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

In the Matter of	)	MB Docket No. 07-51
	)	
Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments	)	
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<u>JOINT OPPOSITION OF AT&T, INC., HARGRAY CATV, INC., AND VERIZON TO STAY PENDING JUDICIAL REVIEW</u>

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The Commission should deny the Request For Stay Pending Judicial Review (the "Stay Request") of the Commission's Report and Order[1] filed in the above-captioned proceeding by the National Cable & Telecommunications Association ("NCTA").[2] NCTA cannot demonstrate that it has satisfied any, let alone all, of the factors the Commission uses in considering stay requests. The Commission already considered and correctly rejected each of the arguments raised by NCTA concerning the existence and effect of exclusivity provisions on video competition, as well as the Commission's authority to address such provisions. These arguments continue to lack merit. Moreover, the balance of the equities and considerations of the public interest in this case – where NCTA seeks to deny the benefits of emerging video competition to millions of residents of MDUs and to discourage new video competition and broadband deployment – strongly weighs against NCTA's request.

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1 Report and Order, *In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51 (rel. Nov. 13, 2007) (the "MDU Order" or, the "Order").

2 This Joint Opposition is filed pursuant to section 1.45(d) of the Commission's Rules.

INTRODUCTION & SUMMARY

As the Commission knows, the video marketplace has not achieved the same level of intense competition that is present for other communications services. Although wireline video competition – the kind repeatedly found to be the most beneficial to consumers – is now emerging, incumbent cable providers continue to enjoy the legacy of their former exclusive monopoly franchises that completely foreclosed competition and have sought to extend those benefits wherever possible. As the record in this proceeding demonstrated, one prominent effort by cable incumbents to prevent or delay wireline video competition takes the form of the exclusive access clauses that are often included in agreements with the owners or developers of MDUs or other centrally managed real estate developments.

The MDU Order is a modest yet necessary next step towards introducing competition and consumer choice to the approximately one-third of all Americans that live in MDUs and planned developments. Many of these consumers have no choice in video providers, often because years or even decades earlier, at a time when there was no competitive option, a developer had struck a deal with an incumbent cable operator to be the exclusive provider of video services. The results were the same as those created by exclusive cable franchises, *viz.*, higher prices, less capital investment, little innovation, and lackluster customer service.

Contrary to NCTA's assertions, the MDU Order is not a departure from the Commission's previous orders or policy statements in this area. Nor does the MDU Order upset the *reasonable* economic expectations of any party, including incumbent MVPDs. In fact, the MDU Order is a logical step in Congress, and the Commission's continuing commitment to opening the video market to increased competition and is authorized by the plain language of section 628.

Legislative and regulatory enactments in the last decade have prohibited exclusive franchise agreements and prohibited the enforcement of provisions that preclude DBS providers from accessing MDUs to offer video services. In these cases and others, the Commission rejected arguments that NCTA once again makes here. Indeed, the exclusivity provisions at issue in the MDU Order are akin to the exclusive franchise agreements between a MVPD and a local franchising authority. The record shows that in some cases incumbent cable operators have been able to replicate the effect of exclusive franchise agreements by entering into exclusive access provisions with developers, thereby denying competitive access to the vast majority of the households in a franchise area.[3] These provisions have been used to delay or deny video competition for the residents of properties subject to such agreements. Congress and the Commission have long rejected exclusive franchises as contrary to the public interest.[4] Like exclusive franchises, exclusivity provisions entered or enforced under current market conditions are designed to extend for cable incumbents the benefits of their former monopolies and to insulate the incumbents from competition.

Also contrary to NCTA's characterization, the MDU Order adopts a narrowly tailored rule aimed at addressing the anticompetitive effect of exclusive access provisions in light of this unique history and current market conditions. While the MDU Order prohibits MVPDs from enforcing provisions in agreements with MDUs that grant an exclusive right to access or provide video services to an MDU, it does not "abrogate" existing contracts. Rather it renders unenforceable, as contrary to public policy, one specific type of clause that completely forecloses

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3 *See* MDU Order at ¶ 10, noting that Hargray has been denied the opportunity to serve 20,000 out of the 25,000 households in Hilton Head Island, South Carolina.

