

Commission's various responsibilities" under the Act.¹⁶⁷ The Supreme Court has established a two-part ancillary jurisdiction test: (1) the regulation must cover interstate or foreign communication by wire or radio; and (2) the regulation must be reasonably ancillary to the Commission's statutory responsibilities.¹⁶⁸ The prohibition we adopt here applies to "interstate and foreign communication by wire or radio," advances the purposes of both the 1992 Cable Act and Section 706 of the 1996 Telecommunications Act, and serves the public interest.

53. Title I confers on the Commission regulatory jurisdiction over all interstate radio and wire communication.¹⁶⁹ The multichannel video services provided by cable operators are interstate in nature¹⁷⁰ and are covered by the Act's definitions of "radio communications" and "wire communication."¹⁷¹ In addition, these services fall within the definition of "cable service."¹⁷² Thus, cable services are within the scope of our subject matter jurisdiction granted in Title I.

54. In addition, we find that applying the prohibition against exclusivity clauses for the provision of video services to cable operators is reasonably ancillary to our statutory responsibilities under the Act. As we have explained, prohibiting exclusivity clauses for the provision of video services to MDUs will prohibit an anticompetitive cable practice that has erected a barrier to the provision of competitive video services. It also will promote the development of new technologies that will provide facilities-based competition to existing cable operators, and thus serves the purposes set forth in Section 628(a).¹⁷³ In addition, for the same reasons explained above,¹⁷⁴ applying this prohibition to cable operators will ensure the furtherance of the broad goals of the 1992 Cable Act and the 1934 Act generally.

55. Because several commenters raise concerns about the treatment of exclusivity clauses in existing MDU contracts,¹⁷⁵ we take particular care to observe that the law affords us wide authority to

¹⁶⁷ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (upholding Commission regulation of cable television systems as a valid exercise of ancillary jurisdiction); *see also Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988) (upholding Commission authority to establish a "Universal Service Fund" in the absence of specific statutory authority as ancillary to FCC responsibilities under Sections 1 and 4(i) of the Act); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1973) ("even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service").

¹⁶⁸ *See American Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005), *citing Southwestern Cable*, 392 U.S. at 177-78.

¹⁶⁹ 47 U.S.C. §§ 151, 152(a).

¹⁷⁰ *Southwestern Cable*, 392 U.S. at 168-69.

¹⁷¹ 47 U.S.C. §§ 153(33), (52).

¹⁷² 47 U.S.C. § 522(6). Section 2 of the Act, as amended, states that "the provisions of this Act shall apply with respect to cable service . . ." 47 U.S.C. § 152(a). For example, by definition, cable operators provide cable service. 47 U.S.C. § 522(5).

¹⁷³ 47 U.S.C. § 548(a).

¹⁷⁴ *See supra* ¶ 42-43.

¹⁷⁵ *See Comcast Comments* at 35 (asserting that the Commission's "legal authority to abrogate existing contracts is simply non-existent"); *ACA Comments* at 4-5 (same); *NCTA Comments* at 11-14 (same); *Time Warner Comments* at 11-13 (same).

prohibit the enforcement of such clauses where, as here, the public interest so requires.¹⁷⁶ Indeed, as the Commission has previously stated, "Congress intended that rules promulgated pursuant to implement Section 628 should be applied prospectively to existing contracts, except as specifically provided for in Section 628(h)."¹⁷⁷ In addition, the Fifth Amendment's Takings Clause¹⁷⁸ presents no obstacle to prohibiting the enforcement of existing exclusivity clauses. To begin with, such a step obviously does not involve the permanent condemnation of physical property and thus does not constitute a *per se* taking.¹⁷⁹

56. Nor does the proposed rule represent a regulatory taking. The Supreme Court has outlined the framework for evaluating regulatory takings claims as follows: "In all of these cases, we have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. To aid in this determination, however, we have identified three factors which have particular significance: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."¹⁸⁰ None of these factors counsels in favor of finding a regulatory taking here.

57. First, prohibiting the enforcement of exclusivity clauses will have minimal adverse economic impact on affected MVPDs. Nothing in the rule precludes MVPDs from utilizing the wires they own to provide services to MDUs or requires them to jettison capitalized investments. Neither does it prohibit the enforcement of other types of agreements between MDUs or MVPDs, such as exclusive marketing agreements. The rule merely prohibits clauses that serve as a bar to other MVPDs that seek to provide services to a MDU. The record in this proceeding demonstrates that in some cases, exclusivity clauses in existing MDU contracts impose adverse *and* absolute impacts upon would-be competitors who are otherwise ready and able to provide customers the benefits of increased competition.¹⁸¹

¹⁷⁶ See, e.g., *BellSouth Telecom, Inc. v. MCI Metro Access Transmission Servs., LLC*, 425 F.3d 964, 969-70 (11th Cir. 2005); *Western Union Tel. Co. v. FCC*, 815 F.2d 1501 (D.C. Cir. 1987).

¹⁷⁷ 1994 Memorandum Opinion & Order, 10 FCC Rcd at 1939; see also *Section 628 First Report & Order*, 8 FCC Rcd at 3365.

¹⁷⁸ U.S. CONST., amend V ("nor shall private property be taken for public use, without just compensation.").

¹⁷⁹ Cf. *Loretto v. Teleprompter Manhattan City Corp.*, 458 U.S. 419, 427 (1982) ("When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking."); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.").

¹⁸⁰ *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 224-25 (1986) (citations and internal quotation marks omitted).

¹⁸¹ See *supra* ¶¶ 1 note 2, 8-9, 17; AT&T Comments at 11 ("The breadth of these clauses – particularly that they apply to alternative providers that already have deployed facilities to the MDU – demonstrates that these exclusive arrangements are plainly intended to block competition and are not designed to address aesthetics or congestion in an MDU's common areas."); AT&T Reply Comments at 8 (in discussing entry by wireline competitors that are Carriers of Last Resort, stating that "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 offered by COLR carriers.").

