

**PRESENTATION OF SUREWEST COMMUNICATIONS**  
**on**  
**MDU EXCLUSIVE SERVICE CONTRACTS**

9/18/2007

- SureWest: Provides voice, DSL and fiber-based broadband data services, as well as digital multichannel video (“MV”) services over a number of different IP platforms using different technologies. SureWest Broadband provides fiber-to-the-home MV services with over 260 channels, as well as advanced video-on-demand and pay-per-view features. MV services are typically marketed as part of a “Triple Play” package with voice and broadband data services.

-SureWest was one of the first proponents of a prohibition on MDU Exclusive Service Contracts (“ESCs”) in this docket, as noted in the NPRM.

**I. The Record Shows That ESCs are a Significant Barrier to MVPD Competition and to the Deployment of Advanced Broadband Networks.**

-SureWest’s recent survey results:

-MDU exclusive contracts bar competitors from serving at least 28% of the MDU units that its network passes, and perhaps as much as 59% of the units.

-ESCs are primarily held by the incumbent in SureWest’s service area -- Comcast. Comcast is the MVPD party to ESCs that represent 85% of the locked up MDU units.

-ESCs are generally not negotiated by or in favor of MDU Residents:

-Generally negotiated by developers, not residents

-Any bulk rates are often part of “take or pay” mandatory service  
(See Comments of City of Lafayette Utilities)

-ESCs do not promote real competition:

-At best, ESCs promote artificial windows of competition of limited duration. Once the ESC is implemented, it anoints a monopoly for 5-20 years or longer, with limited incentives to invest further or improve service.

-With advent of triple play, MVPDs do not need exclusive right to provide video services in order to justify wiring an MDU. MVPDs do not need a guarantee of all an MDU’s video revenue, but they do need an opportunity to compete and recover some of the cost of wiring through MV revenues.

## II. The Record Supports a Prohibition on Enforcement of *Existing*, as Well as of New, ESCs.

-The FCC has authority to modify provisions of private contracts if necessary to promote the public interest – *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).

-The record shows that existing ESCs harm the public interest by denying competitive choice to consumers and impeding the construction of advanced broadband networks.

-Prohibition on enforcement would not constitute an unconstitutional “taking.” Prohibiting MVPDs from enforcing or entering into ESCs would not constitute a physical intrusion onto MDU property. Property owners need not be forbidden from enforcing the remaining provisions of existing ESCs, or from setting reasonable conditions on such MVPDs’ access to their private property, or from receiving a share of revenues from such MVPDs.

-SureWest understands that the Commission must be mindful of legitimate business expectations connected with existing ESCs. If Commission wishes to protect legitimate expectations it could:

*-Prohibit enforcement of all new or future ESCs: There is no legitimate expectation that parties should be able to enter into new ESCs, now or in the future. The regulatory environment regularly changes in the MVPD business.*

*-Prohibit enforcement of renewals of existing ESCs: there is not the same level of expectation that the ESC will be in operation after the initial term as there is during the original term, unless the renewal provisions are in essence “automatic.” In such cases, the result is a form of perpetual ESC, which even advocates of ESCs recognize as contrary to the public interest. No evidence in the record of need to recover costs after initial term of ESC.*

*-Prohibit enforcement only of the exclusivity provisions of existing ESCs, while retaining the remaining provisions for the current term of the contracts. Competing MVPDs could thus provide service to the MDU subject to the ESC, as long as the competing MVPD was willing to “opt-in” on a case-by-case basis to the essential remaining provisions of the ESC, or negotiate a new contract. In this way, any legitimate expectations (the right to provide service to MDU residents, and any cost allocations between MVPD and MDU owner) of the original MVPD party to the ESC are maintained, while expectations that are contrary to the public interest (avoidance of competition) are eliminated. Similarly, any legitimate expectations of the MDU owner (financial recovery for allowing entrance into the MDU, MVPD service requirements to residents) are maintained, and applied to all competitive MVPDs. The Commission could also establish a sunset date on existing ESCs.*