4 *See* 47 U.S.C. § 541(a)(1).

competitors' ability to compete for residents of these properties. The Order also does not prohibit, nor does it restrict, an incumbent MVPD from continuing to provide video service to MDUs, nor does it require the MVPD to share its equipment or other facilities with new entrants.[5] The Order does not effect exclusive marketing arrangements between owners and MVPDs or bulk billing arrangements. Finally, the MDU Order does not require an MDU owner to grant access to any particular MVPD.[6]

Moreover, the balance of the equities and the public interest strongly weigh in favor of allowing the MDU Order to take effect. As Congress and the Commission have repeatedly emphasized, the public benefits from video competition by receiving better prices, higher quality services, and more diverse information sources. Yet existing exclusive access clauses continue to deny these benefits of emerging video competition to the residents of many MDUs and other centrally managed properties. They also undermine investment in facilities that can be used to offer next-generation broadband services. These interests overwhelmingly weigh against a stay.

ARGUMENT

Before the Commission will grant a stay of an order, a petitioner must demonstrate that it is likely to prevail on the merits of its petition for review; that it will suffer irreparable harm in the absence of a stay; that a stay will not injure other parties; and that a stay is in the public

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[5] MDU Order at ¶ 37 ("[I]ncumbent cable operators will still be able to use their equipment in MDUs to provide service to residents who wish to continue to subscribe to their services. . . . While this Order prohibits the enforcement of existing exclusivity clauses, it does not, on its own terms, purport to affect other provisions in contracts containing exclusivity clauses.").

[6] *Id.* ("A MDU owner still retains the rights it has under relevant state law to deny a particular provider the right to provide service to its property.").

interest.[7] Contrary to NCTA's claim, it cannot demonstrate that it satisfies a single one of these prongs, let alone all four. The Commission has already properly rejected NCTA's recycled legal and factual arguments, and removing one obstacle to video competition hardly constitutes "irreparable harm" to the cable incumbents. Moreover, both the public and new entrants in the video marketplace would be significantly harmed by a stay.

I. NCTA IS UNLIKELY TO PREVAIL ON THE MERITS.

In an effort to show a likelihood of prevailing on the merits, NCTA argues that the MDU Order is contrary to a previous Commission decision on exclusive access clauses, that the Commission lacks authority to address such provisions in any event, and that the Commission lacked authority to address provisions of existing contracts in particular. NCTA has previously raised each of these arguments,[8] and the Commission squarely addressed, and properly dismissed, each in the MDU Order. These arguments continue to lack any merit.

A. The MDU Order is not a Departure from Previous Commission Precedent.

NCTA argues that the MDU Order is an abrupt reversal of the Commission's previous policy concerning exclusivity provisions. Specifically, NCTA claims that the MDU Order is inconsistent with the Commission's decision in the 2003 *Inside Wiring Order*.[9] To the contrary, the MDU Order is consistent with the Commission's Congressional mandate to "promote

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7 *See In re Regulation of Prepaid Calling Card Svcs.*, 22 FCC Rcd. 5652, ¶ 7 (2007); *see also Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 59 F.2d 841, 843 (D.C. Cir. 1977).

8 NCTA *Ex Parte* Letter at 5 (Oct. 24, 2007) (arguing that the Commission was faced with an "about face in policy" in this proceeding). Comments of NCTA at 4-8 (filed Jul. 2, 2007) (arguing that the Commission lacks statutory authority), and at 11-14 (arguing that the Commission lacks the authority to abrogate existing contracts).

9 *See, e.g.*, Stay Request at 4-8.

competition in cable communications," which was a principal purpose of the Cable Act.[10] The Commission has taken this mandate seriously, resulting in a long-standing policy of promoting video competition.[11]

NCTA mischaracterizes the MDU Order as a "completely unwarranted policy reversal."[12] This claim is simply inaccurate. As early as 1997, the Commission assessed the competitive effects of exclusive access agreements. In its 1997 *Inside Wiring Order*,[13] the Commission expressed its concern "that long-term exclusive contracts may raise anti-competitive concerns because they 'lock-up' properties, preventing consumers from receiving the benefits of a newly competitive market."

