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

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

# **REPLY COMMENTS OF VERIZON[*] ON EXCLUSIVE ACCESS CONTRACTS**


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## SUMMARY AND INTRODUCTION

In its opening comments, Verizon made four basic points. *First*, given the current state of competition in the video marketplace, exclusive access agreements pose a unique threat to emergent wireline video competition and to deployment of advanced communications networks. Like exclusive franchises on a smaller scale, exclusive access agreements at this critical juncture inhibit entry by new providers and deny consumers the benefits of competitive choice. *Second*, there is evidence that incumbent cable companies are using these agreements to try to block competition. *Third*, the Commission can address the anticompetitive features of exclusive access arrangements by adopting a narrow, time-limited remedy preventing video service providers from entering into or enforcing such contracts. *Fourth*, the Commission has authority, under Section 628(b) of the Communications Act, to implement such a remedy. Comments from other new video market entrants, from a leading supplier of fiber optic equipment, and from consumers provide additional support for a targeted remedy.

The arguments mustered in opposition to the Commission's Notice of Proposed Rulemaking ("NPRM") should not dissuade the Commission from acting at this critical time. As an initial matter, several points are largely undisputed. First, there is clear evidence of the use of exclusive access agreements to inhibit entry and to deny consumers a competitive option before competition can become established. Second, there is widespread agreement among new entrants and incumbents alike that exclusive access agreements can be anticompetitive in the unique circumstances presented here. Third, there is agreement that it is not only video competition that is at stake in this proceeding; rather, anticompetitive practices in the video marketplace will threaten deployment of advanced networks offering broadband and advanced telecommunications capabilities as well. Fourth, there is nearly universal agreement that any restriction should be narrowly limited to exclusive *access* arrangements and that less restrictive arrangements – for example, exclusive marketing arrangements – should not be subject to any restrictions.

Cable providers and others make four basic arguments in opposing Commission action; those arguments are contrary to the evidence and unsupported by sound analysis. *First*, providers argue that competition in the video services marketplace is already vigorous and that restrictions on exclusive access contracts are therefore unnecessary. But the Commission has already rejected the premise of this argument in its recent *Video Franchising Order*.[1] *Second*, some providers claim that there are significant benefits to exclusive access agreements that regulations would threaten. But nothing in Verizon's proposal would prevent service providers and multiple dwelling unit ("MDU") owners from entering into mutually beneficial arrangements that are less restrictive of competition than exclusive access arrangements, and there is no evidence to support the claim that such arrangements are insufficient to provide these same benefits, especially for the limited time that a prohibition on exclusive access might be in place. And nothing would deny *MDU owners* the ability to negotiate terms of non-exclusive access with video providers. *Third*, several parties argue that, even if the Commission restricts exclusive access arrangements prospectively, it should not restrict enforcement of existing contracts. That proposal is backwards: it is existing agreements – many of them opportunistically entered into by cable incumbents in anticipation of new entry – that pose some of the most important obstacles to competition. *Fourth*, several commenters argue that the Commission lacks statutory authority to restrict video service providers' enforcement of

[1] Report and Order and Further Notice of Proposed Rulemaking, *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*, 22 FCC Rcd 5101, ¶ 19 (2007) ("*Video Franchising Order*") (concluding that "[m]ost communities in the United States lack cable competition, which would reduce cable rates and increase innovation and quality of service").

exclusive access arrangements. But Section 628(b) authorizes the Commission to restrict "unfair methods of competition or unfair or deceptive acts or practices," a grant of authority that, by its plain terms, authorizes the Commission to restrict enforcement of exclusive access agreements where such agreements threaten 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).

## DISCUSSION

In the *Video Franchising Order*, the Commission found that the local franchising process was frequently one obstacle to meaningful video services competition and adopted new rules to reduce that barrier to entry. For the same reason, the Commission should adopt a time-limited remedy to ensure that another barrier to entry – exclusive access contracts – does not frustrate the development of competition. To address the anticompetitive effects of such contracts' blocking access to MDUs and private real estate developments, Verizon has proposed a narrow, time-limited remedy. The Commission should prohibit video service providers (whether incumbents or new entrants) from entering into new exclusive access arrangements and – at least as important – bar them from enforcing existing exclusive access contracts. That restriction should sunset after five years, unless the Commission decides to modify or renew it.

