Ex Parte* Letter of Verizon, filed in MB Docket No. 05-311, at 5-6 (July 6, 2006).

⁶⁰ As Comcast has noted in several other proceedings, Congress's intent in this regard has been fulfilled -- intense competition in the video marketplace and an ever-increasing diversity of available programming serve as proof that Congress's goals have been achieved. See, e.g., Comments of Comcast Corporation, filed in MB Docket No. 07-29 (Apr. 2, 2007); Reply Comments of Comcast Corporation, filed in MB Docket No. 07-29 (Apr. 15, 2007).

⁶¹ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, § 16, 106 Stat. 1460, 1482-83 (1992).

⁶² Nothing about the adoption of Section 628 remotely suggests that it was intended to give the Commission authority to address "access to premises" issues that Congress consciously decided not to address in the Cable Act of 1984. See *supra* nn. 52-57 and discussion.

Any multichannel video programming distributor aggrieved by conduct it alleges constitutes a violation of subsection (b), or the regulations of the Commission under subsection (c), may commence an adjudicatory proceeding at the Commission.⁶³

This language demonstrates Congress' intent that the Commission enforce Section 628(b) through adjudication, not through the adoption of rules, and certainly not through the adoption of rules that are irrelevant to the goals of Section 628.

The Commission also asks about the potential implications of some parallel language that appears in both Section 628(b) of the Communications Act and Section 5(a)(1) of the Federal Trade Commission Act (the "FTC Act").⁶⁴ Section 5(a)(1) of the FTC Act says:

Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.⁶⁵

On the other hand, Section 628(b) says:

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.⁶⁶

The *Notice* appears to be drawing an incorrect conclusion based on the coincidence that eleven words happen to appear in both provisions. They are part of completely different statutes, written some 80 years apart from one another. The words do not even appear in the same order,

⁶³ 47 U.S.C. § 548(d).

⁶⁴ 15 U.S.C. § 45(a)(1).

⁶⁵ *Id.*

⁶⁶ 47 U.S.C. § 548(b).

and, to the extent that they do suggest some parallel meaning, the fact is that Section 628(b) includes language that *limits* the meaning of these words in the context of Section 628(b).

Of course, these provisions diverge not only in their text, but also in their structure, purpose, and history. Congress unquestionably did intend to give the FTC rather broad and open-ended authority to investigate and prosecute allegedly anti-competitive practices in the economy at-large. On the other hand, in the 1984 and 1992 Cable Acts, Congress much more specifically delineated the particular powers it meant to confer upon the Commission. Thus, the Commission cannot draw authority to regulate the relationship of MDU owners and MVPDs from Section 628(b).

Other Title VI provisions mentioned in the *Notice* are similarly unavailing as a source of authority. For example, the *Notice* mentions Section 623 of the Communications Act⁶⁷ as a potential source of authority. But Section 623 contains detailed provisions regarding the regulation of *rates* charged for cable services, and the only mention of MDUs is in a provision which says that the general requirement for a uniform rate structure does *not* prohibit bulk discounts for multiple dwelling units.⁶⁸ If anything, this provides further proof (in addition to the legislative history discussed above about the provision that was not adopted) that Congress was aware of -- and did not mean to empower the Commission to disturb -- exclusive access arrangements for MDUs. Likewise, Section 624(i) of the Communications Act⁶⁹ is of no help, either. Although Section 624(i) does give the Commission the power to regulate cable wiring

⁶⁷ *Id.* § 543.

⁶⁸ *Id.* § 543(d).

⁶⁹ *Id.* § 544(i).

inside the home, it expressly does so only in circumstances where the customer has terminated service.⁷⁰

The *Notice* also mentions Section 706 of the Telecommunications Act of 1996 as potential source of authority.⁷¹ But it too does not provide the Commission with the authority necessary to take the steps it is contemplating. As the Commission has properly and conclusively ruled, Section 706 is not a source of independent authority; rather, it is an important guidepost for the Commission to consider in choosing how to exercise the powers that Congress has elsewhere conferred on the agency.⁷² Further, as discussed in more detail above, Section 706 may cut both ways in this proceeding. While the Commission, for whatever reason, may feel that prohibiting exclusive arrangements for video services would help to speed the deployment of broadband by ILECs, it obviously must not take actions that hamper competition in the broadband marketplace by making it more difficult for cable operators to provide broadband service in MDUs.

⁷⁰ *Id.* See also *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, Report and Order, 8 FCC Rcd 1435 ¶ 5 (1993).

