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

In the Matter of	)	
	)	
Exclusive Service Contracts for Provision of Video Service in Multiple Dwellling Units And Other Real Estate Development	)	WT Docket No. 07-51

REPLY COMMENTS OF AT&T INC.

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Pursuant to section 1.415(c) of the Commission's rules, 47 C.F.R. § 1.415(c), AT&T Inc. ("AT&T") respectfully submits these reply comments in response to the Commission's *Notice*.[1]

INTRODUCTION AND SUMMARY

It is no surprise that the *Notice* has been met with a chorus of complaints from incumbent cable operators and other entities that support exclusive MDU access agreements, because those agreements serve to exempt their services from meaningful competition. That is the very reason that the Commission should immediately exercise its clear authority to prohibit video providers from entering or enforcing these exclusive access agreements. The comments vividly confirm that under current marketplace conditions – in which real wireline video competition is just developing – exclusive access agreements threaten to deny an entire class of consumers competitive video choice and the rate reductions and service improvements that wireline video competition unquestionably fosters. As such, these agreements do enormous harm to the public interest. At the same time, the comments make clear that legitimate concerns of video service

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

providers to manage the risks of their investments and of MDU owners to provide real benefits to their tenants can be accommodated with alternative arrangements such as marketing agreements and bulk billing arrangements that MDU owners concede they prefer, that do not categorically bar competitive offerings and consumer choice, and that would be unaffected by a limited ban on arrangements that require absolute exclusivity.

First, as shown in Part I, the use of exclusive MDU access agreements is widely prevalent, is growing rapidly, and is impeding competition in the provision of both video and broadband services to MDU residents. The record is completely one-sided on these points. Indeed, incumbent cable operators and MDU owners alike concede both that exclusive MDU access arrangements are already commonplace and becoming more so as wireline video entrants roll out their service offerings and that these arrangements can "inhibit competition by allowing a provider to lock up customers for long periods of time." Time Warner at 1. Although opponents of Commission action complain that such agreements with MDU owners can also have benefits, the record confirms that these same benefits can largely be achieved through contracts that may strongly incent tenants to stick with the MDU owner's preferred provider but do not ban competition. Any residual benefits of absolute exclusivity are clearly overwhelmed by the harms associated with creating competition-free zones that deny MDU residents *any* choice in who provides their wireline video services.

As shown in Part II, the comments likewise confirm that Congress has given the Commission ample tools to fix this problem. Opponents of Commission action have no answer to the precedents stretching back to the 1960's that establish the Commission's broad regulatory authority over cable services and video competition under both its longstanding ancillary authority and explicit provisions of the Cable Act. Indeed, there is no serious question that the

Commission is authorized to adopt regulations that promote competition within the video services marketplace by restricting exclusive MDU access arrangements that impede competitive providers from even offering their services to millions of consumers. Claims by MDU owners that the Commission lacks authority to regulate them are entirely beside the point. AT&T and other wireline video entrants ask the Commission only to exercise its clear authority over video providers themselves, and it is well established that this authority is not somehow invalidated because the regulation of video service providers may affect, indirectly, their dealings with third parties. Finally, there is no merit to claims that the Commission can address this barrier to competition only on a prospective basis so that anti-competitive agreements with terms of 5 or 10 years (and, in some cases, in perpetuity) are allowed to bar competition while they run their course.

ARGUMENT

I. THE COMMISSION SHOULD PROHIBIT MULTI-CHANNEL VIDEO PROVIDERS FROM ENTERING OR ENFORCING EXCLUSIVE MDU ACCESS AGREEMENTS.

The comments submitted in response to the Commission's *Notice* confirm that the Commission should prohibit providers of video services from obtaining or enforcing exclusive video access rights to an MDU or other centrally-managed real estate development so that all consumers can enjoy the public interest benefits of developing wireline entry and meaningful video competition. There is no denying that, under current video market conditions, exclusive MDU access arrangements that wall off substantial numbers of MDU residents from competition harm consumers by denying them the lower prices and innovative services that wireline video competition unquestionably fosters. And, as detailed below, the claimed benefits of these exclusive access arrangements – primarily in encouraging investment by reducing the exclusive supplier's financial risk – can be obtained through other means such as marketing agreements or bulk discount arrangements that steer tenants toward a single provider but do not deny an entire class of consumers competitive choice.

A. The Comments Confirm That Exclusive Access Agreements Are Ubiquitous And That They Stifle Competition.

What is perhaps most notable about the comments is that there is no real dispute about the use of exclusive access arrangements in MDUs. Cable incumbents do not deny that they are aggressively targeting MDU owners with exclusive arrangements to wall off MDU residents from competition. Nor do they deny that a substantial portion of MDUs currently are closed to competition through exclusive access agreements entered into before wireline competition even got off the ground. As the comments confirm, the use of exclusive access arrangements in MDUs and other centrally-managed developments is "widespread."[2] What is more, incumbent cable operators' widespread use of exclusive access arrangements places competitive providers under strong pressure to follow suit. As a result, a failure to regulate here could only ensure that more and more MDU tenants are denied competitive choice.