In arguing against Commission action, many commenters set up straw proposals: extreme forms of regulation that would bar any type of preferential marketing agreements; rules that would mandate access to private property; rules that would exempt new entrants rather than applying to all providers. Verizon has not proposed any actions that meet those descriptions, however. And the evidence is clear that a narrowly tailored – and even-handed – remedy will enhance competition in the video marketplace at this critical time, promoting investment and enhancing competition in all communications services, to the benefit of consumers. After competition is given a chance to take hold, even this narrow remedial measure should sunset.

## I. Given the Current State of Competition in the Video Marketplace, Exclusive Access Agreements Pose a Unique Threat

Comments filed in response to the Commission's NPRM establish the need for prompt, measured Commission action to address the threat to competition from exclusive access contracts.

*First*, the comments provide further evidence of the use by incumbents of exclusive access agreements precisely to inhibit competitive entry and to deny consumers a competitive choice prior to the time that competition can become established. For example, Comcast admits that it has "thousands of contracts to serve MDUs" and that "[a] number of these contracts give Comcast the right to be the exclusive service provider." Comcast Comments, Revell Decl. ¶ 6. Charter Communications likewise confirms that it routinely enters into such agreements. *See* Charter Comments at 1. The experience of SureWest Communications proves the point: it reports that, of the 40,000 MDUs passed by its network, at least 28 percent – and perhaps as many as 59 percent – are subject to exclusive access agreements. The incumbent provider, Comcast, accounts for 85 percent of those units. *See* SureWest Comments at 3-4. As the City of Lafayette, Louisiana, correctly notes, "[i]ncumbent 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." Lafayette Utilities System Comments at 9. Cable MSOs seek "to compel developers and [a]ssociations to enter into contracts with either excessively long or perpetual terms." Hotwire Comments at 7. AT&T has encountered "efforts to lock-up MDUs . . . in California, Texas, and virtually every market where AT&T has begun to enter the video service market." AT&T Comments at 10. And, as it previously explained, Verizon has had similar experiences: despite the inherent difficulty in obtaining reliable information on the prevalence of exclusive access agreements, Verizon has encountered such agreements in communities across the country. *See* Verizon Comments at 8-12. Thus, nearly all parties – whether in favor of or opposed to a restriction on exclusive access arrangements – acknowledge that exclusive access agreements are a common feature of the current marketplace.

*Second*, there is widespread support for the conclusion that, in light of the current circumstances in the market for video services, exclusive access arrangements – especially existing arrangements that were entered into before there was meaningful wireline competition – impede competitive entry. Cable providers have been protected from such competition for decades – originally as a result of exclusive franchises – building up a bulwark of exclusive agreements that, with the advent of competition, they have rushed to reinforce. For example, the Independent Multi-Family Communications Council ("IMCC") notes that "franchised cable companies us[e] exclusive MDU access arrangements to foreclose significant portions of the MVPD market to new entrants, including . . . telephone companies deploying fiber networks." IMCC Comments at 23; *see also id.* at 24 (noting that cable companies have "dominate[d] . . . entire geographical market[s] . . . and then lock[ed] in virtually all MDU properties in the area through the use of long-term exclusive MDU contracts"). As the City of Lafayette explains in its comments, "incumbents . . . negotiate new contracts with MDUs . . . as soon as they are certain that [a] new provider will be entering the market." Lafayette Utilities System Comments, Dawson Decl. ¶ 24. "[E]xclusive service contracts constitute significant barriers to entry and thus greatly impede competition in the MVPD service market." SureWest Comments at 3; *see* *also* AT&T Comments at 5; Corning Comments at 5; Embarq Comments at 1; Warner Properties Comments at 2; Hotwire Comments at 7.

