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

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

<u>REPLY COMMENTS OF ADVANCE/NEWHOUSE COMMUNICATIONS</u>

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Advance/Newhouse Communications, by its attorneys, hereby submits these reply comments in response to the Notice of Proposed Rulemaking ("NPRM") issued on March 27, 2007, in the above-captioned docket. 1/ Advance/Newhouse manages Bright House Networks, LLC ("BHN"), which operates cable systems serving over 2.4 million customers in and around Tampa Bay and Central Florida (Orlando), Birmingham, Indianapolis, Bakersfield, and Detroit, as well as several smaller systems in Alabama and the Florida Panhandle.

INTRODUCTION AND SUMMARY

This rulemaking is premised on the notion that exclusive service contracts ("ESCs") for video services in multiple dwelling units may be anticompetitive. 2/ Given

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

2/ *See NPRM* ¶ 1 ("Greater competition in the market for the delivery of multichannel video programming is one of the primary goals of federal communications policy.").

that premise, it is ironic that the main supporters – practically the only supporters – of a ban on ESCs are the nation's largest phone companies. 3/ They are in no need of assistance from this Commission. They have ample market power; they can and do compete for exclusive contracts to serve MDUs; and if anything their status as holders of condemnation power, providers of "land-line" phone service, and carriers of last resort often gives them a competitive advantage *vis a vis* cable operators. That competitive advantage would only be enhanced by an ESC ban, which (absent a mandatory-access rule) would do nothing to guarantee multiple video providers in MDUs and instead would simply give building owners an incentive to choose the ILEC as the sole provider. The ILECs' main argument to the contrary – that cable operators are rushing to lock as many MDUs as possible into long-term exclusives before the ILECs can begin video service – does not stand up to examination.

Indeed, despite the ILECs' sky-is-falling pronouncements, there is ample evidence in this docket that ESCs are a good thing. The evidence shows that they lead to better customer service, that they produce lower or comparable prices, that they facilitate service to rural and other underserved areas, and that they provide the competitive foothold that allows smaller providers to stay in business. There is, in short, no reason for Commission intervention here. And even if the Commission were nonetheless inclined to intervene, it lacks both the factual and legal basis to do so. As to the former, the Commission cannot "state, based on the record, that exclusive

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3/ *See* Comments of AT&T, Verizon, Embarq, SureWest, and Qwest. Putting aside a telecom trade association, the only other entities to write in favor of a ban are Warner Properties, Corning Inc., and the City of Lafayette, Louisiana. And as to the last of these, it should be noted that both a national league of cities and a national association of city officials with responsibility for telecom matters disagree with the City of Lafayette and argue against an ESC ban, at least on this record. *See* Reply Comments of NATOA and the National League of Cities ("NLC").

contracts are predominantly anti-competitive" now any more than it could four years ago. 4/ As to the latter, the statutory provisions the Commission identified in the NPRM do not suffice to bring an ESC ban within the Commission's authority.

ARGUMENT

I. THE EVIDENCE IN THE DOCKET DEMONSTRATES THAT REGULATORY INTERVENTION IS UNNECESSARY.

Perhaps most noteworthy about the opening round of comments is the near-consensus it reveals *against* a Commission ban on video ESCs. It was not just large cable operators that argued against the wisdom and propriety of such a ban. To the contrary, small, local cable operators took the same position – as did developers, building owners, startup broadband service providers, condominium associations, local governments, local government telecom officials, and even one state Department of the Public Advocate. 5/ Last but not least, even small *telecom companies* agreed that a video ESC ban would make for bad policy: The Shenandoah Telecommunications Company ("Shentel") wrote that ESCs "enhance – rather than diminish – competition in the video service market," 6/ and WorldNet Telecommunications noted that ESCs "make it possible for many advanced services to be made available to consumers where they otherwise would not be." 7/ Advance/Newhouse respectfully suggests that

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4/ *Telecommunications Services Inside Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, 1369 (2003) ("*Inside Wiring Order*").