58. Second, the rule does not improperly interfere with investment-backed expectations. As previously stated in footnote 7 and paragraph 36, exclusivity clauses in MDU contracts have been under active scrutiny for over a decade, and the Commission has prohibited the enforcement of such clauses in similar contexts. States have also taken action to prohibit such clauses. Moreover, to the extent that MVPDs have used exclusivity clauses to “lock up” MDUs in anticipation of competitive entry or to obstruct competition, as described in Section II above, any underlying investment-backed expectations are not sufficiently longstanding or pro-competitive in nature to warrant immunity from regulation.¹⁸²

59. Finally, with respect to the character of governmental action, the rule’s prohibition of the enforcement of exclusivity clauses in existing MDU contracts substantially advances the legitimate governmental interest in protecting consumers of programming from “unfair methods of competition or unfair acts or practices” – an interest Congress explicitly has recognized and protected by statute, *see* 47 U.S.C. § 628(b), and commanded the Commission to vindicate by adopting appropriate regulations, *see id.* § 628(c)(1). The rule we adopt today is based upon the Commission’s detailed analysis of the harms and benefits of exclusive MDU contracts, discussed above in Section III, and is carefully calibrated to promote this interest.¹⁸³ In short, the rule at issue here does not invoke Justice Holmes’ observation that “if regulation goes too far it will be recognized as a taking.”¹⁸⁴

60. Because the prohibition that we adopt today applies only to cable operators, common carriers or their affiliates that provide video programming directly to subscribers, and operators of open video systems, and does not require MDU owners to provide access to all MVPDs, we do not address comments raising concerns about the Commission’s authority to mandate such access.¹⁸⁵ However, we reject arguments suggesting that the Commission has no authority to regulate such entities’ contractual conduct because of the tangential effect of such regulation on MDU owners. As explained above, Sections 628(b), 628(j), and our ancillary jurisdiction provide ample bases for regulating these specific

¹⁸² *Cf. Connolly*, 475 U.S. at 226-27 (declining to find interference with investment-backed expectations where subjects of regulation long had been “objects of legislative concern”; where “it was clear” that agency discretion to regulate, if exercised, would result in liability; and where affected entities had “more than sufficient notice” of possibility of regulation); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958) (“Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.”). Furthermore, we do not believe that any MVPD has a legitimate investment-backed expectation in profits obtained through anticompetitive behavior such as that found to exist in this Order. *Cf. Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (antitrust law proscribing monopolies “assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency,” and a monopolist may not “substitute for competition anticompetitive uses of its dominant power”); *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 178 (2d Cir. 1990) (“A monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits.”). To the extent that Comcast and Time-Warner argue otherwise, we reject their arguments. *See Comcast Comments* at 33-35; *Time-Warner Comments* at 11-13.

¹⁸³ *Cf. Connolly*, 475 U.S. at 225 (upholding governmental “interference with . . . property rights . . . [because it] arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation”).

¹⁸⁴ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In addition, the Contract Clause of the U.S. Constitution does not limit our authority in this regard, because as Verizon points out, “by its terms [it] applies only to state, not federal, enactments.” *Verizon Comments* at 18, *citing Washington Star Co. v. International Typographical Union Negotiated Pension Plan*, 729 F.2d 1502, 1507 (D.C. Cir. 1984).

¹⁸⁵ *See e.g.*, RAA Comments at 26-28; CAI Comments at 11-12.

MVPDs. Moreover, Sections 4(i), 201(b), and 303(r) supply the Commission with strong authority to enforce the full scope of the Cable Act prohibition at issue.¹⁸⁶

V. FURTHER NOTICE OF PROPOSED RULEMAKING

61. The *Report and Order* is limited to those MVPDs covered by Section 628. In this regard, we note that the record in this proceeding predominantly addressed exclusivity clauses involving cable operators.¹⁸⁷ Therefore, in order to assess whether we should take action to address exclusivity clauses entered into by DBS providers, PCOs, and other MVPDs who are not subject to Section 628, we ask for comment on several matters.¹⁸⁸ Do DBS service providers, PCOs, and other MVPD providers not subject to Section 628 use any or all forms of exclusivity clauses (building, wire, and/or marketing)? If they do, what kinds of exclusivity do those clauses provide? Is it likely that an MVPD provider subject to Section 628, in reaction to the foregoing *Report and Order* and seeking to avoid its effects, would partner with a DBS provider or PCO? What are the effects of the use of exclusivity clauses by MVPD providers not subject to Section 628 on consumer choice, competition for multi-channel video and other services, and on the deployment of broadband and other advanced communications facilities? Are those effects and the balance of benefits and harms the same as we have found with respect to the use of exclusivity clauses by providers that are subject to Section 628?

62. If the net effect of the use of exclusivity clauses by MVPD providers not subject to Section 628 is harmful to consumers, what remedy should we impose – the same kind of prohibition we adopt in the *Report and Order*, or something different? We also ask for comment about two legal matters. First, do our OTARD rules¹⁸⁹ affect the remedy we should impose on DBS providers? Second, we ask for comment about our legal authority. Does the Commission have the authority to regulate the use of exclusivity clauses by MVPD providers not subject to Section 628. Does the Commission have

¹⁸⁶ See *National Cable & Telecommun. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (“Congress has delegated to the Commission the authority to ‘execute and enforce’ the Communications Act, § 151, and to ‘prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions’ of the Act, § 201(b).”); *City of New York v. FCC*, 486 U.S. 57, 70 n.5 (The Commission has “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.”); see also 47 U.S.C. § 154(i) (“The Commission may . . . make such rules and regulations, and issue such orders, not inconsistent with this chapter, which may be necessary in the execution of its functions.”). It bears noting that the Commission previously has exercised its authority under Sections 4(i) and 303(r) to regulate cable wiring inside MDUs. See *1997 Inside Wiring Order*, 13 FCC Rcd at 3700, ¶ 83, 3703, ¶ 87 (1997) (adopting rules for the disposition of cable “home run” wiring inside MDUs pursuant to Sections 4(i) and 303(r)).

¹⁸⁷ See *supra* ¶¶ 9-10, 14-15.

¹⁸⁸ See generally *supra* note 12; Bandwidth Consulting Comments at 2 (without exclusivity, a PCO’s “ability to offer a customized product would not exist” and “only the large monopolies . . . will be able to survive”); Charter Comments at 1, 4 (“if the Commission were to impose any limitations on . . . exclusive contracts it must do so for all bidders”); Comcast Comments at 10-11 (similar to Charter); Consolidated Smart Systems Comments at 1-2 (similar to Bandwidth Consulting); IMCC Comments at 5, 7-11 (similar to Bandwidth Consulting); Lafayette Comments at 10 (similar to Charter); MSTI Comments at 1 (similar to Bandwidth Consulting); NCTA Comments at 8-9 (similar to Charter); SureWest Comments at 8 (similar to Charter); Time Warner Comments at 5-8 (similar to Charter); Ygnition Networks Comments at 1-2 (similar to Bandwidth Consulting); Letter from Terry L. Clifford, Sr., Astro Telecommun. Inc., to the Commission (June 30, 2007) (PCOs “do not have the unlimited resources to funding like the major cable competitors have”).

¹⁸⁹ See *supra* note 27.

authority over DBS providers under Section 335 of the Act?¹⁹⁰ Does the Commission have authority over DBS and other providers under Title III generally, Title VI, its ancillary authority, or some other source? We ask for comment on all the foregoing factual, analytical, and legal issues.