*Third*, many parties acknowledge that exclusive access agreements affect not only competition among providers of video services, but competition in broadband and other advanced communications services as well. *See* Comcast Comments at 6-8; Greenfield Comments at 4; Shenandoah Comments at 12; *see also* Corning Comments at 5; Embarq Comments at 1-2; Qwest Comments at 2 ("the creation of a new revenue stream from multichannel video service is driving wireline broadband deployment nationwide"); SureWest Comments at 3-8; USTelecom Comments at 9-14. To the extent exclusive access contracts are impeding video competition, they are likewise impeding "deployment . . . of advanced telecommunications capability," 47 U.S.C. § 157 note, thus frustrating a core congressional policy.[2]

*Fourth*, there is similarly widespread agreement that the Commission should *not* restrict exclusive *marketing* arrangements, in which property owners agree to exclusively promote a particular provider's service in exchange for a marketing fee. *See, e.g.*, Qwest Comments at 10-11. Such agreements enhance consumers' choices, because they enable the consumer to be informed about the product without preventing any other provider from offering or even

[2] Comcast argues, confusingly, that a rule that barred Comcast from enforcing exclusive access agreements would "reduce competition in broadband Internet and voice services" because, if a consumer chose to obtain video services from Verizon, "Verizon would . . . take over Comcast's wiring." Comcast Comments at 10. But, as the Commission has properly determined (and as even Comcast admits), the focus of competition in communications markets today is among providers offering multiple services, including video, voice, and broadband, in a single package. If Verizon is permitted to compete, consumers will still, of course, have the opportunity to purchase service – including voice and data – from Comcast, but they will also have, for the first time, a meaningful competitive alternative to Comcast's video. In any event, the customer would have control of wiring and would be able to decide which services she wanted to receive from which provider.

marketing its services to MDU residents through other channels. In fact, as described below, many of the comments offered in opposition to Commission action ignore the possibility that many of the supposed benefits of exclusive access arrangements can be achieved through less restrictive marketing arrangements.

## II. Video Competition Is Not Sufficient To Eliminate Concerns About Exclusive Access Agreements

Various parties argue that competition in today's video marketplace is already sufficient to protect consumers, and, for that reason, the Commission should not address exclusive access arrangements. *See* Comcast Comments at 14-17; Greenfield Comments at 15-18; Real Access Alliance Comments at 3-7 (discussing competition among MDU owners). That argument ignores marketplace facts and the Commission's own prior findings.

This is a critical moment for new entry, with carriers like Verizon investing billions of dollars in fiber networks that offer capabilities that surpass anything that the cable incumbents have made available. In its comments, Corning documents the explosive growth in fiber deployment since the FCC issued the *Triennial Review Order* in 2003: an increase of 4,300 percent in just three-and-a-half years. *See* Corning Comments at 3. At a time when carriers are making massive investments, exclusive access agreements that deprive individual consumers or whole communities of the benefits of those investments threaten harm to consumer welfare that may persist for years to come. And this is particularly true because the video marketplace is affected by exclusive access arrangements that were executed at a time before any meaningful wireline competition existed and/or in a targeted effort to frustrate such entry.

## III. The Harm from Exclusive Access Arrangements Is Not Outweighed by Any Potential Benefits

Commenters claim that exclusive access arrangements offer benefits that may be sacrificed if the Commission adopts a rule limiting such agreements. Several small providers argue that exclusive access agreements are necessary to ensure that small or rural providers are able to recoup investments that might be uneconomic if providers were subject to competition. *See* American Cable Association Comments at 2-3; Greenfield Comments at 6-7; Hotwire Comments at 5-6; Shenandoah Comments at 2-3. Other commenters maintain that such agreements can help to promote more intensive investment or to allocate the costs of investment in an efficient manner. *See* Comcast Comments at 18-19. And real estate interests maintain that the power to grant exclusive access is a valuable entitlement that property owners use to exact certain concessions from video service providers. *See* Community Associations Institute Comments at 5; Real Access Alliance Comments at 16-18. Verizon has acknowledged that, under most circumstances, exclusivity arrangements can have a procompetitive effect, as they allow for efficiencies such as product differentiation or more effective marketing and distribution. *See* Verizon Comments at 1. However, under the unique competitive conditions present in the market for video service, exclusive *access* agreements thwart competitive entry and inhibit consumer choice. *See id.* at 3-8. The Commission should find that there is no evidence that any such potential benefits outweigh the harm to competition and consumers that exclusive access agreements cause.