Even the proponents of exclusive access arrangements concede that their use is already commonplace: RAA estimates that about half of all apartment buildings across the nation are subject to agreements with exclusivity provisions, and "a smaller proportion—we are not sure how many—are subject to exclusive access agreements." RAA at 16. Indeed, no commenter seriously denies that "incumbent cable providers routinely enter into a broad range of

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[2] Verizon at 8; *id.* at 8-13; 10-12 (exclusive access agreements are "in Florida," "throughout the Tampa area," "in California," "in the Dallas area," . . . [and] "across Maryland"); SureWest at 5 (exclusive access MDU contracts are "a nation-wide concern" and are used throughout SureWest's territory in Northern California); *id.* at 3 (28% of units through which SureWest's network passes are "locked into exclusive service contracts"); Lafayette Utilities at 3 (exclusive access agreements are "routine[]"); *see also* Warner Properties at 2; USTA at 6; Qwest at 3; Embarq at 2-5; Corning at 5-7.

anticompetitive exclusive arrangements at MDUs and other real estate developments."[3] And, as RAA confirms, these exclusive arrangements often deny MDU tenants competitive choice for 5 or 10 years, or even longer. *Id.*

Providers like Verizon and AT&T, which are attempting broad-based entry in numerous markets throughout the nation, have already faced exclusive access arrangements designed to foreclose them from offering competing video (and broadband) services to MDU residents in numerous instances across the country. "Even at this early stage of its FiOS rollout, Verizon has uncovered or been informed of exclusive access arrangements covering scores of properties with tens of thousands of units in five separate states. Furthermore the contracts Verizon has found to date have involved several different companies." Verizon 12; *see also* AT&T Comments 10-11.

Providers entering more selectively, such as SureWest and Embarq, likewise report that exclusive access arrangements have been used to prevent them "from installing and providing multichannel video and internet services to [MDU] customers."[4] And fiber providers like Corning report that deployment of fiber is substantially lagging in MDUs. "[L]ess than 15 percent of the living units passed by FTTP are in the MDUs," which Corning attributes to the existence of exclusive access arrangements by cable incumbents.[5] RAA admits that alternative video "[p]roviders may sometimes be stymied by such agreements," RAA at 16, and Time

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[3] Lafayette Utilities at 3. Nonetheless, as Verizon and others make clear, it is nearly impossible for new entrants in the wireline video market to ascertain the full extent to which exclusive access arrangements are utilized in MDUs. The agreements often contain confidentiality provisions, and in many cases neither the property owner nor the cable incumbent will reveal the existence of these agreements – at least until, as described below, the agreements are used to foreclose a new entrant's efforts to offer a competitive alternative in an MDU to the cable incumbent's video services. *See, e.g.,* Verizon at 8-9, 12; SureWest at 3 & n.2; RAA at 16 (RAA is "not sure how many" MDUs are "subject to exclusive access arrangements").

[4] SureWest at 4-5; Embarq at 2-5; *see also* Lafayette Utilities at 3-8; USTA at 5-8.

[5] Corning at 6.

Warner likewise concedes that exclusive access arrangements can "inhibit competition by allowing a provider to lock up customers for long periods of time," Time Warner at 1.

There is also no dispute that cable incumbents are aggressively moving to lock up many more MDUs with exclusive access agreements, and that the pace of this foreclosure has accelerated dramatically as wireline competitors enter. "Incumbent providers commonly engage in a flurry of activity to lock up MDUs and other real estate developments in exclusive arrangements as soon as it becomes clear that a new entrant will be coming to town."[6] They do so, because exclusive access arrangements allow them to retain customers without reducing their rates or improving their services. Conversely, the price paid for insulating incumbents from the risks associated with full and fair competition is that MDU tenants are denied the chance to choose alternative wireline providers with better rates and services.[7]

The need for Commission action is urgent, and unlike in 2003, when the Commission declined to act because the record then did not "indicate the extent to which excusive contracts have been utilized" or whether they "have thwarted alternative providers' entrance into the MDU market,"[8] the record compiled in response to the Commission's *Notice* proves beyond any doubt that cable incumbents' use of exclusive access arrangements to foreclose multichannel video competition is extensive and is currently preventing MDU residents from receiving the lower prices and improved services that Congress and the Commission have repeatedly found arrive

[6] Lafayette Utilities at 9 & Dawson Decl ¶ 24; *see also* Verizon at 10-11; USTA at 6-7.

[7] *E.g.*, Verizon at 1 (exclusive agreements are "analogous to exclusive franchises"); Lafayette at 3-8 (describing anti-competitive effects of exclusive access arrangements).

[8] First Order on Reconsideration and Second Report and Order, *Telecommunications Services Inside Wiring*, 18 FCC Rcd. 1342, ¶ 69 (2003).

when wireline video providers are allow to enter the MDU market and to compete against cable incumbents.[9]

Incumbent cable operators claim that this is a "no harm, no foul" situation because they lack market power. *See* Comcast at 12-13. But, as the Commission recognized just a few months ago, after considering a massive record compiled in response to its franchising process rulemaking, "[i]n the vast majority of communities, cable competition simply does not exist."[10] And while "DBS competition . . . has only lowered rates slightly,"[11] competition from wireline competitors "reduces rates far more than competition from DBS."[12] Indeed, "the presence of a second cable operator in a market results in rates approximately 15 percent lower than in areas without competition."[13] Eliminating artificial barriers to wireline entry and competition such as

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[9] *See, e.g.*, Corning at 5 ("Both Corning's customers' real-world experience and market data demonstrate that exclusive access contracts discourage FTTP deployment, impede competition, and discourage innovation").

