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

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

REQUEST FOR STAY PENDING JUDICIAL REVIEW

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SUMMARY

In the *2007 MDU Order*, the Commission revisited a question that it had addressed only four years earlier – namely, whether it should restrict the use of exclusive contracts between owners of multiple dwelling units (MDUs) and multichannel video programming distributors (MVPDs). The Commission not only reversed its previous decision and prohibited cable operators from entering into such contracts, but it also applied its prohibition to *existing* contracts – including contracts entered into in reliance on the *2003 MDU Order*. NCTA intends to seek judicial review of the Commission's decision, and respectfully requests that, in order to prevent irreparable injury, the Commission stay, pending judicial review, that portion of its order that prohibits enforcement of existing contracts.

Nothing in Title VI or anywhere else in the Communications Act gives the Commission authority to restrict such contracts between cable operators (or other MVPDs) and owners of MDUs. Although the Commission concluded that it has such authority, its primary basis for this conclusion is Section 628 – a provision squarely directed at competitive access to *programming*, not access to *premises.* Contrary to the Commission's ambitions, Section 628 is not a catch-all grant of authority to restrict any contractual relationships that might be deemed by the Commission to restrict competition. Nor does the Commission have any "ancillary authority" under any provision of the Act to restrict the use of exclusive access agreements. Moreover, as a matter of law, the Commission may not interfere with *existing* common law contractual rights unless it is expressly or "imperatively" required by the Communications Act, which plainly is not the case here.

Not only is the Commission's legal analysis flawed, it did not provide the type of substantial evidence and reasoned analysis the courts require when an agency radically alters its policies or when it applies them retroactively to prohibit enforcement of existing contractual

agreements. Throughout the order, the Commission repeatedly accepts at face value the unverified assertions of the telephone companies and ignores or discounts the record evidence, including sworn declarations, submitted by cable operators and building owners. The Commission's attempt to distort the record in order to bolster its overreaching is the essence of arbitrary and capricious decisionmaking.

In determining whether to stay the effectiveness of one of its orders, the Commission applies a four-factor test. Under this test, the party requesting the stay must demonstrate that: (1) it is likely to prevail on the merits of its petition for review; (2) it will suffer irreparable harm in the absence of a stay; (3) a stay will not injure other parties; and (4) a stay is in the public interest. For the reasons shown below, NCTA's request satisfies that test and the Commission should stay, pending judicial review, the effectiveness of its decision to prohibit the enforcement of existing exclusive access agreements.

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The National Cable & Telecommunications Association ("NCTA"), pursuant to Sections 1.41 and 1.43 of the Commission's rules,[1] hereby requests that the Commission stay, pending judicial review, the Report and Order in the above-captioned rulemaking insofar as it prohibits the enforcement of exclusivity clauses in existing contracts.[2] NCTA respectfully requests that the Commission act on this request by December 21, 2007. If the request is not acted on by that date, NCTA will seek a stay in the United States Court of Appeals.

NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. NCTA plans to appeal the Commission's decision to prohibit cable operators from: (1) enforcing existing exclusive access agreements with MDU owners; and (2) entering into new exclusive access agreements. Because that decision is beyond the Commission's legal authority under the Act and is arbitrary and capricious, NCTA is likely to succeed on the merits in its appeal. In addition, absent a stay of the decision with respect to

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[1] 47 C.F.R. §§ 1.41 and 1.43.

[2] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order, FCC 07-189 (rel. Nov. 13, 2007) ("*2007 MDU Order*").

existing agreements, NCTA's members will be irreparably harmed by the Commission's unlawful decision. Conversely, grant of a stay pending judicial review will not change the status quo for other parties and will, in fact, serve the public interest. For all these reasons, grant of a stay is warranted under well-established Commission precedent.

I. BACKGROUND AND PROCEDURAL HISTORY

The provision of video service to a customer in an MDU is a more complex undertaking than serving a single family home. In particular, while a cable franchise provides a cable operator with access to public rights-of-way, it does not provide access to private property. Consequently, before a service provider can begin offering service to customers in an MDU, it must obtain access to the property from a third party – the building owner or manager.[3] There is no comparable issue when a provider serves a single family home because a customer that wants service presumably will provide the cable operator with access to its property.

As with other commercial agreements, negotiations between a building owner and a cable operator over the terms and conditions of access reflect an attempt by both parties to reach a mutually beneficial outcome. For the building owner, the goal is to make the building attractive to tenants while minimizing the costs associated with providing them cable service. For the cable operator, the goal is to generate sufficient revenue from customers in the MDU to earn a return on its investment in wiring the building and to cover the cost of any payments to the building owner (e.g., "door fees" paid by a cable operator for each unit in the building and/or a percent of any revenue generated from subscribers in the building) and other concessions, such as offering additional services to MDU residents or complying with more stringent customer

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[3] *See, e.g.,* Charter Comments at 2 ("Charter has no right to compel access because the property is in private hands. Charter (like other MVPDs) has had to buy the rights to reach customers who reside in those MDUs."). Except where otherwise indicated, references to "Comments" or "Reply Comments" refer to pleadings submitted in response to the Commission's NPRM in this docket.

service standards.[4] Although this is a commercial negotiation, the building owner often has substantial leverage over the cable operator because it has the power to deny access to the MDU, thereby depriving the operator of the opportunity to serve customers and the resulting revenue.

In the context of this commercial negotiation over access to a building, both parties may see exclusivity as a way to improve their business case. For the cable operator, exclusivity increases the anticipated penetration of its service within the building and its anticipated revenue. For the building owner, exclusivity may be beneficial because it reduces the owner's own cost of offering communications services to residents and because the cable operator may agree to make its offering to residents more attractive than what is offered throughout the community generally.[5]

For decades, issues regarding access to, and wiring in, MDUs were considered solely a matter of private contracts, subject only to state contract law. In 1973, New York became the first state to provide cable operators with a right of access to MDUs. No other state followed this approach until 1982, when four more states adopted such laws. Today, 18 states have some form of "access to premises" law restricting or prohibiting building owners from excluding a tenant's chosen video provider.[6] These laws typically arose not from any regulation of the cable operator

4 *See, e.g.*, Real Access Alliance (RAA) Comments at 5 ("If a communications provider is to bear the capital expense of installing facilities in a building, it must be able to justify the expense."); Declaration of William Revell at ¶ 5, 9 (attached to Comcast Comments, Attachment A); Declaration of Chris Acker at ¶ 8-16 (attached to RAA Comments, Exhibit C); Declaration of Stephen J. Sadler at ¶ 11-22 (attached to RAA Comments, Exhibit D); Declaration of Kent McDonald at ¶ 8 (attached to RAA Comments, Exhibit E).

5 *See* Revell Decl. at ¶ 9; Acker Decl. at ¶ 8-16; Sadler Decl. at ¶ 11-22; McDonald Decl. at ¶ 8-11.