⁷¹ See Telecommunications Act of 1996, Pub. L. 104-104, §706 (1996).

⁷² *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Mem. Op. & Order, 13 FCC Rcd. 24012 ¶ 77 (1998), subsequent history omitted (“For the foregoing reasons, we conclude that, in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress’ policy objectives, the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority.”); *id.* ¶ 74 (“[W]e conclude that section 706(a) gives the Commission an affirmative obligation to encourage the deployment of advanced services, *relying on our authority established elsewhere in the Act.*” (emphasis added)); see also *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, Order on Reconsideration, 15 FCC Rcd. 17044 ¶ 5 (2000) (affirming that Section 706 does not constitute an independent grant of authority). Even in the recent *Franchising Order*, the Commission recognized that it was empowered merely to “consider the goals of Section 706 when formulating regulations under the Act,” and did not find that Section 706 gave it independent authority to promulgate rules. See *Franchising Order* ¶ 62.

Finally, the Notice invokes Sections 4(i) and 303(r) of the Communications Act.⁷³

But courts have determined that these provisions only provide the Commission with ancillary authority to adopt rules that are necessary to meet obligations specified in other sections of the Communications Act, not authority to engage in free-lance policymaking.⁷⁴

B. The Actions Proposed by the Notice Would Involve a Significant Intrusion on State and Local Contract and Property Law.

As it considers the contours of its legal authority, the Commission should also take into account the extent to which any restrictions on contracts between MDUs and video providers would necessarily interfere with state property and contract law, such as state landlord-tenant law. Taking the actions contemplated by the Notice would run counter to both judicial and Commission precedent. It is well settled that the rights of property owners are a matter of state and local law.⁷⁵ Both Congress and the Commission have recognized that issues related to the area of MDU owners' contractual relationships with MVPDs are "best settled at the local

⁷³ 47 U.S.C. §§ 154(i), 303(r).

⁷⁴ See *American Library Ass'n v. FCC*, 406 F.3d 689, 702 (D.C. Cir. 2005) (in lack of specific statutory authorization, FCC's purported authority is "ancillary to nothing"). See also *California v. FCC*, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) ("Title I [of the Communications Act] is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities.") (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (FCC's authority under Title I "is restricted to that reasonably ancillary to the effective performance of its various responsibilities for the regulation of television broadcasting.")).

⁷⁵ See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."); *Hotz v. Federal Reserve Bank of Kansas City*, 108 F.2d 216, 219 (8th Cir. 1939) (noting that the "general rule applicable to real property" is that "the law of that state [in which the premises are situated] governs the rights and liabilities of the parties").

level.”⁷⁶ As such, the Commission appears to lack the necessary authority to take any preemptive actions.

Consistent with the policy of local and state control over such issues, 18 states have enacted laws governing (in various ways) the relationship between MDU owners and MVPDs seeking access to MDU tenants.⁷⁷ Each of these laws reflects judgments that have been made by duly elected representatives of the people, on subjects entrusted to their authority and with the accountability that our electoral system ensures. Without an express grant of authority from Congress, the Commission cannot displace and disrespect those legislative judgments.⁷⁸ Likewise, the Commission should not displace and disrespect the decisions of those states which have *not* chosen to pass a mandatory access law. Certainly, the Commission cannot infer the power to preempt state legislative judgments based solely on its desire to achieve some nebulous goal of “video competition.” The Commission’s authority extends only so far as Congress allows. Where Congress meant to give the Commission general preemptive power over state and local laws that constrain competition, it did so *expressly*, such as in Section 253.⁷⁹ Congress did not give the Commission this general preemptive power in Title VI.

⁷⁶ *Implementation of the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, FCC 85-179, 50 Fed. Reg. 18637-01, 1985 WL 132696 ¶ 80 n.51 (1985). See also 16 Cong. Rec H10435 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth) (noting that the 1984 Cable Act left the issue of MDU access to the states).

⁷⁷ See *supra* note 43.

⁷⁸ Even as it took sweeping new actions to constrain the freedoms that Congress assigned to local government officials on franchising matters, the Commission was careful not to claim preemptive authority over state governments that had enacted their own franchising laws. *Franchising Order* ¶ 126.

⁷⁹ 47 U.S.C. § 253. Congress did empower the Commission to preempt state and local laws that “may prohibit or have the effect of prohibiting any entity to provide any . . . telecommunications service,” *id.* § 253(a), but, notably, it granted the Commission no corresponding authority to interfere with laws that hinder video competition.