[10] *See* Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 22 FCC Rcd. 5101, ¶ 19 (2007) ("*Franchising Reform Order*").

[11] Twelfth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503, ¶ 5 (2006) ("*Twelfth Annual Report*").

[12] *Franchising Reform Order* ¶ 50.

[13] *Id.*; *see also Twelfth Annual Report* ¶ 41 ("competition to an incumbent cable operator from a wireline provider resulted in cable rates that were 'substantially lower (by 15 percent)' than in markets without this competition"); U.S. GAO, Subscriber Rates and Competition in the Cable Television Industry, GAO-04-262T (Mar. 2004) ("[S]ubscribers in areas with a wire-based competitor had monthly cable rates about $5 lower, on average, than subscribers in similar areas without a wire-based competitor. Our interviews with cable operators also revealed that these companies generally lower rates and/or improve customer service where a wire-based competitor is present."); U.S. GAO, GAO-04-8, Issues Related to Competition and Subscriber Rates in the Cable Television Industry, Report to the Chairman, Comm. on Commerce, Science and Transp., (2003) at 3, 10 (noting that cable rates are about 15 percent lower in markets where wireline competition is present); U.S. GAO, GAO-03-130, Issues in Providing Cable and Satellite Television Services, Report to the Subcomm. on Antitrust, Competition, and Business and Consumer Rights, (2002) at 9 ("in franchise areas with a second cable provider, cable prices are approximately 17 percent lower than in comparable areas without a second cable provider").

those posed by exclusive MDU arrangements thus plainly would benefit consumers and serve the public interest.

The need for immediate Commission action is all the more critical now because the use of exclusive access arrangements in MDUs impedes not only multichannel video offerings but also broadband deployment. Commenters of all stripes confirm the Commission's findings that "broadband deployment and video entry are inextricably linked."[14] Alternative providers are seeking to offer MDU residents a bundle of voice, video and broadband services, but the cable incumbents' are more and more using exclusive access arrangements to prevent these residents from obtaining this bundle and the broadband (and telephone) services included within it.

These anticompetitive effects are particularly acute for Carriers of Last Resort ("COLR") such as AT&T, Verizon and Embarq. *See* Embarq at 5-8. COLR carriers are obligated to provide voice services to MDUs in the areas in which they operate whether or not a "reasonably prudent business enterprise" would have concluded that the providing voice service alone to the MDU made economic sense. As such, carriers such as AT&T are obligated to build facilities in certain areas to new and greenfield developments to comply with their obligations to provide voice services when no other carrier is willing to do so. Exclusive access arrangements for video services are particularly inappropriate under these circumstances because they deprive MDU tenants with competitive choices and favorable rates and services offered by COLR carriers that are seeking to "gain[] additional revenues from video and data . . . to help spread the cost of serving one particular area" with respect to voice services. *Id.* at 6.

In short, the record overwhelmingly demonstrates the need for immediate Commission action not only to prevent the many millions of MDU residents from being denied the benefits of

[14] *Franchising Reform Order* ¶ 51. *See, e.g.*, Embarq at 2-3; Corning at 5-7; Verizon at 4-5; SureWest at 6; USTA at 8-12; Qwest at 6.

wireline video competition, but also to remove very real impediments to broadband investment and competition across the entire range of communications services that can be provided over today's multi-service converged broadband networks.[15]

B. The Purported Benefits to Consumers Can Be Obtained Without Exclusive Access Agreements, Which Are Designed to Preclude Competition In MDUs.

Unable to deny that their use of exclusive access arrangements in MDUs is widely prevalent, is growing rapidly, and is currently stifling entry by alternative providers, some existing multi-channel video providers attempt to justify these practices on a variety of grounds. None has merit.

A number of commenters argue that exclusive access arrangements can, in some circumstances, provide benefits to MDU customers because they allow video service providers to offer lower rates and advanced services. For example, NCTA argues that exclusive access agreements can have both "pro-competitive and anti-competitive aspects." NCTA 8.[16] Or, as ACA argues, exclusive access arrangements ensure a "predictable return on their investment" by allowing only a single video service provider to provide "service to the entire MDU for the term of the agreement." ACA at 3. These comments overlook that exclusive access arrangements impose significant costs on consumers. As the New Jersey Division of Rate Counsel reports (at

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[15] The Commission cannot rely, as some commenters urge, upon state regulation to address the ills posed by exclusive access agreements in MDUs. *E.g.*, NJ Comments at 8. As Charter concedes (at 2 n.2), only a minority of states regulate such access today, and there is no realistic prospect the majority of other states will address this problem in the near term.