6 *See* Comcast Comments at 21-23.

by the state, but from the traditional role of the states in regulating the landlord/tenant relationship.[7]

Congress first considered issues related to MDU access in the early 1980s, but ultimately chose not to include a provision addressing this issue in the 1984 Cable Act. Specifically, a provision that would have prohibited landlords from interfering with a consumer's ability to receive cable service was deleted by the House Committee on Energy and Commerce and not included in the final legislation. Congress has not revisited the issue of access to MDUs. It did, however, address issues related to cable wiring in the 1992 Cable Act. In Section 624(i), Congress required the Commission to adopt rules "concerning the disposition, after a subscriber terminates service, of any cable installed by the cable operator within the premises of such subscriber."[8]

The Commission adopted the home wiring rules required by Congress in 1993.[9] Subsequently, however, notwithstanding the fact that Section 624(i) was limited to wiring "within the premises" of the subscriber, the Commission decided that it had more expansive authority over wiring within MDUs. In 1997, it adopted rules regarding the disposition of MDU wiring outside individual residences – so-called "home run wiring" – which is dedicated to a

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[7] In none of these cases did the state find it necessary to interfere with agreements entered into before such laws took effect. *See* Letter from the National Governors Association to Kevin J. Martin, Chairman, Federal Communications Commission, MB Docket No. 07-51 (filed Oct. 24, 2007).

[8] After adopting Section 624(i), Congress made no other changes in the law that directly relate to MDU access and wiring issues in the context of cable services. In contrast, as part of the Telecommunications Act of 1996, Congress specifically addressed the rights of MDU residents to use equipment needed to receive satellite services. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 207. Congress also imposed network unbundling requirements on incumbent local exchange carriers and the Commission has found that those requirements cover equipment located within MDUs. 47 U.S.C. § 251(c); *Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15697, ¶ 392.

[9] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, MM Docket No. 92-260, Report and Order, 8 FCC Rcd 1435 (1993).

particular unit but is located outside the unit.[10] The Commission established procedures requiring the sale, removal, or abandonment of cable home run wiring so that it could be made available to alternative video service providers.[11] At the same time, the Commission also sought comment on whether it should prohibit cable operators from entering into exclusive access agreements with MDU owners or otherwise restrict the use of such agreements.

In the *2003 MDU Order*, the Commission decided that such "government intervention with market forces and privately negotiated contracts" was not warranted.[12] The Commission stated 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."[13] Based on its finding that cable operators' market share was declining and that new entrants were succeeding in the market, the Commission not only rejected requests to prohibit exclusive access agreements, it also rejected calls to limit their duration.[14]

In that same order, the Commission also affirmed its rules governing the "building-by-building" disposition of cable wiring.[15] The Commission found that "market forces will, in most cases, provide incentives for MDU owners to recognize tenants' interest in selecting a provider."[16] Based on that finding, the Commission concluded that "in some cases an acceptable alternative to the incumbent MVPD may be another MVPD to provide service to the entire

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10 *Telecommunications Services Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 (1997).

11 *Id*. at 3661-2, ¶ 2.

12 *Telecommunications Services Inside Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, ¶ 4 (2003) (*2003 MDU Order*).

13 *Id*. at 1369, ¶ 69

14 *Id*. at 1369-70, ¶ 70.

15 Under these rules, an MVPD that no longer has a right to remain in the building may be required to sell or abandon its home run wiring so that the building owner can use it for service from an alternative provider. *Id*. at 1346-47, ¶ 9.

16 *2003 MDU Order* at 1349, ¶ 15.

building."[17] In other words, customers would be well served if the building owner, rather than individual tenants, had the option to choose a single MVPD among competing providers.

Finding no basis for regulation of exclusive access agreements or for any change in its building-by-building disposition rules, the Commission ended its consideration of these issues.[18] The situation remained unchanged until March 2007, when the Commission issued its Notice of Proposed Rulemaking in this proceeding. Only four years after deciding not to bar, or even restrict, exclusive contracts, the Commission once again asked whether such contracts should be prohibited.[19] This new proceeding was triggered primarily by a request from Verizon, a dominant provider of wireline and wireless phone services, but a relatively new entrant in the video services market. Verizon had complained to the Commission that it was being denied access to certain MDUs because of exclusive agreements those MDU owners had entered into with cable operators.

In response to the NPRM, cable operators and building owners argued that the Commission had no statutory authority to restrict exclusive contracts and that there was no reason to do so given the lack of evidence that Verizon or any other telephone company had scaled back its plans for entering the video services market based on the presence of exclusive access agreements.[20] Cable operators also explained that, following the Commission's *2003 MDU Order*, they had continued to enter into exclusive access agreements with MDU owners in

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17 *Id*.

18 The docket remained open, however, for the Commission to address a remand from the United States Court of Appeals after NCTA's successful appeal of the Commission's decision that cable home wiring that is located behind sheetrock in an MDU is physically inaccessible and therefore not subject to the usual rules regarding location of the demarcation point. *NCTA v. FCC*, 89 Fed. Appx. 743 (D.C. Cir. 2004). We discuss the "sheetrock issue" in more detail below.

19 *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Notice of Proposed Rulemaking, 22 FCC Rcd 5935 (2007).

20 *See, e.g.*, NCTA Comments at 4-8, 12-13; Comcast Comments at 24-31; RAA Comments at 26-44, 59-62.

situations where both parties found them to be mutually beneficial, and that competing MVPDs had done the same.[21] Cable operators also explained that, in many cases, those contracts called for cable operators to make significant investments in wiring or re-wiring MDUs.[22] Therefore, they argued that the Commission should exempt these existing agreements from any prohibition it might adopt, as the Commission had done when it prohibited the use of exclusive agreements for voice service in commercial buildings.[23]

In the *2007 MDU Order*, the Commission rejected these arguments and completely abandoned its existing market-based policy regarding exclusive access agreements. The Commission not only prohibited cable operators from entering into new exclusive access agreements, it also prohibited them from enforcing existing agreements.

The Commission's decision was premised on an entirely novel interpretation of the Communications Act. Specifically, it found that Section 628(b), the "program access" section of the statute, provided the necessary legal authority to regulate MDU access arrangements. The Commission also found that it had ancillary authority for its decision under other provisions of the Act, including Sections 4(i), 303(r), and 706.

The Commission's new policy rested on three separate findings, each one a radical departure from prior findings:

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21 *See, e.g.,* Revell Decl. at ¶ 8; Comcast Comments at 15-21

22 *See* Revell Decl. at ¶ 5 ("Comcast has invested tens of millions of dollars in the installation and upgrade of cable home wiring and home run wiring in MDUs."); *see also* Letter from Megan Delany, Vice President and Senior Counsel, Charter Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-51, Exhibit A (filed Oct. 16, 2007) (Charter Letter) (identifying almost $3 million of investment in 46 MDUs over a period of two years).

23 *See, e.g.*, NCTA Comments at 11-14; Comcast Comments at 33-35; Charter Comments at 6-9; *see also Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, First Report and Order and Further Notice of Proposed Rulemkaing, 15 FCC Rcd 22983, 23053, ¶ 164 (2000) (*Competitive Networks Order*) ("modification of existing exclusive contracts by the Commission would have a significant effect on the investment interests of those building owners and carriers that have entered into such contracts.").