The 2003 *Inside Wiring Order* does not suggest that such a concern had abated.[14] Rather, in that Order and on the basis of the record before it at the time, the Commission merely "decline[d] to restrict exclusive contracts" because "[t]he record does not demonstrate that banning these contracts would significantly improve the competitive situation of multi-channel video services."[15]

The record before the Commission in the current proceeding, however, contains evidence of the substantial harms imposed by existing exclusivity provisions.[16] Moreover, while NCTA

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10 47 U.S.C. § 521(6).

11 MDU Order at ¶ 26 (finding that exclusivity clauses cause significant harm to competition and consumers).

12 Stay Request at 21.

13 *1997 Inside Wiring Order*, 13 FCC Rcd. 3659, 3754 at ¶ 203 (1997).

14 *2003 Inside Wiring Order*, 18 FCC Rcd. 1342 (2003).

15 *Id.* at ¶ 5.

16 MDU Order at ¶¶ 12-15.

attempts to minimize the time that has passed between the release of the 2003 *Inside Wiring Order* and the MDU Order,[17] the record shows that a number of key developments have taken place in the intervening time that fundamentally alter the analysis. In particular, LECs such as AT&T, Hargray, and Verizon have begun to enter the wireline video market "on a large scale,"[18] a new development that even NCTA acknowledges.[19] What was a potential threat to competition in 2003 has now become an actual impediment – well documented in the record – to market entry by telephone companies ready to provide competing video services. Both the use of such clauses by incumbents and the harm from such use have grown since 2003.[20]

The Commission made clear in the MDU Order that the different outcomes in 2003 and 2007 were the result of a change in record evidence of market conditions, and not a result of any policy shift or reversal.[21] Contrary to the Stay Request, the Commission never established a "settled course of behavior" that exclusive access provisions would be permitted in the face of

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[17] Stay Request at 6 ("[o]nly four years after deciding not to bar, or even restrict, exclusive contracts, the Commission once again asked whether such contracts should be prohibited.").

[18] MDU Order at ¶ 13.

[19] Stay Request at 32 (noting that "the telephone companies [are] finally entering [the wireline video market] in a significant way").

[20] Claims by the NCTA that its members reasonably relied on *the 2003 Inside Wiring Order* as a basis for recent exclusivity provisions are specious. As Verizon pointed out in filings with the Commission, the record demonstrates that many of the contracts at issue include severability provisions that "save" the rest of the contract should the exclusive access provision be found unlawful. Incumbent carriers were thus well aware of the risk that these provisions would be declared unlawful and unenforceable, and made contingent contractual arrangements with this eventuality in mind. Moreover, many of the exclusive access provisions subject to the MDU Order were entered into decades before the *2003 Inside Wiring Order*. As Hargray noted in its *ex parte* filings with the Commission, some of the exclusive access contracts Time Warner has relied on to block video service in Hilton Head Island were entered into the 1970s. *See* Hargray Oct. 12, 2007 *Ex Parte* at 4 (citing an allegedly perpetual exclusive access agreement from 1976).

[21] MDU Order at ¶ 26 (concluding "that exclusivity clauses cause significant harm to competition and consumers that the record did not reflect at the time of our *2003 Inside Wiring Order*.").

evidence that such provisions deter or prevent video competition.[22] As the Commission explained in the MDU Order,

> the lawfulness of exclusivity clauses has been under our active scrutiny for over a decade. Although we have not prohibited enforcement of them until now, we had previously recognized the reasons for doing so but had lacked an adequate record on which to base such a decision.[23]

The Commission's decision to address exclusivity clauses was a response to changed circumstances in the marketplace, and is fully supported by the record.[24]

B. <u>The Commission has Authority to Prohibit Exclusivity Provisions.</u>

NCTA also argues that the Commission lacks the authority to prohibit exclusive access arrangements.[25] This argument is belied by the plain language of the broad statutory mandate the Commission enjoys to promote video competition and broadband investment. As the Commission discussed in depth in the MDU Order,[26] section 628 of the Communications Act[27] as amended by the Cable Television Consumer Protection & Competition Act of 1992[28] provides ample authority for its action.