5/ We refer to, respectively, the Comments of Lennar Corp., the Real Access Alliance, OpenBand Multimedia LLC (among others), the Community Associations Institute, NATOA, the NLC, and the New Jersey Division of Rate Counsel.

6/ Shentel Comments at 17.

7/ WorldNet Telecommunications Comments at 6.

the Commission proceed with caution before attacking a right of contract that is deemed "anti-competitive" by several large ILECs and almost no one else. 8/

Several commenters have made compelling cases why video ESCs should not be regulated. Advance/Newhouse has no desire to add unnecessary bulk to the record by repeating these points at length. It will instead emphasize very briefly the evidence that this rulemaking is built on false factual premises. It also will set the record straight as to several misimpressions introduced into the record by Verizon.

A. The Factual Premises That Might Theoretically Support A Ban On ESCs Are Not Present In The Record.

Five factual premises, implicit and otherwise, underlie this rulemaking: (1) cable operators have "market power" and competitors need help to break in to the video business; (2) ESCs are "anti-competitive"; (3) unsophisticated building owners find themselves locked into unfavorable long-term contracts; (4) ESCs lead to higher prices for consumers; and (5) a ban on ESCs automatically would mean multiple video providers in each MDU. The record evidence undermines, if not flatly disproves, each of these premises.

1. Market power: The assertions of "market power" in this proceeding 9/ are fallacious. As several commenters have made clear, the ILECs are "among the largest companies in the country," and "[t]he demand for their services is such that they are

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8/ Indeed, as the Commission no doubt has noted, even the few parties in favor of an ESC ban cannot agree on the mechanics. AT&T and SureWest support a total and retroactive ban. Verizon supports a ban lasting only five years – a transparent attempt to cancel video providers' existing ESCs and then permit Verizon to secure its own down the line. And Qwest supports a five-year ban applicable only to prospective contracts.

9/ *See, e.g.*, United States Telecom Association ("USTA") Comments at 3 (arguing that cable operators maintain a "firm . . . grip" on the video market).

able to command the attention of apartment owners and largely dictate the terms of their entry." Real Access Alliance ("RAA") Comments at 60. The RAA, which counts among its members some of the largest building owners in the nation, states categorically that, because many renters still want traditional, name-brand "land-line" service, "it is essentially impossible for [building owners] to operate a building without service from the local ILEC." *Id.* at 61. Furthermore, many ILECs have condemnation power, provider-of-last-resort rights, and other mandatory-access advantages not enjoyed by cable operators. 10/ All of this means, of course, that ILECs typically do not have trouble gaining access to buildings to install networks. The ILECs' easy access to MDUs has two important implications. First, they have no trouble offering the other portions of the "triple play," even in a building that has an exclusive video contract. Second, banning ESCs would not create a level playing field. It would instead enhance ILECs' competitive advantage over cable operators and other video providers, because the ILECs' rights of access put them in a superior negotiating position *vis a vis* MDU developers and owners. 11/

2. "Anti-competitive": Although the ILECs argue that ESCs are anti-competitive in this market generally, the argument is belied both by logic and by the facts. First, as an economic matter, there is nothing inherently anti-competitive about such contracts. Competing providers may vie for the right to supply a given MDU on an exclusive basis, and the building owners or residents may take advantage of that competition to win lower prices and other benefits. This is the very definition of

10/ *See, e.g.,* RAA Comments at Exh. D (Sadler Declaration at 9).