Commission and judicial precedent strongly suggests that the Commission may only interfere with contract rights where Congress has clearly authorized or directed the Commission to do so.⁸⁰ It has not done so here. Unlike other areas of law where Congress expressly conferred jurisdiction on the Commission to abrogate or restrict private contracts, such as in the program access context,⁸¹ Congress has never empowered the Commission to interfere with the rights of property owners and MVPDs to enter into exclusive agreements.⁸²

C. The Commission's Proposed Actions Would Implicate Constitutionally-Protected Contract and Property Rights of MVPDs and Property Owners.

Finally, the Commission should be wary of Constitutional considerations as it deliberates whether to interfere with lawful, arms-length contracts. Cable operators and other MVPDs, large and small, have invested significant sums of money in reliance upon, and provided due consideration for, the contractual rights that the Commission has previously approved but is now considering abrogating. MVPDs' property interests extend not just to the wires that they own, but to the capitalized investment in constructing those wires and providing services to any particular MDU. MVPDs have a reasonable, "investment-backed expectation" in their ability to continue to serve consumers in MDUs according to the provisions of their existing

⁸⁰ *California Water and Tel. Co., et al.*, Mem. Op. and Order, 64 F.C.C.2d 753 ¶ 17 (1977) (noting that the power to regulate private contractual agreements, even where they directly affect communications activities, "must be conferred by Congress. [It] cannot be merely assumed by administrative officers.") (citing *FTC v. Raladan Co.*, 283 U.S. 643, 649 (1930)); *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."); *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994) ("without express delegation of such authority from Congress, the Commission may not order a regulated entity to provide a competitor access to its facilities.").

⁸¹ See 47 U.S.C. §§ 548(c)(2)(C)-(D).

⁸² Even in the franchising context, the Commission could conceivably, if incorrectly, look to the express directive of Section 621(a)(1) prohibiting unreasonable denials of competitive franchises. No such explicit language exists with regard to contracts between MVPDs and MDU owners.

contracts. Taking the steps contemplated in the Notice may implicate MVPDs' and MDU owners' property rights and could give rise to an unconstitutional Fifth Amendment regulatory taking.

The Supreme Court's ruling in *Tahoe-Sierra* is consistent with the view that the actions contemplated in the Notice present Fifth Amendment issues.⁸³ As this case confirms, constitutional "takings" may occur both when the government takes action that involves a physical intrusion onto private property and when it uses regulation to restrict a property owner's use of his or her own property.⁸⁴ As a long line of cases confirms, regulatory takings require essentially ad hoc, factual inquiries focusing on the nature of the governmental action, the severity of its economic impact, and the degree of interference with the property owner's reasonable investment-backed expectations.⁸⁵ Although the *Tahoe-Sierra* decision rejected "the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking," it endorsed Justice Holmes's admonition that "if regulation goes too far it will be recognized as a taking."⁸⁶ In this case, the Commission appears to be considering actions that would result in regulation that "goes too far."

It is presumably for this reason that the Commission has heretofore exercised restraint in interfering with private contracts. Even when implementing a statute whose principal purpose

⁸³ See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

⁸⁴ The concept of property "extends beyond land and tangible goods and includes the products of an individual's labor and invention." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (concluding that trade secrets are property for Fifth Amendment purposes). See also *Ballstaedt 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").

⁸⁵ See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

⁸⁶ *Tahoe-Sierra*, 535 U.S. at 326, citing *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

was to break the ILEC monopoly in the provision of local phone services, and even where the factual record and legal context justified a *prospective* prohibition on exclusive access agreements for telecommunications services in commercial buildings, the Commission refrained from abrogating or restricting contracts between MDUs and local telephone monopolies, reasoning “that the modification of existing exclusive contracts ... would have a significant effect on the investment interests of those building owners and carriers that have entered into such contracts.”⁸⁷

* * * * *

The Commission’s legal authority to act is tenuous, at best, and its legal authority to abrogate existing contracts is simply non-existent. The Commission should be leery about *inferring* the authority to limit MVPD agreements with MDUs based on its desire to promote competition in the MVPD marketplace. It is well established that “allegations of harm to competitors or competitors’ customers do not in any way expand the Commission’s ... powers”⁸⁸ and the Commission may not “in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation.”⁸⁹

⁸⁷ *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983 ¶ 36 (2000).

⁸⁸ *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 375, n.47 (D.C. Cir. 1977) (quoting *AT&T v. F.C.C.*, 487 F.2d 865, 880 (2nd Cir. 1973), *cert. denied*, 434 U.S. 1040 (1978)).