- First, in contrast with the *2003 MDU Order*, the Commission found that the harms associated with exclusive access agreements outweighed the consumer benefits from such agreements.[24]
- Second, also in contrast with its *2003 MDU Order*, it found that building owners do not adequately represent the interests of MDU residents.[25]
- Third, it found that modification of existing agreements would not have a significant impact on companies that were parties to such agreements, the exact opposite of the finding it made in the *Competitive Networks Order* when it prohibited telecommunications carriers from entering into exclusive agreements to serve commercial buildings.[26]

The flaws in the Commission's decision to prohibit cable operators from enforcing existing commercial agreements with building owners are numerous and significant and the harm to cable operators if the order is allowed to take effect will be irreparable. Moreover, the public interest will be served if the order does not take effect. Accordingly, as we explain in the following section, the Commission should grant a stay of the prohibition on the enforcement of existing agreements pending judicial review.

II. REASONS FOR GRANTING THE STAY

The Commission ordinarily assesses requests for a stay pending appeal utilizing the factors set forth in *Virginia Petroleum* – the likelihood of success on appeal, the extent the applicant will suffer irreparable harm, and whether the stay will harm other parties or the public

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[24] *2007 MDU Order* at ¶¶ 26-29.

[25] *Id*. at ¶ 28

[26] *Id*. at ¶¶ 36-37.

interest.[27] Where "there is a particularly overwhelming showing in at least one of the factors, [the Commission] may find that a stay is warranted notwithstanding the absence of another one of the factors.[28] Even where the moving party has not established a likelihood that it will prevail on the merits, a court may decide to stay enforcement of its ruling if it finds that plaintiff has presented a "serious legal question [ ]" and that the other three factors weigh heavily in plaintiff's favor.[29] Here, the probability of success is high and the balance of harms tips sharply in favor of a stay.

A. NCTA Has a Substantial Likelihood of Prevailing on the Merits

1. Section 628 does not provide the Commission with authority to prohibit exclusive access agreements.

a. Building access agreements are not within the scope of Section 628.

The principal provision relied upon by the Commission for its authority to restrict the use of exclusive MDU contracts is Section 628 – the "program access" provision adopted as part of the Cable Consumer Protection and Competition Act of 1992.[30] The Commission specifically points to Section 628(b), which provides that:

> It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor *from*

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[27] *See, e.g., Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Order, 22 FCC Rcd 5652, 5654 (WCB 2007), *citing Virginia Petroleum Jobbers Ass'n v. Holiday Tours, Inc.*, 259 F.2d 921, 925 (D.C. Cir. 1958)("*Virginia Petroleum*") and *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977) ("*WMATA*").

[28] *See, e.g., Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies*, Third Memorandum Opinion and Order, Third Further Notice of Proposed Rulemaking, and Order, 19 FCC Rcd 25045, 25063, ¶ 43 (2004).

[29] *WMATA*, 559 F.2d at 843.

[30] *2007 MDU Order* at ¶¶ 2, 40-46.

> *providing satellite cable programming or satellite broadcast programming to subscribers or consumers*.[31]

The Commission suggests that the "plain language of Section 628(b) encompasses the conduct at issue here" because "by its very nature, [] an exclusivity clause prevents other MVPDs from providing service to the consumers who live in the MDU."[32] The Commission attempts to bolster this "plain language" argument by suggesting that the phrase "to subscribers or consumers" at the end of Section 628(b) means that the provision covers anything that affects retail competition.[33]

The Commission's novel interpretation of its own legal authority is unsustainable. As an initial matter, the Commission's assertion that an exclusive access agreement "prevents" a competitor from "providing" programming "to consumers" and therefore is covered by the "plain language" of Section 628(b) is impossible to reconcile with Commission precedent. In its earlier proceeding, the Commission spent six years looking at the issue of exclusive access agreements in MDUs. Yet neither the 1997 order that first asked about exclusive access agreements, nor the *2003 MDU Order* that found no need to regulate such agreements, even hint at the possibility that such agreements might be prohibited under this provision. The Commission's silence in these prior decisions confirms that the language of the statute is nowhere near as "plain" as the Commission now suggests.

The broader problem with the Commission's analysis is that it reads Section 628(b) without any consideration of the rest of the statute.[34] In Title VI, Congress created a regime in

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[31] 47 U.S.C. § 548(b) (emphasis added).

[32] *2007 MDU Order* at ¶ 43.

[33] *Id.* at 44.

[34] *See Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) ("[T]extual analysis is a language game played on a field known as 'context.' The literal language of a provision taken out of context cannot

which responsibilities are divided among the courts, the Commission, and state and local franchising authorities, with clear grants of authority and clear constraints on how that authority is exercised.[35] It is a regime that includes provisions that are focused on the provision of retail services (*e.g.*, Section 623 rate regulation, Section 631 privacy requirements) and provisions that are focused on the wholesale market (*e.g.*, Section 612 leased access, Section 616 program carriage), but no overarching grant of broad regulatory authority comparable to the Commission's broad authority over telecommunications carriers under Title II or its authority over broadcast licensees under Title III.

Within the context of this carefully tailored legal regime, Section 628 has always been understood as a provision that gives the Commission authority to prevent cable operators from using their control over some types of programming to unduly hinder their retail competitors. As Rep. Tauzin, the sponsor of the amendment that became Section 628, made clear at the time, "[t]he Tauzin Amendment, very simply put, requires [the cable industry] to stop refusing to sell its products to other distributors of television programs."[36]

The Commission's suggestion that Congress, by adding the phrase "to subscribers or consumers" in Section 628(b), intended to upset this regime by giving the Commission broad

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provide conclusive proof of congressional intent, any more than a word can have meaning without context to illuminate its use.").

35 *See, e.g.*, 47 U.S.C. § 531(a) (franchising authority may establish PEG channel requirements "only to the extent permitted in this section."); *id*., § 543(a)(1) (rate regulation is not permitted "except to the extent provided under this section and section 612").

36 Indeed, Congress specifically considered and rejected the inclusion of a provision in Title VI that would have guaranteed all cable operators access to MDUs. As Rep. Wirth, a principal House sponsor of the Cable Communications Policy Act of 1984, noted, "section 633, consumer access to cable service, was deleted [by the full Committee on Energy and Commerce] from H.R. 4103 and is not part of the legislation we will consider today…. The provision prohibited landlords from interfering with a consumer's ability to receive cable service – an increasing troublesome problem whereby landlords become the ultimate electronic editors, deciding to what sources of information, if any, a consumer shall have access." Nothing in the adoption of Section 628 eight years later remotely suggests that it was intended to give the Commission authority to deal with these same "access to premises" issues.

authority to regulate any practice deemed to be anticompetitive is not credible. There is absolutely nothing in Section 628 or its legislative history to suggest that its intent was to give the Commission the type of broad powers given to the Federal Trade Commission to police any and all allegedly unfair or anticompetitive behavior in the cable industry. Nor does the Commission explain why Congress would have buried such extensive powers in a provision whose legislative history indicates a much narrower focus and purpose. Had it intended to prohibit *any* practices that hindered or prevented an MVPD's ability to compete in the marketplace, it would have adopted a provision more like Section 201(b) of the Act, which explicitly prohibits all unreasonable practices of telecommunications carriers.[37]

The Commission cites the rejection of the "Lent Amendment" by the House of Representatives as evidence that Congress knew how to draft a provision that focused only on programming, but that it chose not to in Section 628(b).[38] But as NCTA demonstrated in its comments, there is no basis for the conclusion that Congress's action supports the Commission's decision to regulate MDU access agreements. Congress rejected the less specific and arguably more permissive program access provisions (along with the much less stringent rate regulation provisions) of the Lent Amendment in favor of the more detailed program access prohibitions of Section 628. But nothing about that choice demonstrates that the provision Congress adopted was intended to cover non-programming related conduct and nothing the Commission points to in the *2007 MDU Order* suggests otherwise.