11/ *See* Charter Comments at 5; RAA Comments at 46.

competition; the fact that the competition occurs one iteration back from the usual beneficiary is no reason to discount its effects. Second, multiple commenters have argued forcefully that ESCs are in fact *pro*-competitive, in that they (i) permit the survival of smaller market participants and thus (ii) ensure options for customers in areas that might otherwise only have one choice – or none. *See, e.g.*, Shentel Comments at 3 (noting that Shentel serves areas that were apparently refused service by the incumbent and that Shentel could not afford to do so absent ESCs); Litestream Holdings LLC Comments at 2 (stating that "Litestream will no longer be capable of offering competition" in its market if it is not allowed to employ ESCs); Ygnition Comments at 1 (noting that smaller providers cannot gain access to capital absent the guaranteed income stream that some ESCs provide). Indeed, at least two commenters – Litestream and Hotwire Communications LLC – have stated that they will be unable to survive absent the right to enter into ESCs, 12/ and several more have explained that an anti-ESC rule would severely harm small providers across the board. As one small private cable operator wrote: "Elimination of exclusive agreements would almost certainly force many small providers out of business and, as such, remove competition from the marketplace." 13/ Furthermore, Advance/Newhouse presumes that the Commission's focus on competition is a means to achieve enhanced consumer choice. If this is so, then the Commission should take particular note of the robust record evidence that ESCs encourage (i) provision of advanced services to rural and underserved areas, (ii) provision of advanced services to greenfield developments, and

12/ *See* Litestream Comments at 2; Hotwire Comments at 2.

13/ Ygnition Comments at 3.

(iii) tailoring of video services to better serve MDUs with particular characteristics, such as buildings with a high percentage of students or speakers of a certain foreign language. 14/

The ILECs' related argument – that ESCs are anti-competitive at this particular juncture because incumbent video operators are using them to lock up newly competitive markets – is triply flawed. First, it relies on remarkably thin anecdotal evidence. Second, that "evidence" itself is, in at least some instances, demonstrably misleading. *See* subpart B, *infra*. And third, sworn record evidence in this docket from at least three of the nation's largest building owners shows that there has been no increase in requests for ESCs in recent years and that providers of voice services also seek exclusive contracts and have long done so. 15/

3. Unsophisticated building owners: The ILECs argue that unscrupulous incumbent video providers have been known to lock unwary building owners into unfavorable contracts. *See, e.g.,* AT&T Comments at 12. As "proof" of this claim, the ILECs rely almost entirely on a single newspaper article that did not purport to examine the national market. *Id.* at 13 n.38. This portrait of savvy cable operators pitted against bumpkin building owners is wholly unrealistic. The RAA Comments offer a much more nuanced view: As they make clear, both in argument and sworn testimony, building owners often are highly sophisticated, repeat players that can and do use ESC negotiations to win significant contractual concessions from video providers. These concessions may include free building-wide infrastructure upgrades, cost

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14/ *See generally* Shentel Comments; Greenfield Service Provider Coalition Comments.

15/ *See* RAA Comments at Exh. C-E (Acker Declaration at 3; Sadler Declaration at 2; McDonald Declaration at 2).

reimbursements that get passed through to tenants, and mandatory service-quality provisions that provide more stringent customer service requirements than those that accompany a standard contract. 16/

4. Prices: The United States Telecom Association argues that video competition lowers prices but that "consumers residing in MDUs subject to exclusive contracts . . . may not realize the tremendous savings gains that competition brings." 17/ Advance/Newhouse takes no issue with the first half of this proposition, but the second half is demonstrably inaccurate. In localities where there is no effective competition, video providers are required by federal law to maintain a rate structure that is "uniform throughout the geographic area." 18/ And in localities where there *is* effective competition, the ESCs themselves, by their terms, often guarantee for MDU residents the best available price. There is record evidence that building owners insert language into ESCs requiring that the provider charge residents no more than single-family residents are charged in the surrounding area. 19/ Where such contractual language is present, the MDU residents will receive all the benefits of competition in the local market by simple operation of the exclusive contract.

5. ESC Ban Does Not Equal Multiple Providers: The arguments in favor of an ESC ban seem to assume that such a ban would necessarily lead to multiple video providers in MDUs. But the assumption is not valid, for at least two reasons. First, the

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16/ *Id.* at 14-15, 17, Exh. D (Sadler Declaration at 4-8).