[16] *See also* RAA at 16 (arguing that exclusive agreements provide benefits to subscribers); Time Warner at 3 (arguing that "competitive effects of exclusive contracts are mixed"); CAI at 5 (CAI argues that, in exchange for exclusive access rights, video service providers provide a host of benefits such as bulk rates, facility upgrades and better quality service); RAA at 17 (arguing that exclusive access agreements can yield "Rate reductions"; "amenities in Buildings"; Quality of Service Commitments"); WorldNet at 5-6 (arguing that consumers benefit from exclusive agreements).

8), "[t]he prohibition on exclusive contracts in New Jersey encourages lower prices and technological development and deployment, and provides consumers with a greater number of alternatives." *Id.*

In all events, a prohibition limited solely to exclusive access agreements would not affect other means of reducing risk and providing benefits to MDU customers short of a blanket prohibition on competition. As such, the supposed benefits to consumers from exclusive access agreements can be retained through other arrangements – *e.g.*, preferred or exclusive marketing agreements or bulk rate discounts – that serve to reduce the potential financial risk to the provider that enters such arrangements but do not foreclose entry by competitors. As Qwest points out, there is broad agreement that exclusive marketing agreements should not be prohibited. Qwest at 10. Indeed, RAA reports that MDU owners prefer "exclusive marketing agreements" and that "service providers, not property owners, regularly request exclusivity of some type." RAA at 11, 12.[17]

In AT&T's experience, alternative multichannel video providers can compete at these properties based on the value of their services relative to incumbent cable services. And exclusive marketing arrangements and bulk billing arrangements can address the provider risks and foster the consumer benefits touted by opponents of Commission action without restricting customer choice through an exclusive access agreement. *See* Embarq at 5 ("such exclusive

[17] Nor is there any merit to the argument that exclusive access arrangements are necessary for MDU owners to ensure quality service or to address aesthetic or space concerns. To begin with, some alternative providers already have existing facilities in place in MDUs, and seek merely to offer additional services over these facilities. There can be no valid objection to these services based on aesthetic grounds. Further, although exclusive access arrangements have become more prevalent, there are still many MDUs which are not subject to exclusivity provisions. In these MDUs, owners plainly have the latitude to ensure service quality, manage common spaces, and address aesthetic concerns.

arrangements are the very antithesis of freedom of choice for consumers"); Lafayette Utilities at 10 ("customer choice ought to be paramount to the FCC's decision")

For this reason, there is no merit to Comcast's assertions that the Commission's *Notice* fails to account for differences in types of MDU agreements. *See* Comcast at 6, 19-21. There is, in fact, a broad consensus against any regulation of exclusive *marketing* arrangements.[18] Rather, the arrangements challenged here are those designed categorically to exclude additional multichannel video providers from selling their services to MDU residents.[19] Likewise, Comcast is wrong in its assertion (at 19) that for bulk rate agreements, "from the point of view of the consumer, the effect is the same" as for exclusive access arrangements.

Under bulk billing arrangements, which are often used at student, senior, and military housing, video services are provided to an MDU and typically paid for by the MDU owner, which provides the services to its tenants as an amenity. These bulk billing agreements differ from exclusive access contracts in one critical respect: under a bulk agreement, customers retain the ability to choose another service provider. The service under the bulk agreement is an amenity of the property much like any other amenity (*e.g.*, a shuttle service or gym), but residents can choose another provider if they want to do so, and they will do so if the alternative offer is compelling.

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[18] *See, e.g.*, Verizon at 7 & n.4; Qwest at 10.

[19] *See, e.g.*, AT&T at 10 & Exh. A (contract providing for "the exclusive right to construct, install, operate, and maintain" a cable system at the MDU); *id.* at Exh. B (granting cable incumbent an exclusive "easement" over the MDU property allowing it to be the sole provider to "sell, market and provide" multichannel video services); *see also* Verizon at 9-11 & Attachments 2-9 (detailing similarly broad exclusivity provisions that barred Verizon from offering any multichannel video services in an MDU); *cf.* City of Lafayette at 4-8 (describing various types of agreements that preclude an alternative provider from offering services in an MDU.

These alternatives refute the claims of small cable operators and certain "greenfield" providers that assert that, absent exclusive access arrangements, they cannot justify the investments necessary to provide multichannel video services. Competitive providers routinely do make investments to provide services to MDU customers under other MDU arrangements, such as the exclusive marketing and bulk billing arrangements discussed above, that can provide a level of predictable revenues but that stop short of barring competitive providers and restricting customer choice. Particularly with these options, it is simply not the case that wireline video entry is economically infeasible without MDU exclusive access arrangements. Both large, medium, and small wireline entrants have signaled their willingness to invest and compete in an environment that prohibits exclusive access agreements.

SureWest and Embarq, for example, are small-to-medium providers that are willing and eager to serve MDUs in their service territory without the guarantee of revenues that is achieved by sacrificing consumer choice. Finally, to the extent that some multichannel video providers are so inefficient that they cannot succeed absent exclusive arrangements, the public – and especially the residents of MDUs served by any such carriers – are better off by unimpeded competition from wireline video entrants that are willing to compete on the merits.