63. We also seek comment on whether the Commission should prohibit exclusive marketing and bulk billing arrangements. For example, we are aware that certain clauses in contracts allow one MVPD into a MDU or real estate development but constrain the ability of competitive MVPDs to market their services directly to MDU residents. These arrangements provide for what is called "marketing exclusivity,"¹⁹¹ and may be anticompetitive. Some argue that in order for MDU residents to exercise freely their choice, they must know about their MVPD options.

64. In particular, we seek comment on a number of questions. How pervasive are these exclusive marketing arrangements? What is the typical scope of such arrangements? In other words, we seek comment on how the Commission should define them for regulatory purposes. Have they been used to impede competition in the video marketplace? Can other MVPDs effectively communicate with MDU residents in those MDUs that have signed exclusive marketing agreements? Do the costs of marketing, promotions and sales substantially increase when a competitive video provider confronts exclusive marketing arrangements? Do these arrangements constitute an unfair method of competition or an unfair act or practice in violation of Section 628(b) of the Act? If so, how should the Commission act to address this problem? Should we prohibit the enforcement of all existing exclusive marketing arrangements as well as the execution of new ones? That is, should we treat them in the same manner as we treat exclusive access arrangements in the item we adopt today? Is our legal authority to address such agreements the same as our legal authority for addressing exclusive access arrangements?

65. We also seek comment on these same questions with respect to "bulk billing" arrangements. Some have argued that bulk contracts are anti-competitive.¹⁹² As we understand them, bulk billing arrangements may be exclusive contracts because MDU owners agree to these arrangements with only one MVPD, barring others from a similar arrangement. Such arrangements may not prohibit MDU residents from selecting a competitive video provider. However, because of the "bulk billing" nature of the contract, residents would have to continue paying a fee to the provider with the bulk billing contract as well as pay a subscription fee to the new service provider. We seek comment on whether these "bulk billing" arrangements are typically formalized as agreements between cable operators and MDUs or between MDUs and residents (or both)? Do these arrangements have the same practical effect as exclusive access arrangements in that most customers would be dissuaded from switching video providers?

66. The Commission will conclude this rulemaking and release an order within six months of publication of this *Order*.

VI. PROCEDURAL MATTERS

A. Filing Requirements

67. *Ex Parte Rules*. The *Further Notice of Proposed Rulemaking* in this proceeding will be treated as a "permit-but-disclose" subject to the "permit-but-disclose" requirements under Section

¹⁹⁰ 47 U.S.C. § 335.

¹⁹¹ Comcast Comments at 19-20; CAI Comments at 3; Embarq Comments at 1 n.1; Qwest Comments at iii; RAA Comments at 8-9; Verizon Comments at 7 n.4.

¹⁹² AT&T Reply Comments at 11; Hotwire Reply Comments at 4-7; Lafayette Comments at 5; Litestream Reply Comments at 2; SureWest Reply Comments at 5.

1.1206(b) of the Commission's rules.¹⁹³ *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.¹⁹⁴ Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

68. *Comments and Reply Comments.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.¹⁹⁵

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
 - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

¹⁹³ See 47 C.F.R. § 1.1206(b), as revised.

¹⁹⁴ See *id.* § 1.1206(b)(2).

¹⁹⁵ See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

69. *Availability of Documents.* Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline at (202) 418-0267 (voice), (202) 418-7365 (TTY), or bill.cline@fcc.gov. These documents also will be available from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554; they can also be reached by telephone, at (202) 488-5300 or (800) 378-3160; by e-mail at fcc@bcpiweb.com; or via their website at <http://www.bcpiweb.com>. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0531 (voice), (202) 418-7365 (TTY).

B. Regulatory Flexibility Analysis

70. Pursuant to the Regulatory Flexibility Act of 1980, as amended,¹⁹⁶ the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") of the possible significant economic impact on small entities of the policies and rules addressed in this document. The FRFA is set forth in Appendix B.

C. Paperwork Reduction Act Analysis

71. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified information collection burdens for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

D. Congressional Review Act

72. The Commission will send a copy of the *Report and Order*, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act.¹⁹⁷ In addition, the Commission will send a copy of the *Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Report and Order* and the FRFA (or summaries thereof) will also be published in the Federal Register.¹⁹⁸

¹⁹⁶ 5 U.S.C. §§ 601 *et seq.*

¹⁹⁷ *See* 5 U.S.C. § 801(a)(1)(A).

¹⁹⁸ *See* 5 U.S.C. § 604(b).

E. Additional Information

73. For additional information on this proceeding, please contact John W. Berresford, (202) 418-1886, or Holly Saurer, (202) 418-7283, both of the Policy Division, Media Bureau.

VII. ORDERING CLAUSES

74. Accordingly, **IT IS ORDERED** that, pursuant to the authority contained in Sections 1, 2(a), 4(i) 157 nt., 303(r), 335, 601(6), 628(b, c), and 653(c)(1) of the Communications Act of 1934, as amended; 47 U.S.C. §§ 151, 152(a), 154(i), 157 nt., 303(r), 335, 521(6), 548(b, c), and 573(c)(1), this *Report and Order* **IS ADOPTED**.

75. **IT IS FURTHER ORDERED** that, pursuant to the authority contained in Sections 1, 2(a), 4(i) 157 nt., 303(r), 335, 601(6), 628(b, c), and 653(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 157 nt., 303(r), 335, 521(6), 548(b, c), and 573(c)(1), 47 C.F.R. Part 76.2000 of the Commission's Rules **IS AMENDED**, as set forth in Appendix D. It is our intention in adopting these rule changes that, if any provision of the rules is held invalid by any court of competent jurisdiction, the remaining provisions shall remain in effect to the fullest extent permitted by law.

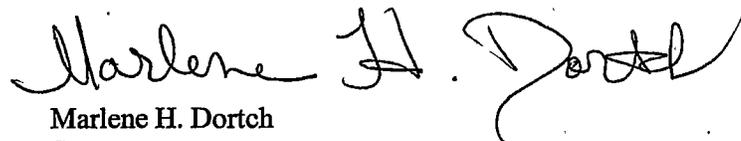
76. **IT IS FURTHER ORDERED** that the following documents shall be made part of the record in this proceeding: (a) Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Commission Secretary, MB Docket No. 05-311 (Aug. 9, 2006); (b) Letter from Ms. Hochstein to Ms. Dortch, MB Docket No. 05-311 (July 6, 2006); (c) Comments of SureWest Communications in MM Docket No. 06-189; (d) Comments of Manatee County, Florida, in MB Docket No. 05-311; and (e) the Comments of Cablevision and Comcast in MB Docket No. 07-29.