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[37] 47 U.S.C. § 201(b).

[38] *2007 MDU Order* at ¶ 44, n.136.

b. There is no legal basis for the Commission to interfere with existing contracts.

Whatever statutory authority the Commission might have to regulate exclusive MDU contracts prospectively – and the preceding analysis demonstrates that it has none under Section 628 – it surely does not have any authority to abrogate *existing* contracts as it purports to do. The Commission's authority to undo existing common law contractual rights is narrowly circumscribed. Under longstanding Supreme Court doctrine, a statute will not be deemed to authorize the abrogation of existing common law rights "unless that result is *imperatively required*" by the statute, to the extent that preserving the contractual rights would "render its provisions nugatory."[39]

There is no statutory provision that authorizes, much less *compels*, the abrogation of existing exclusive contracts between cable operators and MDU owners. Indeed, as one court held in 1974, "[t]he Communications Act contains no express statement of an intention to authorize unilateral modification or abrogation of privately negotiated contracts. Nor do the various provisions of the Act 'imperatively require' that [a court] imply such authorization."[40] And nothing in the subsequently-enacted Title VI, which defines the Commission's regulatory powers and responsibilities over cable systems, provides any such authority.

Sensitive to these weaknesses in its position, the Commission purports to "take particular care" to show that "the law affords [it] wide authority to prohibit enforcement of such [existing] clauses where, as here, the public interest so requires."[41] But the truncated discussion that

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[39] *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907) (emphasis added). *See also Bauers v. Heisel*, 361 F.2d 581, 587 (3d Cir. 1966 (en banc), *cert. denied*, 386 U.S. 1021 (1967) ("[A] statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment.").

[40] *Bell Telephone Co. of Pa. v. FCC*, 503 F.2d 1250, 1280 (3d Cir. 1974).

[41] *2007 MDU Order* at ¶55.

follows shows nothing of the kind. As support for its "wide authority" to interfere with existing contracts, the Commission cites just two cases – *BellSouth v. MCImetro* and *Western Union v. FCC* – neither of which is even relevant to the Commission's decision here, let alone supportive.[42]

As a threshold matter, both cases arise under Title II, which subjects telecommunications carriers to traditional utility regulation. Title II gives the Commission broad authority to regulate unreasonable practices of carriers (under Section 201), contracts between carriers (under Section 211) and interconnection agreements between incumbent LECs and their competitors (under Section 251).[43] But cable operators provide service under Title VI and "shall not be subject to regulation as a common carrier or utility" when they provide cable service.[44] Unlike Title II, Title VI is not modeled on utility regulation and contains no broad statutory provisions comparable to Sections 201, 211, or 251. Accordingly, cases decided under Title II provide no support for actions taken under Title VI.

Moreover, within the context of the highly-regulated Title II regime, both cases cited by the Commission involve interpretations of the *Sierra-Mobile* doctrine. That judicial doctrine generally provides that an agency cannot allow a regulated utility to alter its contractual obligations (*e.g.,* by filing a conflicting tariff), except as needed to protect the public interest.[45] Thus, *Sierra-Mobile* generally operates as a restraint on the conduct of utilities, not a broad grant

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42 *2007 MDU Order* at ¶55, n.176, *citing BellSouth Telecommunications v. MCImetro Access Trans. Serv*., 425 F.3d 964, 969-70 (11th Cir. 2005); *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).

43 47 U.S.C. §§ 201, 211, 251.

44 47 U.S.C. § 541(c).

45 *See FPC v. Sierra Pacific Power Co*., 350 U.S. 348, 352-55 (1956); *United Gas Co. v. Mobile Gas Corp*. 350 U.S. 332, 344 (1956).

of authority to regulators. And even to the extent it does confer power on the Commission, there is no precedent for applying the *Sierra-Mobile* doctrine in the cable context.

Closer scrutiny of the two cases confirms that they fail to support the Commission's theory. The *BellSouth* case involved a dispute regarding the status of Section 251 interconnection agreements after the Commission amended its unbundling rules on remand from a court decision. The *BellSouth* court found that the Commission had authority to change the terms of "interconnection agreements [that] were the product of an earlier regulatory scheme now repudiated by the FCC."[46] The interconnection agreements at issue in that case were regulated agreements between regulated entities for regulated services at regulated rates and subject to a regulated negotiation and arbitration process. They were, in other words, entirely creatures of federal regulation. In contrast, MDU access agreements between cable operators and building owners have *never* been subject to federal regulation. To say that the *BellSouth* case supports the proposition that the Commission has authority to unilaterally change the terms of commercial agreements between cable operators and building owners extends the *Sierra-Mobile* doctrine well past the breaking point, assuming it was applicable in the Title VI context, which it is not.

The *Western Union* case is no more helpful to the Commission. In that case, the Commission allowed a carrier to increase its rates through a tariff filing, notwithstanding arguments that the filing violated certain provisions of a Commission-approved settlement agreement between the carrier and some of its customers. On appeal, the Commission argued that there was no basis for any challenge to its decision to allow the rate increase because it had abrogated the settlement agreement under the *Sierra-Mobile* doctrine. The court rejected that

46 *BellSouth v. MCImetro*, 425 F.3d at 970.

argument, finding that the Commission had "never offered adequate reasons for jettisoning the provisions" and that its "very general treatment" of the issues failed to "reweigh in any detail the tradeoff made in these provisions."[47] The court did uphold the Commission's decision to allow the rate increase, but only based on its finding that the terms of the settlement agreement had, in fact, been satisfied.

In addition to citing these two cases, the only other support the Commission provides for its statement that it has "wide authority" to interfere with existing agreements is a single previous *Commission* statement with respect to its authority under Section 628 regarding its authority to deal with existing *programming* contracts.[48] In that case, however, Congress had explicitly preserved some existing agreements,[49] thereby implicitly giving the Commission discretion to abrogate agreements not covered by this statutory protection. But nothing in that set of circumstances has any bearing on the Commission's attempt in this case to abrogate existing agreements in an area that Congress has not specifically addressed and that previously had been completely free of federal regulation.

2. The Commission has no ancillary authority to prohibit enforcement of existing contracts.

In addition to Section 628, the Commission also relies upon a number of broad general provisions of the Act, including Section 1 and Section 4(i), as authorization for it to regulate exclusive MDU contracts.[50] But Section 4(i) only authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent* with this

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[47] *Western Union v. FCC*, 815 F.2d at 1502.

[48] *2007 MDU Order* at ¶ 55.

[49] 47 U.S.C. § 548(h).

[50] *See 2007 MDU Order* at ¶ 75 (*citing* statutory grounds for its authority); *Id*. at ¶¶ 52-52 (*citing* Title I, sections 1, 2(a)), ¶ 60 (*citing* Section 4(i), 201(b), 303(r).