A number of commenters are quite candid in their opposition to Commission regulation of existing exclusive access arrangements.[20] The position of these commenters is that even if exclusive agreements unfairly stifle competition, they should be permitted to continue to reap the benefits of their MDU monopolies. But these commenters can have no legitimate vested interest

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[20] *E.g.*, NCTA at 11 (arguing that any prohibition on exclusivity "should apply prospectively and should not abrogate existing contracts") *accord* Qwest at ii, 6-8; Litestream at 5.

in a contract that the Commission concludes unfairly constrains competition.[21] And a prohibition on exclusive MDU access contracts would in no way preclude service providers or MDU owners from providing benefits to consumers while managing the risks associated with projected revenue streams through other arrangements that do not create a de facto monopoly within a given MDU.[22]

In the end, the large cable incumbents offer virtually no affirmative reason to justify exclusive access contracts and instead simply complain that any regulation of exclusive access arrangements in MDUs that applied only to cable incumbents would be unfair and not competitively neutral. *See* Comcast at 7; NCTA at 8-11; Time Warner at 5-8. The reality is that Commission action barring exclusive access MDU arrangements is necessary in order to achieve competitive neutrality. As the cable incumbents admit, the lack of entry barriers in

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[21] The comments of groups representing MDU owners also object to a rule prohibiting exclusive access arrangements in MDUs, but most of their concerns are based on the premise that the Commission would be directly regulating property owners, which is simply not true. A Commission rule prohibiting exclusive access arrangements in MDUs would not interfere with property owners' rights, subject to governing state and local laws, to deny access to their property. Rather, such a rule would simply prohibit video providers from attempting to enter or enforce contracts that would impede MDU residents from enjoying the full benefits of competition.

[22] Charter and other large cable incumbents argue that *developers and property owners* insist on exclusivity provisions in arrangements to serve MDUs. *See* Charter at 3; Comcast at 14-15. As noted, however, MDU owners' experience is exactly the opposite: building owners typically do not seek exclusive access arrangements, and such proposals generally come from video service providers seeking to evade competition. RAA at 12. The record shows that in many cases, cable incumbents are insisting on exclusivity provisions and that they often attempt either to bury such provisions in dense legal terminology that many MDU managers would not read or to insert exclusivity provisions as a *quid pro quo* for cash payments or other benefits that accrue to the developer and/or MDU owner, rather than the MDU residents. *See, e.g.*, AT&T at 12-13 (citing "Comcast Throws a Curve In Its Broadband Pitch," S.F. Chron, July 19, 2006); Verizon at 8-9; City of Lafayette at 5. But as the City of Lafayette points out, it is ultimately irrelevant which party insists on an exclusivity provision in an access agreement for an MDU, for "the effect is the same – the cable provider and the property owner act together to exclude competitive services providers," to the detriment of the MDU residents.

telecommunications markets means that "cable operators are offering [video, voice and broadband] bundles *right now*" to all MDU residents (Comcast at 7), while alternative providers are foreclosed from making similar offers to the many thousands of MDUs covered by cable incumbents' exclusive access arrangements.

For similar reasons, there is no merit to the claim that "competitive neutrality" precludes the Commission from acting here to bar enforcement of existing exclusive access arrangements in MDUs merely because the Commission declined to ban existing exclusive arrangements for telecommunications services provided to commercial buildings.[23] In reality, telecommunications providers are, in fact, barred from entering into exclusive access agreements under a web of state regulations. As such, the absence of similar regulations applicable to video service providers creates an unfair playing field in favor of video service providers. In all events, the conditions in the telecommunications services marketplace in 2000 were very different from today's multichannel video programming distribution marketplace. With regard to the former, competition was already well-developed in 2000 and the record then before the Commission showed that any existing contracts were not significantly impeding competition. Here, by contrast, there is ample evidence that exclusive access arrangements in MDUs have existed for a long time, are already in widespread use, and are currently foreclosing competition for significant numbers of MDU residents.

II. THE COMMISSION HAS AMPLE STATUTORY AUTHORITY TO ADOPT RULES PROHIBITING EXCLUSIVE ACCESS AGREEMENTS.

The comments strongly confirm that the FCC has ample statutory authority to adopt limits on cable operators' ability to enter into exclusive MDU access arrangements. The cable

[23] *See* First Report and Order, et al., *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, ¶ 30 (2000) ("*Competitive Networks Order*").

companies and building owners opposing Commission action have no answer to the well-established precedents, from the 1960's onward, holding that the Commission has broad regulatory authority over cable services and video competition under its longstanding ancillary authority as well as explicit provisions of the Cable Act. That authority easily is broad enough to encompass a prohibition on exclusive access contracts with MDUs. Opponents of the proposed regulation cannot avoid that result by recasting the entire issue as a regulation that would directly regulate building owners, when in fact the rule would impose obligations solely upon video providers that are indisputably within the Commission's jurisdiction. And, finally, the Commission has ample authority to apply those regulations to existing contracts.