⁸⁹ *MCI Telecommunications Corp.*, 561 F.2d at 375. See also *FCC v. R.C.A. Communications, Inc.*, 346 U.S. 86, 96-7 (1953) (Commission is not free to create competition for competition’s sake alone).

IV. CONCLUSION

For the foregoing reasons, Comcast urges the Commission proceed with extreme caution in this proceeding. The Commission should not abrogate any existing contracts between MVPDs and MDUs or other real estate developments, and any rules the Commission adopts going forward should be applied on a competitively and technologically neutral basis that recognizes and appreciates the increased intermodal competition to deliver bundled services to consumers.

Respectfully submitted,

/s/ James L. Casserly

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July 2, 2007

ATTACHMENT A:

**DECLARATION OF WILLIAM F. REVELL
VICE PRESIDENT, MDU SALES OPERATIONS
COMCAST CABLE COMMUNICATIONS, LLC**

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)	
)	

**DECLARATION OF WILLIAM F. REVELL
IN SUPPORT OF
COMMENTS OF COMCAST CORPORATION**

I, William F. Revell declare and state as follows:

1. I am Vice President, MDU Sales Operations for Comcast Cable Communications, LLC ("Comcast"). I am providing this Declaration in support of the "Comments of Comcast Corporation" before the Federal Communications Commission ("Commission") in MB Docket No. 07-51, concerning exclusive contracts for the provision of multichannel video services to multiple dwelling units ("MDUs").

2. I am responsible for, among other things, leading Comcast's national multi-family residential markets (MDUs, condominiums, planned communities, etc.) and hospitality business markets (hotels, condotels, universities, institutions). I negotiate the terms of contracts between Comcast and various building owners, and monitor, manage, and measure Comcast's success in this area. I assist the various regions in their work for MDUs, and handle many large contracts myself. I manage Comcast's MDU contract databases and other MDU records across the country. Although I have had various titles,

I have worked in this capacity for Comcast and its predecessors since 1999 at the regional and national levels. I have 24 years experience in the cable industry, with executive roles for approximately the past 15 years. Most of my career has involved MDU sales and system operations for cable operators.

3. In response to the Commission's Notice of Proposed Rulemaking ("Notice") in this proceeding, Comcast employees undertook a review of Comcast practices, and the practices of Comcast's competitors. I know the following statements either of my own personal knowledge, or as a result of the due diligence performed by the Comcast team. If called as a witness in this action, I could and would testify competently to these facts under oath.

4. Comcast is in the business of providing advanced multichannel video service, high-speed Internet, and voice services to customers. In all cases, Comcast provides its video, broadband Internet, and voice services over a single wire running to each residential unit within the MDU building or complex.

5. Comcast has invested tens of millions of dollars in the installation and upgrade of cable home wiring and home run wiring in MDUs. Some of this investment has been in the form of the costs of constructing and upgrading wiring within MDU buildings. Comcast's MDU investment includes acquisition costs paid to acquire other companies that, in turn, had already invested capital in constructing and upgrading cable facilities to and within MDUs. It has not been possible for Comcast to obtain an accurate dollar amount of this massive investment across the country, nor to break it down into the investment for exclusive contracts, but Comcast nationwide has invested tens of millions of dollars that it has not yet recovered.

6. Comcast has thousands of contracts to serve MDUs throughout 39 states and the District of Columbia. A number of these contracts give Comcast the right to be the exclusive service provider. A number of these contracts give Comcast exclusive marketing rights. Other contracts give Comcast exclusive rights to use the inside wiring (home run and home wiring) in MDUs where the MDU itself owns the wiring. Where the MDU itself owns the wiring, it has often acquired the wiring through some contractual arrangement with either a franchised or unfranchised MVPD, through which the service provider obtains the right to use the wiring in exchange for transferring ownership to the developer.

7. Some of Comcast's agreements with MDUs require that Comcast provide the MDU with a bulk rate. A bulk rate agreement is an agreement whereby the MVPD agrees to provide its service to the MDU owner at a discounted rate. The individual dwelling units are automatically provided with the services purchased by the MDU owner. Bulk rates in these agreements are generally below regular retail rates. Some bulk rate agreements do not include provisions for exclusive access or service, while others specify exclusive service or access rights for one provider.