17/ USTA Comments at 13.

18/ 47 U.S.C. § 543(d).

19/ RAA Comments at Exh. C (Acker Declaration at 5).

cost of extending service to some MDUs makes it likely that only one provider may even venture to provide service. Indeed, sometimes ESCs are necessary to encourage any provider to offer advanced services to an MDU. 20/ Second, absent a mandatory-right-of-access rule, no one can compel an MDU owner or developer to grant access to more than one provider. An ESC ban therefore would not guarantee multiple video providers in a given building. To the contrary, as discussed *supra* at 5 & n.11, a more likely scenario would be that ILECs would become the only video provider in many MDUs. An MDU owner who did not want multiple video providers in the building would be hard-pressed to choose anyone other than the ILEC. ILECs have been known to refuse voice service to buildings that do not also permit them to provide video service, and many MDU residents still want the brand-name voice service that the ILECs offer. 21/ Furthermore, as explained above on pages 4 and 5, ILECs have a number of other legal rights that can assure them building access. The Commission should decline the ILECs' invitation to leverage their existing competitive advantages.

B. Verizon Mischaracterizes BHN's Actions.

In short, the record is replete with evidence that undercuts the ILECs' central assumptions. And to the extent the ILECs attempt to create record support for their "anticompetitiveness" argument by way of anecdotal evidence, their comments are misleading. Verizon, for example, spends several pages recounting the supposed anticompetitive behavior of BHN and other cable operators in Florida. Advance/Newhouse will walk the Commission through three of these statements to

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20/ *See, e.g.,* Shentel Comments at 8-9.
21/ *See* RAA Comments at 46, 48.

demonstrate that each is either inaccurate or missing crucial context that changes the import entirely.

1. River Chase: Verizon offers as one of its key pieces of evidence BHN's exclusive service agreement with the River Chase apartment complex in Temple Terrace, Fla. Verizon Comments at 10. 22/ Verizon breathlessly writes that the agreement "was signed by Bright House on December 15, 2005 – just two weeks before Verizon began to offer FiOS television service in the area." *Id.* The timing of the River Chase agreement "is almost certainly not coincidental," Verizon adds, citing this as evidence that "exclusive access agreements are used by incumbent cable companies to forestall competition." *Id.* at 9-10.

What Verizon fails to mention is that it received a franchise to serve Temple Terrace in May 2005 – seven months *before* BHN entered into the River Chase agreement 23/ – and that it was publicly offering service to Temple Terrace customers by, at the very latest, September 2005, still several months before BHN signed the River Chase agreement. 24/ Verizon, in other words, had ample opportunity to contact River Chase and compete for the right to serve its residents. For all we know, Verizon may have done so. BHN is not privy to the date when Verizon actually starts offering service in a community except to the extent that Verizon publicly announces its activities.

22/ Verizon wrote that River Chase is in Tampa, but it actually is in the nearby Temple Terrace community.

23/ *See Verizon Gets Temple Terrace Video Franchise*, Tampa Bay Business Journal (May 18, 2005), *available at* http://www.bizjournals.com/tampabay/stories/2005/05/16/daily34.html;

24/ *See* Verizon News Release, *Verizon Brings Blazing-Fast Computer Connections to Customers in Temple Terrace, Fla.* (Sept. 30, 2005), *available at* http://newscenter.verizon.com/press-releases/verizon/2005/page.jsp?itemID=29707592. In the News Release, Verizon proclaimed that "customers can experience breathtaking high-speed Internet access as the company expands its Verizon FiOS . . . suite of Internet services to Temple Terrace."

Verizon's "two weeks" reference therefore is entirely beside the point; Verizon had seven months to compete head-to-head with BHN and strike a deal of its own.