In considering whether any benefits may be lost, it is important to compare the attributes of exclusive *access* agreements to the benefit of a less restrictive alternative that would be permitted under the proposed rule. Verizon seeks a narrow remedy: a time-limited bar on enforcement, by video providers, of agreements to deny alternative video service providers access to an MDU or other real estate development. *See id.* at 2-3 (describing proposed remedy). For example, video service providers should be permitted to agree to exclusive marketing arrangements with MDU owners. Likewise, a narrowly limited prohibition on exclusive access arrangements would not prohibit bulk sales agreements – agreements that, unlike many of the exclusive access agreements typically negotiated by cable incumbents, often provide for significant discounts on rates. *See* Real Access Alliance Comments at 17 ("Bulk discounts . . . are not common in apartment properties."). Such agreements – because they do not give the video service provider the right to prevent the property owner from granting access to an alternative provider – are less restrictive of competition than exclusive access agreements. The parties that oppose any remedy appear to assume that all such agreements would be restricted, *see id.* at 11-16, but that need not and, under Verizon's proposal, would not be true.

Furthermore, Verizon has proposed that the Commission adopt a narrowly tailored, time-limited remedy. In light of the evidence that exclusive access agreements pose a significant threat to competition at this critical time, Verizon's proposal strikes an appropriate balance between the need to protect consumers and the recognition that, in most cases, exclusivity arrangements are procompetitive.

There is even less reason for concern that restrictions on exclusive access contracts will deter investment by established providers. There is scant evidence that incumbent providers couple exclusive access agreements with significant new investments in MDUs. As Comcast and others acknowledge, states already impose a variety of restrictions on exclusive access contracts and other arrangements that may restrict competitive access to MDUs. *See* Comcast Comments at 21-23; *see also* New Jersey Division of Rate Counsel Comments at 8. But cable providers have provided no evidence that investment is higher in states without restrictions or otherwise demonstrated that prohibiting exclusive access arrangements would inflict sufficient harms to offset the benefits of a narrow and time-limited prohibition. To the contrary, the record makes clear that cable incumbents have used exclusive access agreements – where permitted – to block new entry, not as a strategy to promote risky investment. *See* Verizon Comments at 9-13; *see also* AT&T Comments at 7-13; Lafayette Utilities System Comments at 9.

In addition, the record provides no support for the contention that, in the current marketplace, exclusive access contracts allow MDU owners to reap benefits that would be unavailable based on less restrictive arrangements. Notably, the Real Access Alliance concedes that "[p]roperty owners uniformly report that *service providers*, not property owners, regularly request exclusivity of some type." Real Access Alliance Comments at 11 (emphasis added).[3] This fact casts substantial doubt on any claim that property owners are actively exploiting their ability to grant exclusive access arrangements to wring concessions from service providers. In all events, because the regulation that Verizon proposes would preserve property owners' ability to enter into less restrictive agreements that provide substantial advantages to service providers – including various types of exclusive marketing arrangements or bulk sales – there is no reason to doubt that property owners can continue to obtain the types of concessions that commenters identify. *See, e.g.*, Community Associations Institute Comments at 5-7; Real Access Alliance Comments at 17-18.[4]

[3] The various comments arguing that the Commission lacks authority to regulate MDU owners – *see, e.g.*, Real Access Alliance Comments at 26-28 – are beside the point. The Commission should regulate video service providers only, not property owners.

[4] In addition, there is no merit to the Real Access Alliance's claim that the Commission's Initial Regulatory Flexibility Analysis ("IFRA") fails to adequately consider alternative proposals that will be less burdensome for small property owners. As the Commission correctly found, a rule prohibiting video providers from entering into or enforcing exclusive access agreements will impose no direct burden on any non-governmental small entities, including small property owners, for purposes of the Regulatory Flexibility Act. *See* Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 5935, App. ¶ 8 (2007) (noting that certain private small entities "may merely be *indirectly* affected by any rules that may ultimately result from the *NPRM*") (emphasis added). Thus, the Commission is not obligated to consider less burdensome alternatives in its IFRA. *See Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 343 (D.C. Cir. 1985) (holding that Congress "did not intend to require that every agency consider