77. **IT IS FURTHER ORDERED** that the rule contained herein **SHALL BECOME EFFECTIVE** 30 days after publication of this **REPORT AND ORDER** in the Federal Register.

78. **IT IS FURTHER ORDERED** that, pursuant to Sections 1, 4(i), 303(r), 335, 623 and 628(b, c) of the Communications Act of 1934, as amended, and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 154(i), 303(r), 335, 543, and 548(b, c), this Further Notice of Proposed Rulemaking **IS HEREBY ADOPTED**.

79. **IT IS FURTHER ORDERED** that the Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

APPENDIX A

List of Commenters

American Cable Association
Association for Telecommunications Professionals in Higher Education
AT&T, Inc.
Bandwidth Consulting
Charter Communications, Inc.
Comcast Corporation
Community Associations Institute
Community Home Entertainment
Consolidated Smart Systems
Corning Incorporated
Embarq
Greenfield Service Provider Coalition
Independent Multifamily Communications Council
Lafayette Utilities System
Lennar Corporation
Litestream Holdings, LLC
Microwave Satellite Technologies Inc.
National Association of Telecommunications Officers and Advisors
National Cable & Telecommunications Association
New Jersey Division of Rate Counsel
OpenBand Multimedia, L.L.C.
Pavlov Media, Inc.
Real Access Alliance
Qwest Communications International, Inc.
Shenandoah Telecommunications Company ("Shentel")
SureWest Communications
Time Warner Cable
United States Telecom Association
Verizon Communications, Inc.
Warner Properties, LLC, and Warner Properties Communications, LLC
Stephen Weinstein
Video Associates

WorldNet Telecommunications, Inc.
Ygnition Networks

List of Reply Commenters

Access Media 3
Advance/Newhouse Communications
American Cable Association
AT&T Inc.
Charter Communications, Inc.
Comcast Corporation
Conexus Networks LLC
Convergent Broadband Communications, Inc.
Digital Streets
DirecPath
Mr. Pat Hagan
Hotwire Communications, LLC
Independent Multifamily Communications Council
Litestream Holdings, LLC
Microwave Satellite Technologies Inc.
Multiband Corporation
National Association of Telecommunications Officers and Advisors
National Cable & Telecommunications Association
New Jersey Division of Rate Counsel
Paradigm Marketing Group
Pavlov Media, Inc.
Privatel Incorporated
Real Access Alliance
SDL Ventures, LLC
Shenandoah Telecommunications Company
SureWest Communications
United States Telecom Association
Verizon Communications, Inc.
Stephen Weinstein
WorldNet Telecommunications, Inc.

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),¹ an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the *Notice of Proposed Rulemaking* (the "Notice") to this proceeding.² The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Commission received one comment on the IRFA, from the Real Access Alliance. This Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.³

A. Need for, and Objectives of, the Report and Order

2. This Report and Order adopts rules and provides guidance to implement Sections 1, 2(a), 4(i) 157 nt., 303(r), 335, 601(6), 628, and 653(c)(1) of the Communications Act of 1934, as amended (the "Act").⁴ Those Sections of the Act authorize the Commission to prohibit cable operators and other providers subject to Section 628⁵ of the Act from enforcing or executing clauses in contracts for video service in MDUs that grant to a single service provider the exclusive right to have access to the premises of a MDU for the purpose of providing such service (alone or in combination with other services). The Commission has found that existing and future exclusivity clauses constitute an unreasonable barrier to entry for competitive entrants that would impede enhanced cable competition and accelerated broadband deployment, and that they constitute an unfair method of competition that has the purpose or effect of hindering significantly or preventing video service providers from providing satellite-delivered programming to subscribers and consumers as set forth in Section 628 of the Act.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

3. Only one commenter, the Real Access Alliance ("RAA"), submitted a comment that specifically responded to the IRFA. RAA asserts that the IRFA was defective because it did not address the effects of possible outcomes on apartment building owners.⁶

4. We disagree with RAA's assertion. In fact, the IRFA discussed apartment building owners specifically in paragraph 15.⁷ Moreover, an IRFA need only address the concerns of entities directly regulated by the Commission.⁸ The Commission does not directly regulate apartment building operators.

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996.

² *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, Notice of Proposed Rulemaking, 22 FCC Rcd 5935 (2007).

³ See 5 U.S.C. § 604.

⁴ 47 U.S.C. §§ 151, 152(a), 154(i), 157 nt., 303(r), 521(6), 548(b), 573(c)(1).

⁵ 47 U.S.C. § 548.

⁶ RAA Joint Regulatory Flexibility Act Comments at 2.

⁷ Notice, 22 FCC Rcd at 5947, ¶ 15 ("The SBA has developed definitions of small entities for operators of . . . apartment buildings").

⁸ *Mid-Tex Elec. Co.-Op., Inc. v. FERC*, 773 F.2d 327, 343 (D.C. Cir. 1985) (inferring that "Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy").

Accordingly, even if the IRFA had not addressed the concerns of apartment building owners, it would *not be defective*. Finally, the IRFA correctly concluded that the kind of rule adopted herein would not impose any direct burden on apartment building owners.⁹ When an agency finds that there is no significant impact on a substantial number of small entities, then no discussion of alternatives, less costly than the proposed rule, is required.¹⁰

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

Entities Directly Affected By Proposed Rules

5. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.¹¹ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small government jurisdiction."¹² In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹³ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹⁴

6. The rule adopted by this *Report and Order* will ease the entry of newcomers into the MVPD business and the business of providing the "triple play" of voice, MVPD, and broadband Internet access service. The Commission has determined that the group of small entities directly affected by the rules adopted herein consists of MVPDs (some of which are also incumbent local exchange carriers). Therefore, in the *Report and Order*, we consider the impact of the rules on MVPDs. A description of such small entities, as well as an estimate of the number of such small entities, is provided below.

Cable Operators

7. The "Cable and Other Program Distribution" census category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. The SBA has developed small business size standard for this census category, which includes all such companies generating

⁹ Notice, 22 FCC Rcd at 5945, ¶ 8 ("The Commission has determined that the group of small entities possibly directly affected by our action consists of small governmental entities.").

¹⁰ *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1170 (D.C. Cir. 1996) ("no analysis is necessary when an agency determines that the rule will not have a significant economic impact on a substantial number of small entities that are subject to the requirements of the rule.") (internal quotation marks and italics omitted).

¹¹ 5 U.S.C. § 603(b)(3).

¹² 5 U.S.C. § 601(6).

¹³ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

¹⁴ 15 U.S.C. § 632. Application of the statutory criteria of dominance in its field of operation and independence are sometimes difficult to apply in the context of broadcast television. Accordingly, the Commission's statistical account of television stations may be over-inclusive.