2. Manatee County: Verizon writes that "Manatee County, Florida noted [in another docket] . . . that Bright House has, on prior occasions, responded to the granting of a franchise to a new entrant by actively soliciting exclusive access agreements from existing customers." *Id.* at 10-11. Again, the crucial context is missing. The Manatee comments in fact cited that particular battle for exclusive contracts as a pro-competitive development that lowered prices. The comments noted that BHN sought contracts "at rates far lower than individual homeowners were then paying" and that, "[f]rom the County's regulatory viewpoint, these developments clearly demonstrated that direct competition could result in better consumer pricing." 25/ Furthermore, Verizon neglects to mention that Manatee County's cable ordinance flatly prohibits an operator from entering exclusive access deals unless it provides better pricing than otherwise offered by the company in the county. Manatee County Code § 2-7-4(b)(1). Far from providing evidence of anticompetitive impact, the Manatee example shows that the availability of exclusive contracts can benefit consumers, and that local law can and does enhance this beneficial effect.

3. Bradenton: Verizon writes that a condominium association in Bradenton, Fla., recently informed residents that due to an "exclusive contract" with a cable provider, DC Nets, the residents could not buy Verizon video service. Verizon conveniently fails to mention, however, that the condominium association was mistaken in this statement

25/ *See 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*, MB Docket No. 05-311, Comments of Manatee County, Florida at 4 (filed Jan. 3, 2006).

to its residents. Florida's condominium laws permit Verizon to provide video service to any condominium owner or tenant who requests it, so long as the operator is "franchised" in that community, which Verizon is in Bradenton. *See* Fla. Stat. Ann. § 718.1232 ("No resident of any condominium dwelling unit, whether tenant or owner, shall be denied access to any available franchised or licensed cable television service"). As such, the condo association had no right to deny its residents access to Verizon's service, regardless of what the contract at issue may have said. The existence of this state law points, yet again, to a reality the Commission should bear in mind as it considers what to do about this docket: States and localities across the country already are regulating video access issues in such a way as to render Commission intervention unnecessary and improvident. 26/

II. THE COMMISSION LACKS STATUTORY AUTHORITY TO BAN ESCs.

Of course, that the record does not suggest the need for a ban on ESCs in the MDU video services context hardly matters in the final analysis, because the Commission has no authority to impose such a ban in any case. Section 628(b), the primary statutory provision cited by the NPRM, is inapposite – a fact made clear not only by the statutory text but also by the legislative history, the applicable regulations, and an unbroken line of Commission decisions dating back almost 15 years. 27/ And even if the Commission did have statutory authority to ban ESCs here (which it does

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26/ *See, e.g.*, Comcast Comments at 21 & n.43 (noting that 18 states already have some form of mandatory access law).

27/ The other provisions cited by the NPRM are even less apposite. *See* NPRM at ¶ 9. BHN fully agrees with the many commenters who have pointed out why those provisions cannot provide authority here. *See, e.g.,* Time Warner Cable Comments at 11 (noting that Sections 706, 1, 4, and 303 "only provide ancillary power to fulfill primary directives located elsewhere in the statute"); RAA Comments at 37-38 (explaining why Section 623 cannot apply). BHN will not reiterate those arguments. It instead will focus on Section 628, the provision on which the NPRM primarily relies.

not), it still would lack the power to make its ban retroactive. Finally, even if the Commission could make any ban retroactive, the contractual abrogations that would result would trigger the Takings Clause and require just compensation of building owners, video providers, and MDU residents.

A. Section 628(b) Is Inapplicable.

Advance/Newhouse agrees with the numerous commenters 28/ who have noted the problem with the Commission's reliance on Section 628. The provision was enacted as, and has always been understood to be, a ban on unfair and deceptive practices *that limit competitive MPVDs' access to programming content*. We write separately to emphasize additional aspects of this crucial point and to explain why the ILECs' contrary arguments must fail.