Finally, some parties suggest that, if the Commission is to take action pertaining to MDUs, it should focus its efforts on wiring issues. *See*, *e.g.*, Real Access Alliance Comments at 57-59. Wiring issues can complicate questions relating to MDU access. Like other new entrants, Verizon has often been frustrated in its efforts to serve MDUs by actions taken by incumbent providers that make it difficult, if not impossible, to access home wiring at the demarcation point (such as placing lockboxes in locations that frustrate such access or covering the home wiring with sheaths in order to accomplish the same result) – which the Commission has already made clear are unlawful. The Commission's recent order reaffirming that wiring behind sheet rock is considered inaccessible for purposes of determining the demarcation point is an additional step in the right direction. *See* Report and Order and Declaratory Ruling, *Telecommunications Services Inside Wiring, Customer Premises Equipment*, CS Docket No. 95-184, FCC 07-111, ¶ 1 (rel. June 8, 2007). If the Commission is inclined to address wiring issues in this or another proceeding, it should reiterate its ruling that incumbent providers may not take actions that frustrate the ability of competitive providers to access wiring at the demarcation point. *See* 47 C.F.R. § 76.802(j). But reiterating the obligations of incumbent providers with respect to wiring is a complement to, not a substitute for, taking action to address the anticompetitive effect of exclusive access agreements at this critical time.

## IV. The Commission Should Prohibit Enforcement of Existing Exclusive Access Agreements

Some commenters argue that, even if the Commission were to restrict exclusive access contracts prospectively, it should not interfere with enforcement of existing contracts, arguing that to do so would interfere with the service providers' investment-backed expectations. *See*

every indirect effect that any regulation might have on small businesses in any stratum of the national economy").

Comcast Comments at 4; NCTA Comments at 11-14; Charter Comments at 6-9; American Cable Association Comments at 2.

The Commission should reject that argument. As explained below, *see infra* Part V, there are no legal impediments to the issuance of a rule that applies to both new and existing contracts. And it is clear that existing agreements – many entered into immediately before new entrants began offering competing video services – pose a threat to competition at least as great as agreements that have yet to be entered into. Even those that oppose *prospective* restrictions acknowledge that existing exclusive access arrangements are the product of an uncompetitive market where cable incumbents used their market position to obtain long-term – even perpetual – exclusive access deals. *See* Hotwire Comments at 8 (characterizing such exclusive access contracts as "anti-consumer" and arguing that a prohibition on enforcement of such contracts "would strongly advance competition and afford relief to consumers"); IMCC Comments at 23. These exclusive access agreements are a legacy of the era in which exclusive franchises and de facto exclusive franchises were common. The effect of a rule that applied only prospectively would be to deny millions of MDU residents across the country the benefits of new competition and advanced technology.

## V. The Commission Possesses the Statutory Authority To Limit Exclusive Access Contracts

**A.** As Verizon explained in its opening comments, and as the Commission tentatively concluded in its NPRM, the plain language of Section 628 grants the Commission the authority to limit new and existing exclusive access agreements. *See* Verizon Comments at 16-17.

Commenters – even those opposed to Commission action – do not contest that the plain language of the statute is consistent with this interpretation. *See, e.g.,* Community Associations

Institute Comments at 13 ("[i]t is true that Section 628(b) . . . might be read broadly enough to encompass" authority over exclusive access agreements); Greenfield Comments at 22 ("the FCC has full authority and discretion" in this area). Instead, commenters argue that the legislative history and past Commission decisions indicate that Section 628(b) applies only to refusals by vertically integrated video service providers to provide programming to other video service providers. *See*, *e.g.*, Comcast Comments at 27; Community Associations Institute Comments at 14; NCTA Comments at 4-5; Real Access Alliance Comments at 29-35; Time Warner Comments at 8-9.

First, this narrow reading of Section 628 is contradicted by the title and purpose of the provision. Section 628 is entitled, "Development of competition and diversity in video programming distribution." 47 U.S.C. § 548. And the purpose of the section is, *inter alia*, "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market . . . and to spur the development of communications technologies." *Id.* Adopting a narrowly tailored, time-limited rule prohibiting video providers from entering into or enforcing exclusive access agreements would both "increas[e] competition and diversity in the mulitchannel video programming market" and "spur the development of communications technologies." So the title and statutory purpose of the provision – two indicators of congressional intent – contradict these commenters' claims that the Commission should interpret Section 628 narrowly.

Second, the account of the legislative history offered by opponents of Commission action ignores the fact that Congress *rejected* a narrower proposal – sponsored by the cable industry – that would have applied only to disputes over programming access. *See* Verizon Comments at 16. That Congress adopted a much more broadly worded provision – over the fierce opposition of the cable industry – belies any claim that Congress intended to restrict the application of Section 628(b) in a way not revealed by the statutory text. *Cf. Video Franchising Order* ¶ 60 (rejecting argument that the Commission lacked relevant authority based, in part, on the fact that Congress had considered and rejected a narrower approach).