The plain text of section 628 supports the MDU Order. Section 628(b) makes it

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[22] Stay Request at 20 (citing *Motor Vehicle Mfrs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983)).

[23] MDU Order at ¶ 36 (citations omitted).

[24] *State Farm*, 463 U.S. at 42 (recognizing "that regulatory agencies do not establish rules of conduct to last forever, and that an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances") (citations omitted).

[25] *Id.* at 9-12.

[26] MDU Order at ¶¶ 40-46.

[27] 47 U.S.C. § 548.

[28] Pub. L. No. 102-385, 106 Stat. 1460 (1992), *codified at* 47 U.S.C. §§ 521 *et seq*.

> 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 [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[29]

Subsection (d) in turn empowers the Commission to "prescribe regulations to specify particular conduct that is prohibited by subsection (b) of this section."[30]

It is self-evident that contractual provisions that prohibit altogether any competition for subscribers or consumers "*hinder significantly or . . . prevent* any [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." *Id.* (emphasis added). As the Commission noted in the MDU Order, "by its very nature . . . an exclusivity clause prevents other MVPDs from providing service to the consumers who live in the MDU."[31]

NCTA claims that the legislative history leading to the enactment of section 628 suggests that this provision should only apply to programming arrangements,[32] but there is no basis for imposing this artificial limitation on the plain language of the statute. First, the statute unmistakably vests the Commission with the authority[33] to declare that certain actions are "anti-competitive" and prohibit such actions that "hinder significantly or . . . prevent any [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or

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[29] 47 U.S.C. § 548(b).

[30] 47 U.S.C. § 548(d).

[31] MDU Order at ¶ 43.

[32] Stay Request at 11.

[33] 47 U.S.C. § 548(c).

consumers."[34] There is no need to resort to legislative history in light of this plain language. As the Supreme Court has noted: "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'"[35]

Second, Congress approved the broad language in section 628 only after rejecting a cable industry proposal that would have applied the prohibition only to disputes arising between programming vendors and video system operators over programming access.[36] Instead, the text of section 628, as adopted, focuses on unfair competition as it affects consumers. As noted above and by the Commission, by denying all access to competitors, exclusive access provisions necessarily restrict consumers' access to programming provided by those competitors.

C. <u>The Commission's Authority Extends to Exclusivity Provisions in Presently Existing Contracts.</u>

Finally, NCTA argues that neither section 628 nor any other source of FCC authority can justify the Commission's application of its rule to existing contracts.[37] NCTA is wrong. Section

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[34] 47 U.S.C. § 548(b).

[35] *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)) (citations omitted); *McCoy v. Gilbert*, 270 F.3d 503, 510 n.4 (7th Cir. 2001) (citing *United States v. Hudspeth*, 42 F.3d 1015, 1022 (7th Cir. 1994) (en banc)) ("We need never consider legislative history when interpreting an unambiguous statute.").

[36] *See* Comments of Verizon at 16 (filed July 2, 2007) (citing 138 Cong. Rep. H6545-01) (July 23, 1992)). In its Stay Request, NCTA can do no more than assert without citation or argument that Congress's affirmative choice of broader language over more restrictive language should not make a difference. Stay Request at 12. But the plain language chosen by Congress is dispositive here. To the extent that the legislative history reveals that Congress chose this particular language over a provision that would clearly have embodied the view of FCC authority articulated by NCTA, there can be no clearer signal that Congress was rejecting NCTA's limited formulation.

[37] Stay Request at 13-25.