Act, as may be *necessary* in the execution of its functions."[51] As the courts have made clear, this is not a grant of authority to do anything that the Commission wishes so long as it is not barred by or inconsistent with the Act's specific mandates. To the contrary, the exercise of authority under Section 4(i) must be "ancillary" to some other explicit grant of jurisdiction.[52] The Commission's "ancillary jurisdiction is limited to circumstances where: (1) the Commission's general jurisdictional grant under Title I covers the subject of the regulations and (2) the regulations are reasonably ancillary to the Commission's effective performance of its *statutorily mandated* responsibilities."[53] The Commission cannot find any such basis for regulating contracts between MVPDs and building owners.

None of the broad provisions or policy pronouncements in sections such as 4(i) or 303(r) give the Commission roving authority to take any steps it sees fit to promote competition. They provide no independent source of jurisdiction but only provide authority to exercise jurisdiction that is ancillary to, and necessary to fulfill, a specific mandate elsewhere in the statute. But, as noted above, Section 628 does not embody a general mandate to promote competition – nor does such a directive exist elsewhere. One of the *purposes* of Title VI is to "promote competition in cable communications,"[54] but nothing in Title VI – or Title I – gives the Commission the general authority or responsibility to adopt whatever rules it may deem necessary or appropriate to promote such competition. To the contrary, the provisions of Title VI establish a comprehensive

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[51] 47 U.S.C. § 154(i) (emphasis added).

[52] *See generally, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *California v. FCC*, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990).

[53] *American Library Association v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (emphasis added). *See also Motion Picture Association of America v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002).

[54] 47 U.S.C. § 521(6).

framework for "the exercise of Federal, State and local authority with respect to the regulation of cable systems."[55]

Those provisions reflect determinations by *Congress* that, in certain circumstances, regulation by State and local governments will best promote competition and the interests of consumers; in some circumstances, regulation by the Commission will best further those objectives; and, in other circumstances, competition and the public interest will best be served by no regulation at all. And they delineate – and circumscribe – the authority of each regulatory body. Nothing in that framework allocates to the Commission the explicit responsibility to promote competition in any way that it sees fit, nor does Title VI provide the Commission with any residual authority or responsibility to do so. For that reason, the Commission cannot rely on its "ancillary jurisdiction" as support for the *2007 MDU Order*.

Finally, the Commission cites Section 706 of the Telecommunications Act of 1996 as a source of authority to restrict exclusive MDU contracts.[56] Section 706 cannot be stretched to provide such authority. That provision directs the Commission, in certain circumstances, to use certain regulatory measures to "encourage the deployment of . . . advanced telecommunications capability to all Americans."[57] The Commission has made clear that Section 706 "does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods."[58] It simply "directs the Commission to use the authority *granted in other*

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55 47 U.S.C. § 521(3).

56 *2007 MDU Order* at ¶¶ 46-47, 75.

57 47 U.S.C. § 157, nt. (incorporating Section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996)).

58 *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, 26044, ¶ 69 (1998).

provisions . . . to encourage the deployment of advanced services."[59] If there is no independent grant of authority to regulate exclusive MDU contracts elsewhere in the statute – and there is not – such authority cannot be found in Section 706.

In any event, Section 706 only mandates that the Commission use the regulatory means otherwise at its disposal when it has determined that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion.[60] Yet the Commission, in each of its periodic inquiries, has repeatedly concluded that such capability *is* being deployed in a reasonable and timely fashion.[61] Thus, wholly apart from whether regulating exclusive MDU contracts for the provision of video services has any impact on the nationwide deployment of advanced telecommunications capability, Section 706 provides no basis whatever for such regulation.[62]

3. The Commission's decision to prohibit enforcement of existing exclusive agreements is arbitrary and capricious

A decision of an administrative agency is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in

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[59] *Id.* at 24045 (emphasis added).

[60] *See* Section 706 of Telecommunications Act of 1996, *supra*. *See also* Conference Report, H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 210 (1996).

[61] *See Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, Fourth Report to Congress at 38 (Sept. 9, 2004).

[62] Even if Section 706 were somehow relevant to the Commission's decision, its discussion of that issue illustrates the arbitrary nature of the order. On the one hand, the Commission asserts, without any evidentiary support, that exclusive access agreements somehow deter broadband investment by telephone companies, notwithstanding that these companies almost always have facilities in the affected building that already are capable of providing broadband service. On the other hand, the Commission completely ignores the evidence suggesting that exclusive access agreements provide a mechanism by which cable operators have been able to extend broadband service to MDUs that previously did not have it and that interfering with such agreements will diminish investment incentives for all companies and, as a result of the Commission's wiring rules, potentially eliminate a cable operator's ability to provide broadband service.

view or the product of agency expertise."[63] When an agency changes course, as the Commission has done in this case, it must provide a "reasoned analysis" for the change and it will not be upheld if it "glosses over or swerves from prior precedent without discussion."[64] Under these standards, the Commission's decision to interfere with existing MDU access agreements is arbitrary and capricious.

The overarching flaw in the *2007 MDU Order* is the Commission's attempt to bolster its abrupt policy reversals by distorting the record before it. The video marketplace the Commission describes in the order bears more resemblance to a fictional story than to the real world in which cable operators provide service. Where the Commission previously found that building owners had strong incentives to look after the interests of their tenants, it now portrays them as greedy simpletons, unable to read a contract and unconcerned for the welfare of their tenants in any event.[65] In 2003, the Commission found that new entrants in the video market, most of whom were small companies competing with much larger incumbents, were able to compete in the face of exclusive access agreements.[66] Now, however, it portrays AT&T and Verizon, two of the biggest companies in the world, as earnest but helpless newcomers, unable to compete in the video market without a helping hand from the Commission.[67] And cable operators, who previously were portrayed as rational businesses, are cast as the all-powerful

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63 *Motor Vehicle Mfrs. Assoc. v. State Farm Mutual Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

64 *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

65 *Compare 2003 MDU Order*, 18 FCC Rcd at 1349, ¶ 15 ("market forces will, in most cases, provide incentives for MDU owners to recognize tenants' interests in selecting a provider"), with *2007 MDU Order* at ¶ 28 ("the person signing an exclusivity clause for a MDU may be a builder or manager whose interests do not coincide with those of the MDU's residents.").

66 *2003 MDU Order*, 18 FCC Rcd at 1369, ¶ 69 (finding that the record "does not demonstrate that such contracts have thwarted alternative providers' entrance into the MDU market, so as to warrant imposition of limits on such contracts.").

67 *2007 MDU Order* at ¶¶ 27 ("Exclusivity clauses prevent new entrant MVPDs from competing with entrenched incumbent providers.").

villains of the story, simultaneously erecting insurmountable barriers to competitive entry, "locking up" buildings through trickery and deceit, and ruthlessly ignoring the needs of their subscribers.[68]

In mischaracterizing the market in this way, the Commission consistently relied on unverified statements from the telephone companies while ignoring or discounting verified declarations submitted by cable operators and building owners, as well as a significant amount of other evidence demonstrating the benefits of the market-based approach that existed previously.[69] With respect to three issues in particular, the Commission's decision to reverse its prior findings unquestionably is arbitrary and capricious.