Third, the fact that Congress was concerned with (among other things) video service providers' access to programming does not mean that the statute does not give the Commission broader authority. It is common for Congress to pass laws that apply to more than the primary evil that motivated the enactment, and it is the language of the actual law that is passed that governs in such situations. *See, e.g., Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[S]tatutory prohibitions often go beyond the principal evil [that motivated Congress] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."). In this instance, Congress expressly prohibited "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).[5] Exclusive access agreements obviously "hinder significantly or … prevent" competing providers from offering their programming to customers. If the Commission determines that exclusive access contracts, under current market conditions, do constitute an unfair method of competition, then the statute

[5] While the Commission has declined to extend the provisions of Section 628(b) to terrestrially delivered programming, as opposed to satellite programming, that distinction is simply not implicated here. *Cf.* Real Access Alliance Comments at 32-24; Time Warner Comments at 8. Likewise, the statute does not, by its terms, reach unfair or deceptive acts by a programming vendor that is not "a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor." 47 U.S.C. § 548(b); *cf.* Time Warner Comments at 8. That distinction is not implicated here either.

expressly grants the Commission authority to adopt rules to address that problem.[6] Furthermore, as Verizon has previously explained, the plain language of Section 628 grants the Commission the authority to prevent the enforcement of existing agreements as well as new agreements. *See* Verizon Comments at 17-18; *see also* 47 U.S.C. § 548(h).

**B.** There is likewise no merit to the suggestion that a rule preventing video service providers from enforcing existing exclusive access agreements would constitute an unconstitutional taking. *Cf.* Time Warner Comments at 13; Comcast Comments at 34-35. The Supreme Court has repeatedly rejected the claim that any interference with the right of a property owner to use his property in a certain way constitutes a taking. Instead, a regulation that does not deprive a property owner of ownership only becomes a taking for which just compensation is required if it "goes too far." *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The Fourth Circuit has held that a state regulation prohibiting payments for exclusive access is constitutional. As an initial matter, the court explained that such a provision is not a "physical invasion" and is thus "drastically less offensive than a physical taking." *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1123 (4th Cir. 1995). Moreover, "far from denying the MDU owners all economically viable use of their land," the regulation "merely prohibits a use . . . from which the MDU owners may derive a minimal income in relation to the greater income they may derive from leasing individual units." *Id.* at 1123-24. Likewise, "it would strain credulity to find that the statute's prohibition" against such

[6] Comcast argues that the Commission has no rulemaking authority under Section 628(b), which is enforceable solely through adjudication. *See* Comcast Comments at 28. That argument is incorrect. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999) (discussing "the Commission's general rulemaking authority"); *see also* 47 U.S.C. § 154(i) (granting the Commission the authority to "make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions"); *Video Franchising Order* ¶ 64 (discussing Commission authority to implement the Cable Act).

payments "deprived each MDU owner of its reasonable investment-backed expectations." *Id.* at 1124. And such a restriction "presumably advances the [government's] interest in preventing an unfair competitive market for cable television providers. Such an unfair market not only disadvantages competing cable providers, but disadvantages the MDU tenants in the form of cable service fees not regulated by the natural forces of competition." *Id.*

The same analysis applies to restrictions on enforcement of exclusive access contracts, whether one considers the property rights of MDU owners and real estate developers or the bargained-for contractual rights of cable service providers. A prohibition on enforcement of exclusive access arrangements is a minimal intrusion on property rights; it permits both property owners and video service providers to negotiate other, less restrictive arrangements; it constitutes a regulatory restriction that any prudent video service provider would have anticipated (particularly in light of existing state-level restrictions and prior Commission statements of intention to revisit this issue); and it serves the critical goals of opening video services to greater competition and promoting deployment of broadband to all Americans. In short, nothing in the Constitution restricts the Commission's authority to take measured action to protect competition and consumers from the effects of exclusive access contracts.

## CONCLUSION

For the reasons set forth above and in Verizon's opening comments, Verizon respectfully requests that the Commission issue a rule, subject to a five-year sunset, prohibiting video service providers from entering into or enforcing exclusive access agreements.

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