Section 628(b) makes it "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." 47 U.S.C. § 548(b). The ILEC commenters that support an ESC ban treat this provision as if it stands alone 29/ – a fundamental mistake. One cannot "read statutory provisions in isolation, as if other provisions in the same Act do not exist." *Miller v. Albright*, 523 U.S. 420, 456 (1998). And when Section 628 is read as a piece, it becomes clear that the

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28/ *See, e.g.*, NCTA Comments at 4; RAA Comments at 29-33.
29/ *See, e.g.,* SureWest Comments at 22.

provision is "not a mini-Sherman Act that gives the FCC broad authority to restrict or proscribe any acts or practices that it may deem unfair." NCTA Comments at 4. It is, to the contrary, a ban on attempts by video providers and affiliated programming distributors to deny competitive video providers access to satellite programming. Thus subsection (c)(2)(A) of Section 628 commands the Commission to prevent cable operators from influencing affiliated satellite programming vendors not to sell to competitive video providers. 30/ Subsection (c)(2)(B) tells the Commission to prohibit price discrimination by satellite programming vendors in their sales to video operators. 31/ Subsections (c)(2)(C) and (c)(2)(D) call for regulations prohibiting agreements between cable operators and affiliated satellite programming vendors that prevent other operators from "obtaining . . . programming." 32/ Subsection (d) creates a remedy only for MPVDs, not for retail customers. 33/ Subsection (e) names one potential remedy as an exemplar – the establishment of "prices, terms, and conditions of sale of programming to the aggrieved [MVPD]." 34/ And subsection (i) defines "satellite cable programming" by reference as programming "*which is primarily intended for the direct receipt by cable operators* for their retransmission to cable subscribers." 35/ Every section of the statute, in short, points to the same end –

30/ 47 U.S.C. § 548(c)(2)(A).

31/ *Id.* § 548(c)(2)(B).

32/ *Id.* § 548(c)(2)(C), (D).

33/ *Id.* § 548(d).

34/ *Id.* § 548(e).

35/ *Id.* § 605(d) (emphasis added).

providing video distributors with fair access to the programming sold by satellite programming vendors. Nothing in the statute suggests a broader scope.

The limited scope of Section 628 is hardly surprising, for Congress inserted it into the legislation solely to achieve parity in wholesale programming access. As the Section's sponsor explained: "The Tauzin Amendment, very simply put, requires [the cable industry] to stop refusing to sell its products to other distributors of television programs." 36/ The written history is to the same effect. 37/ And the Commission, contemporaneously with the statute's passage, described it thusly: "Congress chose *program access provisions targeted toward cable satellite programming vendors* in which cable operators have an 'attributable' interest and toward satellite broadcast programming vendors regardless of vertical relationships." 38/

Despite these unambiguous statements, Verizon attempts to argue that the legislative history cuts the other way. It argues that "the House of Representatives rejected a far narrower proposal" at the time of the 1992 Act, meaning that the enacted version of Section 628 must be of practically unlimited breadth. But Verizon's argument mischaracterizes the events of the day. First, Congress did not consider and reject a proposal to replace Section 628 standing alone. It rejected a massive amendment in the nature of a substitute that contained dozens of provisions, none of which was even a precise analogue to Section 628. *See* 138 Cong. Rec. H6545, H6550 (July 23, 1992). Effective legislative-history-by-negative-implication arguments require much better facts.

36/ Statement of Rep. Tauzin, Cong. Rec. H6532 (daily ed., July 23, 1992).

37/ *See* Sen. Rep. 102-92 at 24-29, 91-93.

38/ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage* ("*1993 Rulemaking*"), 8 FCC Rcd 3359, ¶ 9 (1993) (emphasis added).