<u>First</u>, the Commission's finding that the harms of exclusivity outweigh the benefits is a completely unwarranted policy reversal, particularly as to existing access agreements. Although the Commission stated that exclusivity clauses "deter new entrants from attempting to enter the market in many areas,"[70] it cited no actual evidence in support of this point and it ignored evidence that Verizon and AT&T, among others, continue to gain market share from incumbent cable operators. It also ignored evidence that these companies are not even entering a significant percentage of MDUs in areas where there are no legal barriers to doing so.[71]

Along the same lines, the Commission misstated the effect of exclusive access agreements on prices paid by customers in MDUs. The Commission based its new policy on a

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68 *Id*. at ¶ 28 ("the cable operator may have induced the MDU owner to accept an exclusivity clause); *id*. ("exclusivity clauses tend to insulate the incumbent from any need to improve service.").

69 *See, e.g., id.* at ¶ 14, n.44; *id.* at ¶ 28 (discounting evidence of cable investment in MDUs as "generalities and anecdotes" notwithstanding sworn affidavits); *id*. at ¶ 29 (discounting specific evidence of lower rates offered to MDUs with exclusivity in favor of general claims that competition lowers rates across markets).

70 *2007 MDU Order* at ¶ 19

71 *See* Letter from Daniel Alvarez, Counsel for Comcast Corp., to Marlene Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-51 at 2 (Oct. 24, 2007) (explaining that Verizon does not serve a single MDU in Philadelphia or Boston, notwithstanding the fact that Pennsylvania and Massachusetts both have access to premises laws).

finding that a cable operator with an exclusive access agreement "would have no incentive to hold down its prices within the MDU."[72] But it cited no evidence in support of this point and completely discounted evidence that cable operators typically price their services the same across markets,[73] except when they offer discounted rates to MDUs.[74] Moreover, nowhere did the Commission explain why this alleged incentive to raise prices would be stronger than it was in 2003, when cable operators faced less competition than they do today.

Finally, the Commission failed to balance the purported benefits of interfering with existing agreements against the unfairness that results from that decision.[75] Cable operators provided evidence that regulatory intervention with existing agreements would increase the risk that millions of dollars of investment made in reliance on settled law would not be recovered.[76] The Commission's failure to balance the purported benefits of interfering with existing agreements against the unfairness to companies that had entered into such agreements is arbitrary and capricious.[77]

Second, the Commission's decision that building owners do not have the incentive to represent the interests of their tenants is an arbitrary and capricious reversal of its prior policy.

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72 *2007 MDU Order* at ¶17.

73 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." Community Associations Institute Comments at 9.

74 *2007 MDU Order* at ¶ 29. Indeed, to the extent Congress was concerned about disparate pricing to MDUs, the concern was that cable operators might offer "predatory prices" in response to competition. 47 U.S.C. § 543(d).

75 *See, e.g., Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998) ("[W]here an agency makes a change with retroactive effect, the reviewing court must also determine whether application of the new policy to a party who relied on the old is so unfair as to be arbitrary and capricious."); *see also Qwest v. FCC*, Case No. 06-1274, slip op. at 12-13 (D.C. Cir. Dec. 4, 2007) (*Qwest v. FCC*); *Public Service Co. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996).

76 *See* Revell Decl. at ¶ 5 (Comcast has invested "tens of millions of dollars" in MDUs); Charter Letter at 2, Exhibit A (documenting almost $3 million in investment over two year period).

77 *See United States Telecom Assoc. v. FCC*, 290 F.3d 415, 425 (D.C. Cir. 2002) ("Although we can't expect the Commission to offer a precise assessment of disincentive effects [of mandatory unbundling] . . . we can expect at least some confrontation of the issue and some effort to make reasonable tradeoffs.").

To reach this result, the Commission has completely twisted the record to create a skewed portrayal of building owners. For example, the Commission asserts that regulatory intervention is needed with respect to existing agreements because exclusivity clauses "may be in 'legalese' and in fine print and the MDU owner may be unaware" of the clause.[78] The notion that a building owner – someone in the business of buying real estate, constructing buildings, and renting units to tenants – is incapable of reading a contract is patently ridiculous, and the Commission cited no comments from building owners to support such a claim. To the contrary, evidence in the record made clear that building owners knew exactly what they were getting into when they signed exclusive access agreements and that they don't need any legal assistance from the Commission.[79]

Similarly, the Commission repeatedly suggests that cable operators entered into exclusive access agreements as a way to "lock up" building owners before they became aware of new competition from the telephone companies.[80] But nowhere does the Commission explain how cable operators could possibly know more about the entry plans of the phone companies than the building owners with whom these companies were negotiating. Nor does it address the evidence that some building owners were fully aware that telephone companies were entering the market, but that the negotiating strategy of the phone companies made it impossible to reach a mutually beneficial arrangement.[81]

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78 *2007 MDU Order* at ¶ 28.

79 *See* RAA Reply Comments at 11 ("[P]roperty owners do not need the Commission's protection. Some owners may make deals they later regret, but this is a risk of any market economy.").

80 *2007 MDU Order* at ¶ 14.

81 *See*, *e.g.*, RAA Comments at 48-57; Acker Decl. at ¶¶ 20-22 (describing issues raised by Verizon's video equipment); Sadler Decl. at ¶¶ 24, 29 (noting that AT&T and Verizon often seek exclusive marketing arrangements for voice service), ¶¶ 30-33 (describing issues raised by Verizon's video equipment).

Third, the Commission's conclusion that interfering with existing commercial agreements would have minimal economic impact is completely unfounded. That conclusion is totally undermined by the Commission's prior decisions which freely acknowledge the fact that invalidating existing exclusive contracts would have adverse consequences that would not result from a *prospective* rule. In the *Competitive Networks Order*, for example, the Commission prohibited telecommunications carriers from entering into exclusive contracts with commercial building owners, but it recognized "that the modification of existing exclusive contracts by the Commission would have a significant effect on the investment interests of those building owners and carriers that have entered into such contracts."[82] Therefore, the Commission was "inclined to proceed cautiously in this area,"[83] and it did not prohibit the enforcement of existing contracts.[84]

Rather than acknowledging this precedent and attempting to distinguish it, the Commission actually suggests that this decision supports its finding that the prohibition adopted in the *2007 MDU Order* will have a minimal effect on cable operators. But this effort to gloss over unfavorable precedent cannot change the fact that the same policy issues the Commission previously identified in the telecommunications context apply with equal force to existing contracts entered into by multichannel video providers. Cable operators and building owners have made investment decisions in reasonable reliance on well settled law, under which there were no restrictions on the use of exclusive access agreements. For the Commission to state that

82 *Competitive Networks Order*, 15 FCC Rcd at 23053.

83 *Id.*

84 The Commission sought further comment on the question in a Further Notice of Proposed Rulemaking, *id.*, but seven years later has not acted on the Further Notice or reversed its determination. In the *2007 MDU Order*, it notes its intention to "resolve that issue within the next two months." *2007 MDU Order* at ¶ 36, n. 109.

its subsequent decision to interfere with those agreements has no economic impact is patently ridiculous.

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The preceding analysis makes clear that the Commission has failed to provide "substantial evidence" or a "reasoned analysis" for its decision to prohibit enforcement of existing exclusive access agreements. These errors, in combination with the Commission's flawed legal analysis, demonstrate that NCTA has a substantial likelihood of prevailing on the merits of its appeal of the *2007 MDU Order*. At the very least, NCTA has presented a "substantial legal question" about the Commission's authority to abrogate existing contracts, and, as we show below, the three other factors which must be considered weigh heavily in NCTA's favor.

