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EX PARTE

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC, 20554

RE: *Exclusive Service Contracts for the Provision of Video Services in Multiple Dwelling Units, MB Docket No. 07-51*

Dear Ms. Dortch:

The National Cable & Telecommunications Association (NCTA) submits this letter in response to Verizon’s proposal that the Commission permit building owners to abrogate existing access agreements that they have entered into with cable operators.¹ Verizon’s proposal to give building owners the right to a “fresh look” is completely inconsistent with Commission precedent and with Verizon’s own advocacy in analogous situations. For the reasons explained below, the Commission should reject Verizon’s self-serving and disingenuous proposal.

***As Verizon And AT&T Acknowledge Elsewhere,
Fresh Look Is An Extraordinary Remedy***

It is well established that creation of a “fresh look” right to a negotiated contract is an “extraordinary remedy” that should be available only in “limited circumstances.”² As the Commission has recognized, abrogation of contracts is a “market-disrupting remedy” that should not be used absent “sufficient evidence” of “abuse of market power.”³ Even where the Commission has legal authority to impose such a drastic remedy – authority that is completely lacking in this situation – it typically has found that abrogating contracts is contrary to the public interest because it would eviscerate the “certainty and stability that stems from the predictable performance and enforcement of contracts” that is vital to the “long-term health of the communications market.”⁴

¹ See, e.g., Letter from Leora Hochstein, Executive Director – Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-51 (filed Sept. 18, 2007).

² *Direct Access to INTELSAT System*, Report and Order, 14 FCC Rcd 15703, ¶ 118 (1999).

³ *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶¶ 698, 699 (2003).

⁴ *Ryder Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 18 FCC Rcd 13603, ¶ 24 (2003).

Verizon's failure to mention any of this precedent in its pleadings in this proceeding is curious, to say the least, because it has relied on all of these cases in arguing *against* the creation of fresh look rights in the Commission's pending special access proceeding.⁵ In that proceeding, new entrants in the market have argued that Verizon and other incumbent LECs routinely "lock up" large customers under long term arrangements and that those customers should be given the opportunity for a "fresh look" in the face of changed competitive circumstances.⁶ In response, Verizon has vigorously opposed any suggestion that customers should be given the right to abrogate their contracts, citing all of the above decisions.⁷

AT&T, which also supports abrogation of existing contracts in this proceeding,⁸ has made similar arguments against such an approach in the special access context.⁹ According to AT&T, giving customers the opportunity to seize the benefits of an agreement "while walking away from the aspects of their contracts they do not like" would be "patently unlawful."¹⁰ AT&T asserts that a finding that existing contracts are "unlawful" is a "prerequisite to abrogation" and that absent such a finding, there is no basis for mandating that one party to a contract "give up the *quid* while letting [the other party] keep their *quo*."¹¹

***There Is No Legal Or Policy Basis For Creating
A Fresh Look Right In This Proceeding***

The arguments that Verizon and AT&T have made against a "fresh look" policy in the special access proceeding are actually *more* appropriate with respect to commercial agreements between cable operators and building owners.¹² Simply put, there is no public policy basis for abrogating such contracts, and the Commission has no legal authority to take such action in any event. As Time Warner stated, the Commission "should not consider destroying private common-law rights unless its authority is certain and the need for intervention is pressing. This is not such a case."¹³

⁵ Reply Comments of Verizon Communications, WC Docket No. 05-25 (filed Aug. 15, 2007) (Verizon Special Access Reply Comments).

⁶ *See, e.g.*, Comments of Comptel, WC Docket No. 05-25 (filed Aug. 8, 2007) at 9-15 (describing contract terms that discourage customers from purchasing from competitive providers).

⁷ Verizon Special Access Reply Comments at 58-61.

⁸ AT&T Comments, MB Docket No. 07-51 (filed July 2, 2007) at 2.

⁹ Supplemental Reply Comments of AT&T, WC Docket No. 05-25 (filed Aug. 15, 2007).

¹⁰ *Id.* at 64.

¹¹ *Id.* at 66.

¹² Unlike AT&T and Verizon, NCTA has been consistent in its view that government interference in negotiated contracts between businesses is rarely, if ever, warranted. NCTA has not endorsed a fresh look remedy (or any other new regulation) in the special access proceeding, notwithstanding the fact that cable operators might benefit if special access customers were given the opportunity to break long-term contracts with the ILECs.

¹³ Comments of Time Warner Cable, MB Docket No. 07-51 (filed July 2, 2007) at 13.