Second, in defending his bill against this substitute, Representative Markey, one of the sponsors of the original bill, made comments that can only support the well-accepted, narrower reading of Section 628: He found the substitute objectionable because "[b]y enabling programmers – *even vertically integrated ones* – to enter into exclusive contracts with cable operators, [it] sanctions anticompetitive practices of cable operators *that have the effect of denying access to programming to their would-be competitors*." *Id.* at 6558 (statement of Rep. Markey) (emphases added).

The plain language, and the clear Congressional purpose, no doubt explain why the Commission again and again has found that Section 628 is about programming access and nothing more. Just last year, for instance, it wrote:

> In section 628 . . . Congress directed the Commission to promulgate rules *governing MVPDs' access to programming*. At that time, Congress was concerned that most cable operators enjoyed a monopoly in program distribution at the local level. Congress found that vertically integrated program suppliers had the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies. *Section 628 is intended to foster the development of competition to traditional cable systems by facilitating competing MVPDs' access to cable programming services*. 39/

This finding is only the latest reiteration of a long-running Commission interpretation that meshes with the legislative history and the statutory structure – and that flies in the face of the Commission's suggestion that Section 628 might provide authority here. In 1995, for example, the Commission characterized Section 628 as an attempt to "promote

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39/ *Applications for Consent to the Assignment and/or the Transfer of Control of Licenses*, 21 FCC Rcd 8203, ¶ 39 (2006) (emphases added). The Commission has repeated this precise description of Section 628 in other orders. *See, e.g.*, *RCN Telecom Servs. of New York, Inc. v. Cablevision Sys. Corp.*, 16 FCC Rcd 12048, 12049 (2001); *DIRECTV, Inc. v. Comcast Corp.*, 15 FCC Rcd 22802, 22803 (2000).

entry into local distribution markets through interim limits on strategic vertical restraints between vertically-integrated cable operators and programmers" and said it "place[s] limitations on the conduct of vertically integrated firms distributing satellite programming and MVPDs." 40/ A year later, the Commission refused to read 628(b) "in isolation" to prohibit unfair practices in general. Instead, it read the subsection "in connection with Sections 628(c)(2)(D) and 628(h) and refused to extend its reach beyond "vertically integrated cable television programmer[s]." 41/ The Commission several times has refused to use Section 628 to reach the sale of terrestrially delivered programming, stating each time that the statute simply did not stretch so far. 42/

The Commission's rules are to the same effect. They revolve wholly around concerns of program access. *See* 47 C.F.R. § 76.1001 *et seq*. Rule 76.1003(e), for example, governs the answers to be filed in proceedings alleging violation of Section 628 and its accompanying regulations. "An answer to an exclusivity complaint shall provide the defendant's reasons for refusing to sell the subject programming to the complainant"; "[a]n answer to a discrimination complaint shall state the reasons for any differential in prices . . . between the complainant and its competitor," and "[a]n answer to a complaint alleging an unreasonable refusal to sell programming shall state the defendant's reasons for refusing to sell to the complainant[.]" The rule does not even

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40/ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 11 FCC Rcd 2060, 2135 (1995).

41/ *American Cable Co. v. Telecable of Columbus, Inc.*, 11 FCC Rcd 10090, 10114 (1996).

42/ *See, e.g., RCN Telecomm. Servs. Of New York, Inc. v. Cablevisions Sys. Corp.*, 14 FCC Rcd 17093, 17105 (1999). Indeed, in the initial rulemaking to create regulations implementing Section 628, it appears that no one, from *any* industry, argued that the provision was as broad as the Commission now suggests it may be. All of the comments assumed that the provision regulated wholesale programming access; they disagreed only as to how broad it might be within the limits of that framework. *See 1993 Rulemaking*, 8 FCC Rcd 3359, ¶ 38 (describing comments).

contemplate the possibility that a complaint will involve anything beyond program access. This same narrow focus pervades the rest of the regulations, as well.