B. NCTA's Members Will Suffer Irreparable Harm If a Stay is Not Granted

The threat of unrecoverable economic loss constitutes irreparable harm[85] and justifies a stay.[86] Although courts will generally not find irreparable harm if money damages are an adequate alternative remedy,[87] or other relief is available,[88] there are strong arguments that in this case, cable operators will face irreparable harm absent a stay.

That cable operators will be harmed by the Commission's decision to interfere with existing contracts is self-evident. The harm arises largely from the "bait and switch" nature of

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85 *See Edelman v. Jordan*, 414 U.S. 1301, 1302-03 (1973) (Rehnquist, J., in chambers) (granting stay where movant unlikely to recover funds paid out if successful on appeal); *see also, American Hosp. Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 596 (7th Cir. 1986) (risk that complete recovery will not be possible creates irreparable injury); *WMATA*, 559 F.2d at 843.

86 *See Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir.) (*Iowa Utilities*), *application to vacate stay denied*, 519 U.S. 978 (1996).

87 *See, e.g., Matrix Group Ltd., Inc. v. Rawlings Sporting Goods Co.*, 378 F.3d 29, 35 (1st Cir. 2004).

88 *See, e.g., Virginia Petroleum Jobbers*, 259 F.2d at 925 (D.C. Cir. 1968).

the Commission's policy reversal. Based on the *2003 MDU Order*, cable operators and building owners continued to enter into exclusive access agreements. With no open rulemaking considering restrictions on the use of these agreements, cable operators made investments in reasonable reliance on what appeared to be well-settled law.[89]

Four years later, all those investment decisions are potentially upended by the abrupt change in policy adopted by the Commission in the *2007 MDU Order*. Unless the Commission's new policy is a complete and total failure, there will be building owners that take advantage of their newfound ability to solicit additional video providers into the buildings they control,[90] there will be video providers that accept such offers,[91] and there will cable customers that switch to these new services.[92] These are the stated goals of the Commission's order, and it appears beyond dispute that cable operators will lose customers (and the revenue generated by those customers) if those goals are achieved to any degree whatsoever.

When this scenario plays itself out, as it inevitably will if a stay is not granted, the harm to cable operators will not be compensable through monetary damages even if NCTA's appeal of the order is successful. It likely would be impossible for cable providers to seek damages from an MDU owner that "breached" an exclusivity provision pursuant to a then-effective government order authorizing termination. By the same token, the cable operator probably could not recover damages from an MVPD that enters the MDU pursuant to the *2007 MDU Order*. Because damages to the displaced cable operator would not be available for past and future subscriber

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[89] *See, e.g., Qwest v. FCC*, slip op. at 12-13 (noting that retroactive application of agency decision may result in manifest injustice when existing law is clear and the ruling upsets "settled expectations – expectations on which a party might reasonably place reliance."); *see also Public Service Co. v. FERC*, 91 F.3d at 1488.

[90] *2007 MDU Order* at ¶ 19, n.29 (noting concerns of MDU owner that would offer alternative services if it did not have contractual obligations under an exclusive access agreement).

[91] *Id*. at ¶ 10 (describing telephone company plans to serve MDUs).

[92] *Id*. at ¶ 11 (noting that consumer groups support regulation of exclusive access agreements).

revenues that are lost while an appeal remains pending, the loss constitutes an irreparable harm to the cable operator.[93] The situation here is analogous to the *Iowa Utilities* case in that the incumbent providers "would not be able to bring a lawsuit to recover their undue economic losses if the FCC's rules are eventually overturned."[94]

In addition, even if an action for damages were available, a stay still would be appropriate because some of the harm from the Commission's decision will not be compensable through damages. It is well-established that a loss of customers and a loss of goodwill "is a concrete harm that cannot be compensated with money damages."[95] This principle has been applied in numerous cases in connection with the loss of customers and loss of goodwill of cable operators and telecommunications providers,[96] including one case involving precisely the setting at issue here. In *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable*, the United States Court of Appeals for the Fourth Circuit upheld a finding that a cable operator would be irreparably harmed absent injunctive relief pending litigation over an attempt by a new entrant to

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93 *Cf., e.g., Micro Signal Research, Inc., v. Otus*, 417 F.3d 28, 31 (1st Cir. 2005) (loss otherwise fully compensable by damages will give rise to irreparable harm if there is a risk that defendant will become insolvent before resolution); *Ohio Oil Co. v. Conway*, 279 U.S. 813, 815 (1929) (risk of paying unconstitutional tax irreparable harm when state law did not provide a remedy for return if tax adjudged invalid).

94 *Iowa Utilities*, 109 F.3d at 426. In *Iowa Utilities*, the United States Court of Appeals for the Eight Circuit granted a stay of Commission rules that established prices for competitive providers to lease unbundled network elements from incumbent LECs. Although the court recognized that the rules were helpful to new entrants in the market, it granted a stay because the rules would cause the incumbents to lose customers and revenue and they "would be unable to fully recover such losses merely through their participation in the market." *Id*.

95 *Merrill Lynch, Pierce, Fenner & Smith v. Wertz*, 298 F. Supp. 2d 27, 34 (D.D.C. 2002).

96 *See, e.g., BellSouth Telecommunications, Inc. v. Cinergy Communications Co*., 2006 U.S. Dist. LEXIS 11535 (E.D. Ky. 2006) ("it is impossible to quantify the amount of loss BellSouth would suffer from *customers* who chose the CLEC defendants over BellSouth.") (emphasis in original); *Cox Communications PCS, L.P. v. City of San Marcos*, 204 F. Supp. 2d 1260, 1263 (S.D. Cal. 2002) ("Injury to a business's goodwill and reputation is not easily measurable and thus supports a finding of irreparable harm."); *AT&T Communications v. City of Dallas*, 8 F. Supp. 2d 582, 594 (N.D. Tex. 1998) (lost revenues and loss of customers and good will "would be very difficult to calculate for the purpose of monetary damages.").

use the operator's wiring in an MDU.[97] The court found that "the threat of a permanent loss of customers and the potential loss of goodwill also support a finding of irreparable harm."[98]

Finally, as NCTA explained in the record, the harm caused by the *2007 MDU Order* will be exacerbated by the Commission's cable wiring rules, as modified by the recent *Sheetrock Order*.[99] The *Sheetrock Order* found that cable wiring that is located behind sheetrock is physically inaccessible and therefore the demarcation point is not located 12 inches outside the unit as it otherwise would be. One consequence of this ruling is to change the available compensation for wiring between the unit and the new demarcation point. The cable operator now must sell wiring outside residential units – home run wiring – at the "replacement cost" of the wiring itself, an amount that will be much less than the actual cost incurred by the operator at the time it was installed and often so low that it does not cover the administrative costs of billing for it. As NCTA and other parties cautioned the Commission, this is a real world advantage for telephone companies and other competitors that seek to enter buildings wired by cable operators.[100]

Moreover, a cable operator that is forced to sell its wiring to a video competitor will lose not only its ability to provide video services to that customer, but also its ability to provide voice and data services to that customer because it no longer will own facilities that run all the way

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97 *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable*, 22 F.3d 546 (4th Cir. 1994).