Abrogating existing commercial agreements is particularly unreasonable in this case given the Commission's finding just four years ago that the record "does not demonstrate that such contracts have thwarted alternative providers' entrance into the market, so as to warrant imposition of limits on such contracts."¹⁴ That finding – based on cable operators' declining market share and the apparent success of new entrants to the market – is even more persuasive today. Cable's share of the marketplace for multichannel video services has declined from roughly 77 percent at the time of the *Inside Wiring Order* to 68 percent today. At the same time, telephone companies continually tell Wall Street how successful they have been in entering the market, with Verizon and AT&T already serving more than 3 million customers between them.¹⁵

Moreover, the facts do not support the ILECs' theory that they are the first "real" competitors in the market and that abrogation of MDU access agreements is needed because building owners had no alternative but to unwillingly sign such agreements. MDUs always have been attractive to new entrants in the market for video services, and cable operators have faced competition in the MDU segment of the market for decades.¹⁶ MDU owners and MDU residents have long had the option to purchase video services from private cable operators (PCOs), overbuilders, and DBS providers.¹⁷ A decision that the entry of the ILECs into this market segment is a unique event requiring the extraordinary remedy of abrogating contracts simply cannot be reconciled with the facts, nor can the notion that companies as large and well financed as Verizon and AT&T are unable to compete on the same terms that far smaller companies have competed in the past.

¹⁴ *Telecommunications Services Inside Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, 1369, ¶ 69 (2003) (*Inside Wiring Order*).

¹⁵ See NCTA Comments at 13; Press Release, *Verizon Posts Strong 2Q 2007 Results Highlighted by Gains in Earnings, Consolidated Margins and Cash Flows* (July 30, 2007) ("The company had a total of 515,000 FiOS TV customers as of the end of the second quarter 2007 – an addition of 460,000 FiOS TV customers since the end of the second quarter 2006. Complementing the FiOS TV rollout, the company added 125,000 satellite TV customers in partnership with DIRECTV in the second quarter 2007. At the end of the quarter, Verizon had a total of nearly 1.3 million video customers."); Press Release, *AT&T Posts Strong Second-Quarter Results Led by Accelerated Wireless Growth, Solid Regional Results and a Significant Improvement in Enterprise Trends* (July 24, 2007) ("AT&T posted strong video growth in the second quarter. U-verse services are now available in parts of 23 metro areas, and sales and installations have ramped significantly. At the end of the second quarter, AT&T had 51,000 U-verse video subscribers, up from 13,000 three months earlier. Total video connections, which include AT&T U-verse service and bundled satellite television service, increased by 200,000 in the second quarter to 1.9 million.").

¹⁶ For example, in its First Video Competition Report in 1994, the Commission noted that there were an estimated 3000-4000 SMATV systems in operation. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, CS Docket No. 94-98, 9 FCC Rcd 7442, 7488-89, ¶ 92 (1994).

¹⁷ The record in this docket demonstrates that PCOs continue to be a competitive force in the video market, passing more than 1.5 million MDU units with service that often includes broadband and voice, not just video. See Comments of the Independent Multifamily Communications Council, MB Docket No. 07-51 (filed June 18, 2007) at 3, 12. Accordingly, there is no basis whatsoever for creating MDU rules that apply to traditional cable operators but not PCOs. Furthermore, the Commission cannot ignore the fact that, even in MDUs with exclusive access agreements, many residents will have access to two other providers – DIRECTV and EchoStar – because of the provisions Congress adopted regarding over-the-air-reception-devices. See Telecommunications Act of 1996, Pub. L. 104-104, § 207, 110 Stat. 56, 114 (1996).

A Fresh Look Policy Would Raise Serious Takings Issues

A decision to abrogate existing commercial agreements also raises serious issues under the Fifth Amendment. It is well established that contract rights are a form of property and that just compensation may be owed pursuant to the Fifth Amendment when the government takes that property.¹⁸ As NCTA explained in its pleadings, “any intervention by the Commission to abrogate existing contracts would directly interfere with the wholly reasonable and legitimate investment expectations of the cable operators (or building owners) who made those investments” and therefore would constitute a regulatory taking.¹⁹ Consequently, if the Commission does abrogate existing commercial agreements, it either must establish some method by which cable operators are to be compensated (*e.g.*, payments from the building owner or subsequent entrants) or make clear that cable operators are free to pursue claims against the federal government in the Court of Federal Claims pursuant to the Tucker Act.²⁰

The Commission’s prior decisions in the MDU context provide ample support for the notion that abrogating existing agreements would result in a taking. In its decision prohibiting exclusive agreements for telecommunications services in commercial buildings, for example, the Commission recognized that “modification of existing exclusive contracts by the Commission would have a significant effect on the investment interests of those [companies] that have entered into such contracts.”²¹ And the Commission’s decision in the *Inside Wiring Order* that there was no basis for restricting exclusive access agreements between cable operators and building owners confirms that companies had a reasonable expectation that subsequent agreements would be honored. As Comcast states, “[c]able operators and other MVPDs, large and small, have invested significant sums of money in reliance upon, and provided due consideration for, the contractual rights that the Commission has previously approved but is now considering abrogating.”²²

¹⁸ See, *e.g.*, *Prometheus Radio Project v. FCC*, 373 F.3d 372, 430 (3d Cir. 2004) (quoting *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 19, n.16 (1977)).