\$13.0 million or less in revenue annually.¹⁵ According to Census Bureau data for 1997, there were a total of 1,311 firms in this category that had operated for the entire year.¹⁶ Of this total, 1,180 firms had annual receipts of under \$10 million and an additional 52 firms had receipts of \$10 million or more but less than \$25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

8. Cable System Operators (Rate Regulation Standard). The Commission has developed its own small-business-size standard for cable system operators, for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.¹⁷ The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.¹⁸ Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

9. Cable System Operators (Telecom Act Standard). The Act also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."¹⁹ The Commission has determined that there are 67,700,000 subscribers in the United States.²⁰ Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.²¹ Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450.²² The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,²³ and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

¹⁵ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517510.

¹⁶ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

¹⁷ 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. See *Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report & Order & Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995).

¹⁸ Paul Kagan Associates, Inc., Cable TV Investor, February 29, 1996 (based on figures for December 30, 1995).

¹⁹ 47 U.S.C. § 543(m)(2).

²⁰ See *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice DA 01-158 (2001).

²¹ 47 C.F.R. § 76.901(f).

²² See *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice DA 01-158 (2001).

²³ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules.

10. Open Video Services. Open Video Service (“OVS”) systems provide subscription services.²⁴ As noted above, the SBA has created a small business size standard for Cable and Other Program Distribution.²⁵ This standard provides that a small entity is one with \$13.0 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.²⁶ Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

Telecommunications Service Entities

11. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”²⁷ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not “national” in scope.²⁸ We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

12. *Incumbent Local Exchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.²⁹ According to Commission data,³⁰ 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. In addition, limited

²⁴ See 47 U.S.C. § 573.

²⁵ 13 C.F.R. § 121.201, NAICS code 517510.

²⁶ See FCC, Media Bureau, *Archived*, <http://www.fcc.gov/mb/ovs/csovsarc.html> (visited Aug. 7, 2007).

²⁷ 15 U.S.C. § 632.

²⁸ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of “small-business concern,” which the RFA incorporates into its own definition of “small business.” See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

²⁹ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

³⁰ FCC, Wireline Competition Bureau, Industry Analysis & Technology Division, “Trends in Telephone Service,” Table 5.3 at 5-5 (June 2005) (“Trends in Telephone Service”). This source uses data that are current as of October 1, 2004.

preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.³¹

D. Description of Projected Reporting, Record Keeping and other Compliance Requirements

13. The rule adopted in the *Report and Order* will require no additional reporting, record keeping, and other compliance requirements.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

14. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.³²

15. Because the *Report and Order* imposes no compliance on reporting requirements on any entity, only the last of the foregoing alternatives is material. The *Report and Order* describes in paragraphs 16-29 and 38 that the Commission considered, but rejected after due consideration, exempting small MVPDs from the rule that the *Report and Order* adopts.

³¹ See U.S. Census Bureau, *2002 Economic Census, Industry Series: "Information,"* Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513310 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" increased from 20,815 to 27,891. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

³² 5 U.S.C. §§ 603(c)(1)-(c)(4).

APPENDIX C

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (the "RFA"),¹ the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact of the policies and rules proposed in the Further Notice of Proposed Rulemaking ("FNPRM") on a substantial number of small entities. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the FNPRM provided on the first page of the item. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").² In addition, the FNPRM and IRFA (or summaries thereof) will be published in the Federal Register.³

Need for, and Objectives of, the Proposed Rules

2. The FNPRM initiates a proceeding to investigate the effects on competition and consumers of certain practices that occur in the provision of MVPD⁴ service in MDUs.⁵ Specifically, the FNPRM solicits comment on the use of all kinds of exclusivity clauses⁶ by providers of Direct Broadcast Satellite ("DBS") service and PCOs⁷ and the use, by all kinds of MVPD service providers, of marketing exclusivity⁸ and bulk billing arrangements.⁹ The FNPRM also asks for comment on whether the Commission has authority to prohibit the use of such clauses and agreements by DBS service providers, PCOs, and other MVPDs.

Legal Basis

3. The FNPRM also asks whether the Commission has authority to regulate the above-mentioned practices of MVPD service providers. It specifically asks whether such authority can be found in Sections 335 (for DBS service providers), 628, and Titles I and III of the Communications Act of 1934, as amended, and the Commission's ancillary authority.¹⁰

¹ The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² *See* 5 U.S.C. § 603(a).

³ *See* 5 U.S.C. § 603(a).

⁴ *See* 47 U.S.C. § 522(13).

⁵ *See supra* ¶ 7.

⁶ *See supra* note 2.

⁷ *See supra* note 12.

⁸ *See supra* note 2.

⁹ *See supra* ¶ 65.

¹⁰ 47 U.S.C. §§ 151 *et seq.*, 335, 521 *et seq.* (especially 548).

Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.¹¹ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹² In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹³ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (“SBA”).¹⁴

5. Small Businesses. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.¹⁵

6. Small Organizations. Nationwide, there are approximately 1.6 million small organizations.¹⁶

7. Small Governmental Jurisdictions. The term “small governmental jurisdiction” is defined generally as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”¹⁷ Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.¹⁸ We estimate that, of this total, 84,377 entities were “small governmental jurisdictions.”¹⁹ Thus, we estimate that most governmental jurisdictions are small.

8. The Commission has determined that the group of small entities possibly directly affected by our action consists of small governmental entities. In addition the Commission voluntarily provides, below, descriptions of certain entities that may be merely indirectly affected by any rules that may ultimately result from the FNPRM.

¹¹ 5 U.S.C. § 603(b)(3).

¹² 5 U.S.C. § 601(6).

¹³ 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

¹⁴ 15 U.S.C. § 632.

¹⁵ See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at 40 (July 2002).

¹⁶ Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

¹⁷ 5 U.S.C. § 601(5).

¹⁸ U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

¹⁹ We assume that the villages, school districts, and special districts are small, and total 48,558. See U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

Cable Operators

9. Cable and Other Program Distribution. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged as third-party distribution systems for broadcast programming. The establishments of this industry deliver visual, aural, or textual programming received from cable networks, local television stations, or radio networks to consumers via cable or direct-to-home satellite systems on a subscription or fee basis. These establishments do not generally originate programming material."²⁰ The SBA has developed a small business size standard for Cable and Other Program Distribution, which is: all such firms having \$13.5 million or less in annual receipts.²¹ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.²² Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$ 10 million or more but less than \$25 million.²³ Thus, under this size standard, the majority of firms can be considered small.

10. Cable Companies and Systems. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.²⁴ Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.²⁵ In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.²⁶ Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.²⁷ Thus, under this second size standard, most cable systems are small.

11. Cable System Operators. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."²⁸ The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total

²⁰ U.S. Census Bureau, 2002 NAICS Definitions, "517510 Cable and Other Program Distribution"; <http://www.census.gov/epcd/naics02/def/NDEF517.HTM>.