As a number of commenters note,[24] the Supreme Court has repeatedly recognized that under Sections 1, 2(a), 4(i), 201(b) and 303(r), the Commission has expansive authority to regulate cable services and to "issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[25] The Commission has used this authority on numerous occasions to adopt rules governing aspects of cable service that are not expressly mentioned in the Cable Act, and courts have uniformly upheld these assertions of authority under § 303(r) even while acknowledging the Cable Act's silence on those particular matters.[26] Indeed,

[24] *See, e.g.*, Qwest at 9 (noting that the Commission has "expansive powers" under Sections 4(i) and 303(r) to issue rules implementing Section 1, quoting *NBC* v. *United States*, 319 U.S. 190, 219 (1943)); Sure West at 13-17 (Sections 1, 4(i), and 303(r) "empower the Commission to take broad action to fulfill the goals and functions placed on the Commission by the Communications Act"); Corning at 10-11; Embarq at 4.

[25] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 181 (1968); *see also FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 706 (1979); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 700 (1984); *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

[26] *See, e.g.*, *United Video* v. *FCC*, 890 F.2d 1173, 1183 & n.5 (D.C. Cir. 1989) (Commission may enact a syndicated exclusivity rule even though Title VI lacks specific authorization to do so); *ACLU* v. *FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) (same, with respect to § 622's franchise fee provisions); *City of Chicago* v. *FCC*, 199 F.3d 424, 428 (7th Cir. 1999) ("[w]e are

as the commenters note, the Commission has already used its authority under Sections 4(i) and 303(r) to assert regulatory authority over cable inside wiring in MDUs,[27] and the building owners have no answer except to say that they disagree with this precedent.[28]

The cable operators and MDU owners that oppose Commission regulation seek to avoid this precedent by arguing from the false premise that the proposed rules would directly regulate building owners or "the real estate industry."[29] Thus, a number of commenters expend considerable effort arguing that the Communications Act does not give the Commission "jurisdiction" over building owners because they "do not engage in communications by wire or radio."[30] This is a fundamental misunderstanding of the nature of the proposed rules, which

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not convinced that for some reason the FCC has well-accepted authority under the Act but lacks authority to interpret [47 U.S.C.] § 541 [*i.e.*, § 621 of the Act] and to determine what systems are exempt from franchising requirements"); *see also City of New York* v. *FCC*, 486 U.S. 57, 70 n.6 (1988) ("§ 303 of the Communications Act continues to give the Commission broad rulemaking power 'as may be necessary to carry out the provisions of this chapter,' 47 U.S.C. § 303(r), which includes the body of the Cable Act as one of its subchapters"); *NCTA* v. *Brand X Internet Services*, 125 S.Ct. 2688, 2699 (2005) ("Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act . . . and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act").

[27] *See Telecommunications Services Inside Wiring, et al.*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd. 3659, ¶ 83 (adopting rules for disposition of cable inside wiring in MDUs under §§ 4(i) and 303(r), despite no express statutory authority, because not prohibited by Cable Act and because "adopting such procedures is necessary to implement several provisions of the Communications Act by effectuating and broadening the range of competitive opportunities in the multichannel video distribution marketplace").

[28] RAA at 40 (RAA members have "always expressed doubts about the home run wiring decision").

[29] *E.g.*, Charter at 2-3 & n.4; CAI at 11 ("the Commission must be able to point to statutory language clearly and expressly permits the agency to regulate any activity conducted by a community association"); RAA at 27 ("the Act simply does not apply to the real estate industry").

[30] *See, e.g.*, CAI at 11 ("the Commission must be able to point to statutory language clearly and expressly permits the agency to regulate any activity conducted by a community association"); *id.* at 12 (Section 2 limits Commission jurisdiction to cable operators, and community associations are not cable operators); *id.* at 23 (no jurisdiction "because building owners do not

would apply only to video providers. The Commission, of course, has unquestioned and broad jurisdiction over video providers and their services, and it has ample jurisdiction to direct them not to deploy or offer their services in ways that exclude competitive alternatives.[31]

Contrary to RAA's claim (at 27), it is well-settled that if a Commission rule prohibits a regulated entity from taking certain actions, such a rule is not invalid merely because it may limit a third party's options in how it deals with that regulated entity. As AT&T previously noted (AT&T Comments at 22-23), the D.C. Circuit affirmed the Commission's rule prohibiting United States carriers from paying foreign carriers more than certain benchmark rates for the completion of international calls, even though the rule's prohibition effectively limited the rates that could be charged by foreign carriers (which are not subject to Commission jurisdiction). *Cable & Wireless P.Q.* v. *FCC*, 166 F.3d 1224 (D.C. Cir. 1999). Indeed, the principal case on which RAA relies, *Ambassador, Inc.* v. *U.S.*, 325 U.S. 317 (1945), actually refutes RAA's argument. *See* AT&T Comments at 23 (discussing *Ambassador*).

In *Ambassador*, the Court upheld a tariff for hotel telephone rates that prohibited the hotel from assessing an additional fee. In language RAA does not quote, Justice Jackson, writing for the Court, explained that where a third party's business depended on its contract for the regulated service, "the regulation will necessarily affect, to that extent, [those] third party relationships," and that "[s]uch a regulation is not invalid *per se* merely because, as to the communications service and its incidents, it places limitations upon the [third party] as to the terms on which he may invite others to communicate through such facilities." *Ambassador*, 325

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engage in communications by wire or radio"); RAA at 27 ("[a]partment owners are not cable operators, and they are not engaged in providing cable service or other video programming services").