These Commission decisions and regulations not only take the correct approach *vis a vis* the statute. They also reflect a longstanding Commission interpretation – an interpretation it cannot abandon without providing a reasoned explanation of a sort that has not been offered here. *See Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983). Furthermore, in their refusal to expand the Commission's focus past *satellite-delivered* programming, they highlight a logical flaw in the proposed broader interpretation of Section 628(b): Why, if Congress desired to vest the Commission with power to curb unfair practices in the cable industry generally, would it have written the statute in such a way as to focus on "satellite" programming? There is, of course, much video content that is terrestrially delivered. Congress would not have bootstrapped FCC jurisdiction in this odd way. The more natural reading takes into account the rest of Section 628 and recognizes that the provision is all about wholesale program access – a long-established interpretation that renders the statutory structure sensible. It is this reading that must carry the day again.

B. The Commission Lacks Authority To Abrogate Existing Contracts And Would Have To Pay Just Compensation If It Did Abrogate Them.

Even if the Commission had the power to ban ESCs going forward, that certainly does not mean it could do so retroactively. Advance/Newhouse agrees with the host of commenters who have pointed out that the Commission must meet a heightened public interest standard before it can alter existing contracts – a standard not met here. 43/ We would only add the following: Even if the Commission concluded it had authority to

43/ *See, e.g.*, Time Warner Comments at 11-12.

abrogate existing ESCs (which it does not), such abrogation would constitute a taking triggering the Fifth Amendment's "just compensation" requirement. This point has been roundly ignored by the ILECs writing in support of a ban on video ESCs. 44/

"Contract rights are a form of property and as such may be taken for a public purpose *provided that just compensation is paid*." *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19 n.16 (1977). The Supreme Court (and the courts of appeals) thus have applied the regulatory takings jurisprudence to laws that interfere in certain ways with contractual rights. *See, e.g., Eastern Enters. v. Apfel*, 524 U.S. 498, 529-530 (1998) (plurality opinion); *U.S. Fidelity & Guar. Co. v. McKeithen*, 226 F.3d 412, 416, 418 (5th Cir. 2000) (finding a taking and noting that retroactivity is "generally disfavored in the law"). Indeed, the Third Circuit recently made clear that abrogation of contracts by the Commission implicates the Takings Clause: In *Prometheus Radio Project v. FCC*, it wrote that "[c]ontracts such as JSAs are protected property interests under the Fifth Amendment." 373 F.3d 372, 430 (3d Cir. 2004) (quoting *U.S. Trust*, 431 U.S. at 19 n.16). The *Prometheus* court declined to find a taking only because, on the facts there presented, the Commission "ha[d] not invalidated or interfered with any contracts." *Id.*

In this case, the Takings problem would be especially acute because, just four years ago, the Commission considered the propriety of video ESCs and declined to regulate them. 45/ That video providers have no doubt entered ESCs since that time in reliance on that decision would cut in favor of finding a regulatory taking. *See McKeithen*, 226 F.3d at 416 (listing "the extent to which the regulation has interfered

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44/ *See, e.g.*, Verizon Comments at 18-19 (addressing only the inapplicable Contracts Clause).

45/ *Inside Wiring Order*, 18 FCC Rcd at 1369.

with reasonable investment-backed expectations" as one of three factors used to find a regulatory taking *vel non*). Given that ESCs provide demonstrable benefits for video providers, building owners, and building residents alike, any decision by the Commission to abrogate existing ESCs could come at a prohibitive cost.

CONCLUSION

The Commission should not be led astray by the desire of a few mammoth ILECs to invalidate the existing contracts of their video competitors. No reason exists to regulate video ESCs in the MDU context. Such regulation would not guarantee multiple video providers in every building, but instead would just tilt the field in favor of the ILECs. And even if the Commission thought otherwise, it lacks the statutory authority to impose the contemplated ban. For all of these reasons, the Commission should follow its own prior wisdom – it should decline, as it did in 2003, to take action in this area.

Respectfully submitted,

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