²¹ 13 C.F.R. § 121.201, NAICS code 517510.

²² U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

²³ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

²⁴ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408 (1995).

²⁵ These data are derived from: R.R. Bowker, Broadcasting & Cable Yearbook 2006, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, Television & Cable Factbook 2006, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

²⁶ 47 C.F.R. § 76.901(c).

²⁷ Warren Communications News, Television & Cable Factbook 2006, "U.S. Cable Systems by Subscriber Size," page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

²⁸ 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.²⁹ Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.³⁰ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,³¹ and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

12. Open Video Services. Open Video Service ("OVS") systems provide subscription services.³² As noted above, the SBA has created a small business size standard for Cable and Other Program Distribution.³³ This standard provides that a small entity is one with \$13.5 million or less in annual receipts. The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of these are currently providing service.³⁴ Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, B.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 24 OVS operators (those remaining) might qualify as small businesses that may be affected by our action.

Telecommunications Service Entities

13. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."³⁵ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.³⁶ We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

²⁹ 47 C.F.R. § 76.901(f); see Public Notice, FCC Announces New Subscriber Count for the Definition of Small Cable Operator, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

³⁰ These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

³¹ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. See 47 C.F.R. § 76.909(b).

³² See 47 U.S.C. § 573.

³³ 13 C.F.R. § 121.201, NAICS code 517510.

³⁴ See <http://www.fcc.gov/mb/ovs/csovsr.html> (visited December 19, 2006), <http://www.fcc.gov/mb/ovs/csovsarc.html> (visited December 19, 2006).

³⁵ 15 U.S.C. § 632.

³⁶ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. See 13 C.F.R. § 121.102(b).

14. *Incumbent Local Exchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁷ According to Commission data,³⁸ 1,303 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,303 carriers, an estimated 1,020 have 1,500 or fewer employees and 283 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action. In addition, limited preliminary census data for 2002 indicate that the total number of wired communications carriers increased approximately 34 percent from 1997 to 2002.³⁹

15. *Wired Telecommunications Carriers.* The SBA has developed a small business size standard for wireline firms within the broad economic census category, "Wired Telecommunications Carriers."⁴⁰ Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census Bureau data for 2002 show that there were 2,432 firms in this category that operated for the entire year.⁴¹ Of this total, 2,395 firms had employment of 999 or fewer employees, and 37 firms had employment of 1,000 employees or more.⁴² Thus, under this category and associated small business size standard, the majority of firms can be considered small.

Dwelling Units

16. *MDU Operators.* The SBA has developed definitions of small entities for operators of nonresidential buildings, apartment buildings, and dwellings other than apartment buildings, which include all such companies generating \$6 million or less in revenue annually.⁴³ According to the Census Bureau, there were 31,584 operators of nonresidential buildings generating less than \$6 million in revenue that were in operation for at least one year at the end of 1997.⁴⁴ Also according to the Census Bureau, there were 51,275 operators of apartment dwellings generating less than \$6 million in revenue

³⁷ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

³⁸ FCC, Wireline Competition Bureau, Industry Analysis & Technology Division, "Trends in Telephone Service," Table 5.3 at 5-5 (June 2005) ("Trends in Telephone Service"). This source uses data that are current as of October 1, 2004.

³⁹ See U.S. Census Bureau, *2002 Economic Census, Industry Series: "Information,"* Table 2, Comparative Statistics for the United States (1997 NAICS Basis): 2002 and 1997, NAICS code 513310 (issued Nov. 2004). The preliminary data indicate that the total number of "establishments" increased from 20,815 to 27,891. In this context, the number of establishments is a less helpful indicator of small business prevalence than is the number of "firms," because the latter number takes into account the concept of common ownership or control. The more helpful 2002 census data on firms, including employment and receipts numbers, will be issued in late 2005.

⁴⁰ 13 C.F.R. § 121.201, NAICS code 517110.

⁴¹ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 517110 (issued Nov. 2005).

⁴² *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

⁴³ 13 C.F.R. § 121.601 (NAICS Code 531110, 531311, 531312).

⁴⁴ 1997 Economic Census: Comparative Statistics for the United States; 1987 SIC Basis: Financial, Insurance, and Real Estate Industries, SIC 6512.

that were in operation for at least one year at the end of 1997.⁴⁵ The Census Bureau provides no separate data regarding operators of dwellings other than apartment buildings, and we are unable at this time to estimate the number of such operators that would qualify as small entities.

Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

17. We anticipate that any rules that result from this action would have at most a *de minimis* compliance burden on cable operators and telecommunications service entities. Any rules that might be adopted pursuant to this FNPRM likely would not require any reporting or recordkeeping requirements.

Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

18. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities."⁴⁶

19. As discussed in the FNPRM, the Commission has initiated this proceeding to ensure that use of exclusivity clauses of all kinds and bulk billing for the provision of video services to MDUs and other real estate developments are pro-competitive. As noted above, applying any rules regarding the use of such practices in the provision of video services to MDUs or other real estate developments likely would have at most a *de minimis* impact on small governmental jurisdictions. We seek comment on the impact that any rules might have on such small governmental entities, as well as the other small entities described, and on what effect alternative rules would have on those entities. For instance, if marketing exclusivity clauses were forbidden – for DBS providers, PCOs, or all MVPD service providers – would there be any effect on the regulatory activities of small government jurisdictions? We also invite comment on ways in which the Commission might impose restrictions of the use of exclusivity clauses and bulk billing arrangements while at the same time imposing lesser burdens on small entities.

Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

20. None.

⁴⁵ 1997 Economic Census: Comparative Statistics for the United States; 1987 SIC Basis: Financial, Insurance, and Real Estate Industries, SIC 6513.

⁴⁶ 5 U.S.C. §§ 603(c)(1)-(4).

APPENDIX DFinal RuleSubpart X – Access to Multiple Dwelling Units and Centrally Managed Real Estate Developments

47 C.F.R. § 76.2000. Exclusive Access to Multiple Dwelling Units Generally

(a) Prohibition. No cable operator or other provider of MVPD service subject to 47 U.S.C. § 548 shall enforce or execute any provision in a contract that grants to it the exclusive right to provide any video programming service (alone or in combination with other services) to a MDU. All such exclusivity clauses are null and void.

(b) Definition. For purposes of this rule, MDU shall include a multiple dwelling unit building (such as an apartment building, condominium building or cooperative) and any other centrally managed residential real estate development (such as a gated community, mobile home park, or garden apartment); provided however, that MDU shall not include time share units, academic campuses and dormitories, military bases, hotels, rooming houses, prisons, jails, halfway houses, hospitals, nursing homes or other assisted living facilities.”