[31] 47 U.S.C. § 152(a) (granting Commission express jurisdiction over cable services).

U.S. at 323-24. In both *Ambassador* and *Cable & Wireless,* federal law dictated the contractual terms a regulated carrier could offer, and in both cases those restrictions were upheld even though they limited the contractual options available to third parties not subject to the Commission's jurisdiction. The proposed regulation of exclusive MDU access contracts is no different.[32] Given that the Commission indisputably has broad jurisdiction over cable services, the Commission likewise has ample authority to prohibit exclusive MDU contacts under its ancillary jurisdiction even in the absence of the specific provisions of the Cable Act.

The building owners' claim that courts have rejected ancillary jurisdiction in similar circumstances again founders on their misconception that the Commission's rule would directly regulate MDU owners rather than cable operators. The cases cited by CAI and RAA all involved Commission attempts to impose direct restrictions on entities or services that were far a field from the Commission's regulatory authority and are thus easily distinguishable.[33] In fact, NCTA and even RAA and CAI expressly concede that Section 4(i) and other provisions permit the Commission to issue regulations "ancillary" to an explicit grant of jurisdiction, and in support

[32] The other case RAA cites, *New England Legal Foundation* v. *Massachusetts Bay Authority*, 883 F.2d 157, 173-74 (1st Cir. 1989), even more strongly supports AT&T. There, the court upheld the Department of Transportation's preemption of certain airport landing fees as conflicting with federal policies, even though its determination effectively invalidated the fees and the governing statute preserved rate-setting functions to state and local authorities.

[33] For example, RAA and CAI claim that *Illinois Citizens Committee for Broadcasting* v. *FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972) establishes that the Commission's "ancillary jurisdiction does not extend to building owners," but in that case the Commission attempted to enjoin the construction of the Sears Tower on the ground that it might interfere with broadcast signals – a direct assertion of authority over the real estate industry that is not remotely analogous to the proposed rule here. Similarly, the building owners' other two cases involved attempts by the Commission to regulate activities that concededly did not involve any interstate communications at all – data processing services (*GTE Services Corp.* v. *FCC*, 474 F.2d 724, 735-36 (2d Cir. 1973)) and the "broadcast flag," a feature of consumer electronics equipment that does not operate in conjunction with any communication (*American Library Ass'n* v. *FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005)).

they cite the very Supreme Court cases that establish that the Commission has broad ancillary jurisdiction over cable services.[34]

Here, however, Congress has granted express authority in the Cable Act in Section 628(b), which makes it unlawful for a "cable operator . . . to engage in unfair methods of competition . . . the purpose or effect of which is to hinder significantly or to prevent any [MPVD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." 47 U.S.C. § 548(b); *see* AT&T Comments at 19-21.[35] The cable and building owner commenters all concede that the plain language of this provision would easily encompass a prohibition on exclusive MDU contracts.

They argue, however, that this language does not mean what it says, because the legislative history allegedly establishes that Congress intended the provision to be read as applying only to the sale of cable-owned satellite programming to other video providers.[36] The legislative history in fact establishes the opposite. While there is no doubt that the sale of satellite programming was an immediate problem on Congress's mind when it enacted Section 628, the House of Representatives considered and rejected an amendment – backed vigorously by the cable industry – that would have limited the prohibition in Section 628(b) expressly to programming access, instead of the broader language prohibiting any cable operator from engaging in unfair competition in the provision of "satellite cable programming or satellite

[34] NCTA at 5 n.5 (citing *Southwestern Cable* and *Midwest Video*); RAA at 41-42 (conceding that Commission has ancillary jurisdiction where it already has jurisdiction over the entity, and citing *Southwestern Cable* as establishing that cable services is an example); CAI at 23 (same).

[35] *See, e.g.*, Verizon at 15; Corning at 9 ("the language of Section 628 clearly allows the Commission to prohibit exclusive contracts by cable operators"); Sure West at 22-23.

[36] NCTA at 4-5; CAI at 12-15; RAA at 30-31; Time Warner at 8.

broadcast programming to subscribers or consumers. 47 U.S.C. § 548(b).[37] The legislative history of the 1992 Act thus reinforces the plain language of the statute.[38]

The cable companies and building owners also rely heavily on an assertion that the Commission in prior orders has held that Section 628 applies only to the ability to offer satellite cable programming and not terrestrially delivered cable programming.[39] But there is no dispute that the MVPDs that compete with incumbent cable operators for access to MDUs would offer "satellite cable programming" to their MDU subscribers. The issue here is what constitutes "unfair methods of competition" that would preclude MVPDs from offering that "satellite cable programming" to MDUs. Under any reasonable interpretation of the statute, exclusive contracts that prohibit entry by all potential competitors can constitute such unfair methods of competition – as the explicit prohibition on exclusive contracts in Section 628(c)(2) confirms. But none of the orders involving "terrestrially delivered" cable programming addresses this question at all.[40]

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[37] *See* Verizon at 16 (citing 138 Cong. Rec. H6545-6601 (July 23, 1992)). While Congress clearly wanted to make sure that the Commission issued a detailed set of regulations aimed at the sale of satellite programming to MVPDs, and spelled out the specific sorts of regulations it wanted in Section 628(c), the fact remains that the general prohibition in Section 628(b) sweeps more broadly than just the sale of satellite programming, and nothing in the remaining subsections of Section 628 requires the Commission to read subsection (b) narrowly.