98 *Id*. at 552.

99 *Telecommunications Services Inside Wiring*, CS Docket No. 95-184, Report and Order and Declaratory Ruling, 22 FCC Rcd 10640 (2007) (*Sheetrock Order*), *appeal pending*, *NCTA v. FCC*, Case No. 07-1356 (D.C. Cir.). The Commission originally adopted this rule in the *2003 MDU Order*, but NCTA successfully appealed. *See NCTA v. FCC*, 89 Fed. Appx. 743 (D.C. Cir. 2004). The *Sheetrock Order* responds to the court's remand.

100 The Commission's assertion that a new entrant's interest in serving an MDU demonstrates that the first provider could have provided service profitably without exclusivity, *see 2007 MDU Order* at ¶ 28, completely ignores this "second mover" advantage created by the Commission's wiring rules. When the provider that installs the wiring is obligated to turn over wiring to a subsequent provider at an artificially low rate, it should be obvious that the two companies face very different considerations in deciding whether to serve the building.

into the customer's unit.[101] Ironically, one of the primary reasons the Commission cites in support of its decision to abrogate exclusive contracts is that they purportedly "foreclose the competitive provision of MVPD service, [including] the triple play" of bundled voice, video and data, "which brings to consumers not just advanced telecommunications capability, but also a simplicity and efficiency that is proving to be highly attractive in the marketplace."[102] But, as a result of the *2007 MDU Order* and the *Sheetrock Order*, if the new video provider does not also provide voice and data services, the customer will have fewer choices for these services as a result of the Commission's rules. And when the video competitor is the incumbent telephone company, the effect of requiring the cable operator to sell its wiring is to enable a single company to own both sets of wires into a unit. Neither result promotes the Commission's goal of triple play competition within buildings.

C. A Stay Will Not Injure Other Interested Parties

A stay of the *2007 MDU Order* as applied to existing contracts will preserve the status quo for consumers and competitors. The fact that cable operators and building owners seek and enter into exclusive contracts demonstrates the beneficial effects that MDU exclusivity can have – in particular, enabling MDU owners and their residents to obtain competitive, up-to-date video and broadband services. These are precisely the sort of pro-competitive effects that, as the Commission previously recognized, can outweigh any anticompetitive effects of exclusivity. The Commission gives short shrift to even the potential for such pro-competitive benefits, much less the actual, specific benefits highlighted in the building owners' comments. Moreover, even

[101] *See* Letter from Natalie Roisman, Counsel for Cox Enterprises, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 07-51, Attachment at 1 (filed Oct. 17, 2007) (Cox Letter); Charter Letter at 3-4.

[102] *MDU Order* at ¶ 27, 20. *See also, id.* at ¶¶ 16, 19-21, 26-27. *Cf. id* at ¶ 28 ("SureWest states that the triple play, which offers a provider revenue from the three services, reduces any need for exclusivity that it may have had in the past, when MVPD revenue was the only way it could recover its investment.")

if a stay is granted, customers in MDUs that are subject to exclusive access agreements would continue to have the option to take service from one of the two nationwide DBS providers, just as they do today.

A stay also would preserve the status quo for competitive providers. As noted above, there is little or no evidence that exclusive MDU video contracts are serving as barriers to entry or are significantly impeding the deployment of video services by competitive providers. Given the substantial inroads being made by Verizon and other phone companies, on top of the already substantial competition cable operators face from the two nationwide DBS providers, there was no basis for the Commission to conclude that exclusive access agreements have any impact on marketplace competition beyond particular buildings subject to such agreements. And even with respect to those buildings, there is no reason that a building owner could not pursue commercial negotiations with the cable operator in an attempt to enter into a revised agreement that does not include exclusivity.

D. Granting a Stay is in the Public Interest

Granting a stay is in the public interest. First of all, NCTA is not seeking a stay of the entire order, only the prohibition on enforcement of *existing* exclusive access agreements. Even if the Commission granted the requested stay, the prohibition on entering into new exclusive agreements would take effect. As a result, competitive providers would face no obstacles in negotiating access arrangements with owners of MDUs that are not currently subject to exclusive access agreements. To the extent the Commission found that consumers would benefit from such a prohibition, the requested stay would not interfere with those benefits.

In addition, if the *2007 MDU Order* were to go into effect it would skew the competitive marketplace, not only for video services but, as noted above, for voice and data services as well. Cable operators and telephone companies are vigorously competing to win customers with bundled offerings of video, telephone and high-speed Internet service. In this environment, differences in the cable and telephone inside wiring rules already skew the competitive balance, and the *Sheetrock Order* tilts the playing field even more. Existing exclusive contracts between cable operators and MDU owners can mitigate this imbalance and allow operators to recoup their investment in MDU facilities. But, as one cable operator explained, "if the Commission were to terminate existing contracts, cable operators would lose the very lines they now rely on to offer competing voice service to MDU residents."[103] Such a result cannot be in the public interest.

Moreover, the Commission's wiring rules, as modified by the *Sheetrock Order*, have the effect of discouraging both new entrants and incumbents from investing in new wiring. New entrants now have an overwhelming incentive to use the existing wiring installed by the cable operator. Not only will the replacement cost of that wiring always be less than the cost of installing new wiring (because replacement cost does not compensate for installation costs), but purchasing the existing wiring eliminates the cable operator's ability to compete for voice or data services.[104] At the same time, the possibility that a cable operator's wiring can be taken for pennies on the dollar, and that the operator can lose the ability to provide three services to a customer, obviously increases the risk associated with any new investment in wiring by an incumbent. As the D.C. Circuit found in reviewing the Commission's unbundling rules, "[i]f parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payments for the losers, the incentive to invest plainly declines."[105]

Finally, as NCTA has explained, this proceeding ultimately must be viewed in a larger policy context. Congress considered, and rejected, a right of access provision in the 1984 Cable

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103 Charter Comments at 7.

104 *See* Charter Letter at 3-4; Cox Letter, Attachment at 2.

105 *USTA v. FCC*, 290 F.3d at 424.

Act, and the major amending laws of 1992 and 1996 did not change that judgment. Four years ago, the Commission found that exclusivity had varying competitive effects and concluded that, on balance, there was no reason to bar the practice. This view coincided with the positions of the majority of states, which also do not have right of access statutes. Moreover, neither the states (in adopting right of access statutes for cable) nor the Commission (in prohibiting exclusive access agreements for commercial telephone services) have found any need to prohibit the enforcement of existing agreements.

To the extent there have been changes in the market since the last time the Commission looked at this issue, such as the telephone companies finally entering in a significant way, those changes counsel in favor of keeping the unregulated status quo, not adopting intrusive regulation that interferes with the reasonable expectations of cable operators and building owners. Accordingly, the public interest would be served by granting a stay of the prohibition on enforcement of existing exclusive access agreements.

CONCLUSION

For the reasons stated above, the Commission should issue a stay pending judicial review of its prohibition on the enforcement of existing exclusive access agreements. In any event, NCTA respectfully requests that the Commission act on this request by December 21, 2007, so that NCTA may seek a stay in the United States Court of Appeals in time for the Court to act before the effective date of the *2007 MDU Order*.

Respectfully submitted,

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