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments

All consumers, regardless of where they live, should enjoy the benefits competition in the video marketplace. Exclusive contracts between incumbent cable operators and owners of "multiple dwelling units" (MDUs) have been a significant barrier to competition. Today's order removes this barrier. Specifically, the item we adopt today finds that the use of exclusivity clauses in contracts for the provision of video services to MDUs constitutes an unfair method of competition or an unfair act or practice in violation of Section 628(b) of the Act. Thus, we prohibit the enforcement of existing exclusivity clauses and the execution of new ones by cable operators.

Fostering greater competition in the market for video services is a primary and long-standing goal of federal communications policy. Congress recognized that competition in the video services market benefits consumers. Indeed, one of the Communications Act's explicit purposes is to "promote competition in cable communications." Competition and choice in the video services market results in lower prices, higher quality of services, and generally enhances the consumers' experience by giving them greater choice over the purchased video programming.

As the Commission has found, from 1995 to 2005, cable rates have risen 93%. In 1995, cable service cost \$22.37 per month. Prices for expanded basic cable service have now almost doubled. The trend in pricing of cable services is of particular importance to consumers. Since 1996 the prices of every other communications service (such as long distance and wireless calling) have declined while cable rates have risen year after year after year.

The Commission has been working hard to take steps to introduce greater competition in the video market for the benefit of consumers. For example, last year we removed regulatory barriers by giving meaning to the words Congress wrote in section 621 of the Cable Act. This item found that local franchise authorities must not "*unreasonably refuse to award an additional competitive franchise*" to new companies seeking to enter the video marketplace. And, more recently, we took action to make sure that new entrants, in addition to existing players, will continue to have access to critical programming on a nondiscriminatory basis. In that same item, we also began an inquiry into the "tying" practices of programmers where broadcast and cable programmers routinely tie marquee programming, such as premium channels or regional sports programming, with unwanted or less desirable programming. These practices have been identified by cable operators as increasing the cost and decreasing choice in video programming.

I believe that people that live in apartment buildings deserve to have the same choices as people that live in the suburbs. In today's item, the Commission found that people who live in apartment buildings often have no choice of companies when it comes to their video service provider. This is because building owners often strike exclusive deals with one cable operator to serve the entire building, eliminating competition. There is no reason that consumers living in apartment buildings should be locked into one service provider. This phenomenon is particularly problematic given the large number of Americans that live in apartment buildings. Right now over one quarter of all Americans lives in apartment buildings. And, according to the American Housing Survey Report, 40% of all households headed by Hispanics or African-Americans live in apartments. Thus, because a greater percentage of minority-headed households live in apartment buildings, I believe minorities in particular will benefit from today's ruling.

I am pleased that the Commission has taken action that will not only enhance video competition but advance broadband deployment by encouraging the deployment of facilities by new entrants. The Commission will continue to look for ways to remove barriers to competition across all platforms and with respect to all services that we regulate. The public interest demands that all Americans reap the benefits of competition.

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*

Thanks to this item, Americans who live in multiple dwelling units (MDUs) will be able to reap the benefits of competition and consumer choice just like those who live in single-family homes. It's a lot of people – nearly thirty percent of our total population and an even higher percentage of the overall minority population.

Today's decision is a significant step forward not just for what it does, but also for what it does not do. It does not prevent a property owner from negotiating a bulk discount for its residents or bargaining for heightened customer service requirements. Nor does it give any video provider the right to enter an MDU over the objection of the property owner. It simply removes a large obstacle to providing residents of MDUs with the ability to choose among alternative providers serving the surrounding community.

We could have gone even further. I am particularly concerned about the potential of tipping the playing field in favor of particular services or particular competitors. Markets can move quickly in response to regulatory changes, and it may be that some MVPDs not covered by today's decision will attempt to fill the vacuum by marketing themselves as the only exclusive game in town. Happily we will be addressing these competitive parity issues in the next six months. In the meantime, I would caution any MVPDs seeking to take advantage of this regulatory lag time that they do so at their own risk. I agree with several public interest commenters in this record who argued, "the Commission should apply the policy of access with an equal and impartial hand."¹ In this regard, I'm pleased that my colleagues have agreed to conclude within the next two months the open proceeding examining the permissibility of exclusive contracts for telecommunications services in residential MDUs. I am also pleased that we will be looking at expanding the multi-channel video service providers (MVPDs) covered by the rule we adopt today. The sooner we complete action on all this, the better off consumers will be.

This is a good and significant step forward, I thank the Bureau and my colleagues for their hard work on it, and I am pleased to support the item.

¹ See *Ex Parte Comments of Consumer Federation of America, Consumers Union, New America Foundation, Free Press, Public Knowledge, and U.S. PIRG*, dated October 24, 2007.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments

Robust and fair competition across the communications landscape, particularly in the video marketplace, remains a central policy objective of mine. So I am pleased to support this Order which should lower barriers for the entry of new competitors and expand the options for video services available to the millions of Americans who live in apartment buildings, condominiums, mobile home parks, and other centrally-managed real estate developments. A person living in a multiple dwelling unit (MDU) property should not be shackled to one video provider. Too often, the landlord gets paid off while the tenants are stuck with no choice or bad service. People want competitive offerings, and today we are delivering them.

This Order addresses the use of exclusive agreements between multichannel video programming distributors (MVPDs) and private real estate developers and owners of MDU properties for video services. Significantly, the Order finds that exclusive access arrangements amount to anticompetitive practices that prevent or greatly hinder providers from providing MDU residents video programming services. Although the Commission has examined this issue before, recent industry trends warranted another look at the effect of exclusive contracts. According to the Commission's most recent Cable Price Survey Report, the average monthly price for basic-plus-expanded basic service has increased by ninety-three percent over a ten-year period.¹ Further, cable rates were seventeen percent lower where wireline cable competition was present.²

The entry of some of the largest incumbent local exchange companies into the video marketplace also signifies a major and positive new development. Verizon, for example, is upgrading its facilities to fiber-based platforms in many areas across the country so that it can offer a suite of video, voice, and data services. This and other investments by phone companies could bring substantial new competition into the video marketplace that is likely to prove historic.

Equally significant is the potential for this new revenue stream to drive broadband deployment, which can benefit consumers and foster the free flow of information beyond the video marketplace. This action alone will not solve our broadband challenges of availability, affordability, and value – too few Americans enjoy the full benefits of competition for broadband services – but it takes an important step by opening the door for millions of Americans to exercise their right to choose their own provider.

In the instant item we find that exclusive contracts do in fact unreasonably impede the Commission's goals of enhancing multichannel video competition and accelerating the deployment of broadband, so it is critical that we act. By prohibiting cable operators from enforcing these exclusive contracts, consumers will benefit not only from more choices, better service, and lower prices, but they also stand to gain from a more robust exchange in the marketplace of ideas.