[38] This direct history of the 1992 Act is a far better indicator of Section 628's meaning than the fact, relied upon by the building owners and cable companies, that Congress declined to adopt an amendment to the Cable Act in 1984 that would have imposed certain duties directly on MDU owners – a step that is not even being considered in this proceeding. *See, e.g.*, NCTA at 5 n.3; Charter at 6-9.

[39] CAI at 15-16; RAA at 32-34; Time Warner at 8.

[40] These commenters read far too much into these Commission orders in all events. In *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc., Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd. 15822, ¶ 71 (1998), the Commission pointedly did not attempt to address the scope of Section 628, but held only that with respect to terrestrially delivered programming there had not been a sufficient factual showing of anti-competitive marketplace behavior to necessitate a change in the program access rules. Similarly, in *DIRECTV Inc. v. Comcast Corporation, et al.*, 15 FCC Rcd. 22802, ¶

The Commission has ample authority to apply these rules to existing contracts. Indeed, the cable companies and building owners acknowledge that, regardless of other legal tests used in other contexts, the Commission would have authority to abrogate contracts if it were granted that authority by statute.[41] Here, Section 628 expressly applies retroactively to all contracts, except for certain particular types of contracts entered into prior to June 1, 1990. *See* 47 U.S.C. § 548(h). That is why the Commission, when it previously issued regulations implementing § 628, expressly held that "Congress intended that rules promulgated to implement Section 628 should be applied prospectively to existing contracts, except as explicitly provided for in Section 628(h)."[42] The Commission thus has ample authority in these circumstances to apply its rules to existing contracts and to open up the substantial percentage of MDUs that are currently locked up in long-term exclusive contracts by cable incumbents to competition and broadband investment.

Finally, the comments also make clear that Section 706 of the Telecommunications Act of 1996 supports the adoption of rules ensuring competitive access to MDUs.[43] The cable

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13 (2000), the Commission acknowledged that cable operators could violate Section 628 by denying access to terrestrially delivered programming, but held only that, as a factual matter, the cable operator had legitimate business reasons for switching to terrestrial delivery and consequently that there had been no unlawful evasion of the satellite program access rules. *See also Echostar Communications Corp.* v. *FCC*, 292 F.3d 749 (D.C. Cir. 2002) (affirming only on factual grounds).

[41] *E.g.,* NCTA at 14; Time Warner at 11.

[42] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 10 FCC Rcd. 1902, ¶ 82 (1994); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 3359, ¶ 19 (1993) ("the rules we adopt today will apply prospectively to existing contracts"); *see also* Verizon at 17-18.

[43] Corning at 10 ("to the extent the Commission finds that exclusive contracts are impeding deployment of FTTP, it must conclude that such an impediment constitutes an investment barrier under Section 706 and use its authority to remove this impediment"); Embarq at 8; Sure West at 21-22; Verizon at 19.

companies and building owners argue that Section 706 is not an independent grant of authority,[44] but the Commission has repeatedly emphasized that it must take Congress's desire to remove barriers to broadband deployment into account when interpreting other provisions of the Act and designing its regulations. *See, e.g., Franchising Reform Order*, ¶ 62 (the statute "directs the Commission to encourage broadband deployment by utilizing measures that promote competition . . .or other regulating methods that remove barriers to infrastructure investment"). The Greenfield Coalition concedes (at 19) that there is a vital link between the ability to offer video services and deployment of advanced telecommunications capabilities within the meaning of Section 706, and the cable companies and building owners make no attempt to argue that eliminating exclusive contracts with MDUs would not remove a barrier to broader investment in competitive broadband facilities.

At a minimum, to the extent that the Act's provisions governing the Commission's authority to issue MDU regulations is ambiguous, Section 706 requires the Commission to interpret the statute in a manner that allows it to remove these impediments to investment.[45]

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[44] NCTA at 7-8; CAI at 21; RAA at 39; Time Warner at 9.

[45] *See, e.g., NCTA* v. *Gulf Power Co.*, 534 U.S. 327, 339 (2002) (Section 706 "underscores the reasonableness" of interpreting statutory commands to encompass broadband Internet capability); *USTA* v. *FCC*, 359 F.3d 554, 580, 583 (D.C. Cir. 2004) (same).

CONCLUSION

For these reasons, the Commission should adopt rules (i) finding that use and enforcement of existing exclusive access arrangements in MDUs or other centrally managed real estate developments is an unfair and unlawful method of competition, and (ii) prohibiting execution or enforcement of such exclusive access agreements going forward.

Respectfully submitted,

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