8. As far as Comcast can tell, all kinds of MVPDs have entered into exclusive types of agreements over a long period of years, and many continue to do so. A number of such agreements in MDUs are attached as exhibits, as detailed below. Comcast has obtained some of these documents from MDU owners during negotiations with the MDU for Comcast's potential service. Although Comcast is not a party to any of these agreements, many of these agreements contain confidentiality provisions, so I have provided excerpts of most of the exhibits only, and further masked much information in

these exhibits that would identify the building or MDU owner. Comcast is aware of a great number of agreements like those provided with this declaration, and submitted only a representative sampling.

9. Sometimes, MVPDs enter into contracts at the request of the MDU owner. Some MDU owners essentially put the right to provide service up for bid to competing providers with the goal of obtaining the lowest discount rate and or the highest revenue from the MVPD. Many building owners view discounted rates from providers as a marketing advantage that increases the attractiveness of the property to potential tenants as the services that are obtained at the discounted rate can be advertised as an amenity. Sometimes the MDU manager simply prefers to only have to deal with one provider so as to increase the responsiveness and accountability of the provider for service.

10. I am unaware of a commercially reasonable or practical service method that would function in the real world which would allow multiple service providers to share a single coaxial wire at the same time. For example, Comcast could not provide reliable, high quality voice service over a coaxial wire that is used simultaneously by another company to provide the other company's video service.

Exclusive MDU Service Agreements

11. Knology, Inc. is, according to its 2006 Annual Report, a provider of bundled video, voice, and high speed Internet service in five states in the Southeast, with "approximately 462,000 total connections," of which approximately 178,000 were video customers. <http://phx.corporate-ir.net/phoenix.zhtml?c=130221&p=irol-reports>.

12. Attached as Exhibit A are excerpts of an exclusive cable television services access agreement between a subsidiary of Knology, Inc. and a condominium complex in

Florida. The agreement gives Knology the “exclusive right to provide the cable television services” listed (section 1.1), and further gives Knology exclusive marketing rights (section 1.3 and 3.2).

13. Attached as Exhibit B are marketing materials advertising Knology’s provision of not only video services, but voice and high speed Internet as well, with a promise that “Property owners receive a check every month and a recap of their subscribers,” as well as other suggested benefits of an MDU contract for Knology service. Included with this Exhibit is an example of a Knology proposal to pay an MDU owner up to \$55,000 in an “advertising allowance” as further consideration for an agreement with Knology.

14. Attached as Exhibit C are excerpts of an example of an exclusive “Cable Television and High Speed Internet Bulk Service Agreement” between an MDU and a local reseller of Dish Network services and high speed Internet services. The agreement gives the company the exclusive “right to market, promote, and sell [s]ervices” at an MDU property, requires the MDU owner to provide marketing services, and obligates the MDU owner to prevent any other provider from using the system (section 3 (a) – (c)). The services provided by this Dish Network reseller include both video and high speed Internet service (section 1 (c)). Exhibit A to this agreement confirms that this is a bulk agreement by requiring the MDU owner to pay a price for each unit of the building in exchange for cable programming.

15. Attached as Exhibit D are excerpts of an agreement for exclusive cable, high-speed Internet, and voice telephone service between Digital Community Networks, Inc. and a large private community in Florida with hundreds of residential units. The fifth

page of this exhibit shows that this is also a "Contract for Bulk Cable Service."

16. Attached as Exhibit E are excerpts of an agreement for exclusive cable, high speed Internet, voice telephone, and home security services between Digital Community Networks, Inc. and a different upscale MDU community in Florida.

Verizon Exclusive MDU Contracts

17. Verizon provides video, Internet and voice services through a number of exclusive marketing agreements and other MDU contracts and arrangements.

18. Exhibit F is a Verizon news release dated March 8, 2006 announcing that Verizon had launched an "aggressive plan to bring FiOS services to apartments, condos, and other multi-dwelling unit sites." This announcement states that Verizon at that time had "agreements with builders and developers covering roughly 152,000 homes," and confirms that "building owners can have an exclusive marketing arrangement with Verizon, or can opt for other marketing arrangements."

19. Attached as Exhibit G are excerpts of a Verizon brochure entitled "Connected: Partnering to Profit from Fiber-Optic Broadband." The brochure is part of Verizon's marketing materials to provide its FiOS service to MDUs, private subdivisions, and other residential developments. The brochure notes on the cover that "Easy Money" is one of the benefits for the MDU owner.

20. The first page of text has a subtitle stating that the benefits of Verizon's fiber-optic broadband rewiring "go right to developers' bottom lines." A section on page 5 of this brochure, titled "The bottom line," states that "Verizon helps the developer market high-tech communities and compensates them for their efforts."

21. On page 8 of this brochure, Verizon explains that "one of the nation's largest