¹ Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Prices for Basic Service, Cable Programming Services, and Equipment, 21 FCC Rcd 1, 15087, ¶ 2-(2006).

² *Id.* at 15090, ¶ 10.

I have long expressed grave concerns about the negative effects of media consolidation in this country, and have focused on the problems raised by growing vertical integration of programming and distribution. Vast new distribution networks promise to limit the ability of any vertically integrated conglomerates from imposing an economic, cultural, or political agenda on a public with few alternative choices. I truly believe the benefits of this new competition extend beyond even the many typical ones that accrue to consumers, and can actually improve the health of our overall democracy.

I am pleased that my colleagues agreed to seek comment on whether the Commission should prohibit exclusive marketing and bulk billing arrangements. I am especially satisfied that the Chairman agreed to finalize rules in this proceeding within six months. While I would have preferred to ban exclusive marketing agreements immediately in this Order, this is an important step.

These and other forms of exclusive arrangements seem to serve the primary purpose of raising the barriers of entry for competitive video providers, whether incumbent cable or telephone video providers, or overbuilders. Similar to exclusive *access* arrangements, exclusive *marketing* arrangements between MVPDs and MDU owners may have the potential to have an anticompetitive effect in the video market because an MVPD essentially purchases the right to prevent or hinder the ability of a competitive MVPD from reaching the MDU resident in a cost-efficient manner. Increasing a competing MVPD's cost is the name of the game, and the unsuspecting consumer is the pawn. They should be banned under the same reasoning we use here to ban exclusive access arrangements.

Bulk billing arrangements are a more sophisticated and, perhaps, insidious form of exclusive agreements. While MDU owners generally enter into a bulk billing arrangement with only one MVPD, if a resident is fortunate to receive video service from a competitive video provider, the resident is sometimes forced to pay two separate subscription fees for video service. While we need to ensure that bulk discounts are not undermined, I look forward to the comments and record generated from an inquiry into these practices.

Finally, I am pleased that this item includes a commitment to address the related issue of exclusive contracts for telecommunications services in residential MDUs. It should be our policy objective to promote fair competition throughout the communications landscape, so I'm pleased that we will take up this issue quickly.

For all these reasons, I support this *Order and Further Notice*.

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

Re: Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments

The FCC continues to encourage competition across platforms and the stimulation of investment further down the marketplace, resulting in more competition and hopefully more choice and lower prices for consumers through the banning of exclusivity clauses in the MVPD market. I think we all recognize that exclusivity contracts in perpetuity are not in keeping with our pro-competitive policies and should be banned.

As a former state official, I am wary of acting in any area in which states have already taken the lead. We recognized state action granting video relief in our 621 Order and I do so again today. I am one of those unique federal officials who still believes that states have a critical role in our concept of "federalism." I appreciate the comments of the National Governors Association and the National Conference of State Legislatures and other local officials who contacted us. As we recognized in our earlier Orders on exclusivity clauses, today's action should not conflict with states that have already imposed a ban. Rather it extends this prohibition to those states that have not yet acted.

Like many of our decisions, the effects of today's Order will not truly be tangible until markets and technology evolve. Much of the U.S. still depends on cable for their video and broadband service and that will not change overnight. This order, which ends exclusivity clauses—as we did earlier in the telecom arena-- will not create competition in every MDU overnight. It will, however, set the stage for more competition through a gradual process that hopefully will allow cable companies and Wall Street to adjust to the change in investment strategy.

This Order does not abrogate existing contracts, but rather declares exclusivity clauses to be unenforceable. Other provisions of service contracts remain intact. Also, this Order is focused solely on access to MDUs. Other competitive, freely negotiated business arrangements are untouched by this action.

I am pleased that we have also agreed, within the next two months, to consider the issues raised in the 2000 Competitive Networks Further Notice of Proposed Rulemaking. In the interest of regulatory parity, it is essential that we seek to apply our rules consistently across all platforms in a timely manner.

**STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL, CONCURRING**

Re: Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments

Today the FCC helps give many consumers who live in apartment buildings and other multiple dwelling units (MDUs) the hope of having more choices among video service providers. If you live in a building where the property owner limits your freedom to choose among video service providers through an exclusive arrangement with just one company, today's Order liberates you.

In our Order, the Commission finds that contractual agreements granting cable operators exclusive access to MDUs is harmful to competition. Accordingly, our Order prohibits the enforcement of existing exclusivity clauses, and the execution of new ones, as an unfair method of competition. Although I agree that increased competition among video providers in MDUs will result in better service, innovative offerings to consumers, and lower prices, I am concerned about the legal sustainability of the Order, should it be appealed. My concern is this: after unanimously inviting cable companies and building owners to strike such deals in 2003, the FCC may now be abrogating those exact same agreements immediately rather than waiting for them to expire and without providing a grace period. In some cases, cable companies relied upon our 2003 Order to make arrangements with owners of older buildings to wire them for the first time, or to upgrade them with newer technologies, in exchange for a limited period of time when they could be the exclusive video service provider to allow for recovery of their investments. The record indicates that many buildings may have been upgraded, or brought online for the first time, as a result of this policy. To flash cut to a new regulatory regime without a sensible transition period only begs for an appeal that could result in a court throwing out all of our Order, the good with the bad. I am disappointed that our Order does not take the simple and small step of avoiding such exposure.

My concern is underscored by what can be perceived as a lack of sufficient evidence in the record to justify such an immediate mandate. In fact, in 2003, the Commission unanimously held that "the record developed in this proceeding indicates little support for governmental interference with privately negotiated exclusive MDU contracts.... We do not find a sufficient basis in this record to ban or cap the term of exclusive contracts."¹ Because the 2003 record reflected both pro-competitive and anti-competitive aspects of exclusive contracts, the Commission decided not to act. Now, only four years later, we do take action despite similar arguments being presented in the record. The Order should do a better job of distinguishing these apparent contradictions.

I am also concerned that our Order may not give sufficient deference to states that have passed their own laws helping consumers with this issue. The record indicates that 20 states have enacted such legislation and no state has abrogated existing contracts such as we are doing here. Arguments that our actions today may constitute a regulatory taking that requires compensation may have merit as well, and I wish the Commission's appellate lawyers the best of luck in defending against such claims. I only wish we were giving our attorneys more legal ammunition to use to defend the agency. At the end of the day, because I agree with the thrust of what the Commission is attempting to do today, namely giving consumers the freedom to choose among a variety of video services providers, I concur in this Order.

¹ *Telecommunications Services Inside Wiring: Cable Television Consumer Protection & Competition Act of 1992, First Order on Reconsideration and Second Report and Order*, 18 FCC Rcd 1342 (2003), at ¶ 68.