¹⁹ NCTA Reply Comments at 10. As noted by Real Access Alliance, a taking also would result from any requirement that a cable operator share an exclusive easement granted by a building owner. See Letter from Matthew C. Ames, Miller & Van Eaton, Counsel for the Real Access Alliance, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-51 (filed Sept. 18, 2007).

²⁰ See, *e.g.*, *Qwest v. FCC*, 48 Fed. Cl. 672, 687 (2001) (“[T]he Court of Federal Claims is well justified in exercising its historic Tucker Act jurisdiction to hear this Fifth Amendment taking claim, especially since that remedy has been neither explicitly nor implicitly withdrawn by the Telecom Act.”); *BOMA v. FCC*, 254 F.3d 89, 100 (D.C. Cir. 2001) (victim of regulatory taking may make claims against the federal government for just compensation under the Tucker Act); *Bell Atlantic v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994) (nothing in the Communications Act forecloses a remedy against the federal government under the Tucker Act).

²¹ *Promotion of Competitive Networks for Local Telecommunications Markets*, WT Docket No. 99-217, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983, 23000, ¶ 36.

²² Comments of Comcast Corp., MB Docket No. 07-51 (filed July 2, 2007) at 33.

***A Fresh Look Policy Is More Appropriate In The Special
Access Market Than In The MDU Video Market***

There is no way that the Commission could justify reaching different conclusions about the abrogation of existing contracts in this proceeding and in the Special Access proceeding. If anything, the record evidence in the two proceedings suggests that abrogating existing contracts is more appropriate in the special access context. The GAO found last year that the vast majority of commercial buildings are served by a single facilities-based telecommunications provider.²³ Even if the ILECs are correct that the GAO Report undercounts the number of buildings served by competitive providers, there is undisputed record evidence that there are thousands of commercial buildings where tenants have no choice but to purchase service from the incumbent LEC.

According to Verizon, the lack of special access options in some buildings is of no concern because markets can still be competitive, and consumers can still benefit from competition, even if numerous buildings are not actually served by competitive providers. Verizon states that the Commission “correctly rejected a focus on individual buildings” in the special access context because the “existence of competitive facilities (and potential for deployment of such facilities) at some locations within [a metropolitan area] effectively constrains prices throughout the region.”²⁴

This argument more accurately describes the state of competition in the marketplace for multichannel video services in MDUs than it does the state of competition for special access services. The record in this proceeding offers clear and compelling evidence that customers in buildings subject to exclusive access agreements do benefit from competition -- both competition to serve the particular building and competition in the community-at-large. As noted by the Community Associations Institute (CAI), providers “generally find it much easier and more effective to market their service at the same rates on a regional basis.”²⁵ Similarly, if a cable operator adds new services or features or additional customer service personnel in response to the entry of a new competitor, those changes benefit all of the operator’s customers in the area, including those in MDUs with exclusive access arrangements.

²³ See Report to the Chairman, Committee on Government Reform, House of Representatives, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80 at 19 (Nov. 2006) (GAO Report) (“Of the buildings with a level of demand greater than the DS-1 level in our model, we found that only about 6 percent of buildings, on average, have a fiber-based competitor.”). The Department of Justice made a similar finding when it looked at the Verizon/MCI merger in 2005. See *U.S. v. Verizon Communications, Inc. and MCI, Inc.*, C.A. No. 1:05CV02103, Complaint at 5, ¶ 15 (filed Oct. 27, 2005) (“For the vast majority of commercial buildings in its territory, Verizon is the only carrier that owns a last-mile connection to that building.”).

²⁴ Verizon Special Access Reply Comments at 3.

²⁵ Comments of the Community Associations Institute, MB Docket No. 07-51 (filed July 2, 2007) at 9. As a result, the CAI is correct when it states that “the suggestion in the NPRM that banning exclusive agreements has some connection to lower rates is simply wrong.” *Id.*

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Conclusion

Abrogating existing commercial agreements between cable operators and MDU owners is unwarranted and unfair as a policy matter, inconsistent with Commission precedent, and well beyond the scope of the Commission's legal authority. Accordingly, the Commission should reject Verizon's proposal that the Commission take such a step in this proceeding.

Respectfully submitted,

/s/ Daniel L. Brenner

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