628, *by its terms,* applied at enactment to existing contracts and only exempted "contract[s] that grant[] exclusive distribution rights to any person with respect to satellite cable programming" entered into before June 1, 1990, more than two years *prior* to the section's adoption.[38] Thus, all other contractual arrangements, regardless of their date, are subject to the statute.

This limited exemption demonstrates that when Congress intended to constrain the Commission's ability to affect existing contracts, it did so in clear terms. In the absence of such limiting language, the Commission is not prevented from finding that exclusive contract provisions such as those at issue here are unfair methods of competition and applying that finding to presently existing contracts.

What is more, the Commission has already recognized *and used* its power under the statute to prohibit future enforcement of existing contracts. In the First Report and Order implementing section 628, the Commission expressly noted that "the rules we adopt today *will apply prospectively to existing contracts* and to contracts executed after the effective date of the rules."[39] On reconsideration, the Commission affirmed its position and rejected a petition from Time Warner that rules adopted pursuant to section 628 should apply only to the formation of new contacts in the future. The reasoning offered by the Commission is particularly appropriate here: "[G]iven the long-term nature of many programming agreements, Time Warner's position would delay for an unacceptable length of time the relief expected from the program access rules."[40]

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38 47 U.S.C. § 548(h)(1).

39 First Report & Order, *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd. 3359, 3365 (1993) (emphasis added).

40 Mem. Op. Order on Recons. of the First Report & Order, *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of*

Moreover, the application of the proposed rule to current contracts is compelled by the substantive terms of section 628. Section 628 makes it "unlawful for a cable operator . . . to engage in unfair methods of competition."[41] Section 628 addresses all forms of conduct – not solely contractual arrangements. When the Commission has identified certain conduct as an unfair method of competition, it is unlawful under the plain terms of the statute.[42] The fact that conduct is enshrined in a contract with a third party cannot distinguish it from other conduct that is not. Once the FCC determines that a particular practice is an unfair method of competition under particular circumstances, the language of section 628 forbids a cable company from engaging in that practice whether or not it has a contract allowing it to do so.

II. THE BALANCE OF HARMS WEIGHS OVERWHELMINGLY AGAINST A STAY.

The remaining considerations for the Commission take into account is the balance of harms of allowing an order to go into effect or granting a stay which includes the interests of, and effects on, NCTA's members, new entrants, and the public. The balance of harms here weighs overwhelmingly in favor of denying the stay request. The only supposed "harm" to the cable incumbents would be the removal of one obstacle that shields them from competition. Allowing the order to go into effect, however, will encourage increased video competition and broadband deployment by new entrants, thus benefiting consumers and the public with lower prices, better service, and increased access to next-generation broadband networks.

Competition and Diversity in Video Programming Distribution and Carriage, 10 FCC Rcd. 1902, 1939 (1994).

[41] 47 U.S.C. § 548(b).

[42] 47 U.S.C. § 548(c)(1).

A. <u>NCTA's Members Will Not Suffer Irreparable Harm Without a Stay.</u>

NCTA has failed to establish that its members will suffer irreparable harm absent a stay. Under long-standing Commission and judicial precedent, a moving party must make a "concrete showing of irreparable harm" to satisfy this factor.[43] In other words, NCTA must establish that its injury will be "both certain and great; it must be actual and not theoretical."[44]

NCTA has not made, and cannot make, a concrete showing of irreparable harm. Rather, NCTA's filing confirms that cable companies will *not* suffer any cognizable harm if preliminary relief is denied, because the only "harm" NCTA claims its members will suffer is having to offer service in a competitive environment. As the authorities relied upon by NCTA make plain, however, being made to compete fairly is not a harm at all, let alone an irreparable harm of the type that would justify extraordinary relief.

As a threshold matter, NCTA grossly overstates the nature and scope of the MDU Order.[45] In the MDU setting, cable providers have entered into two distinct types of contracts: (1) contracts with MDUs that include provisions that grant cable incumbents exclusive access to end-user customers; and (2) contracts with end-user customers. The MDU Order has absolutely no impact on cable providers' contracts with existing end-user customers. Contrary to the suggestion in the Stay Request,[46] the MDU Order also has no impact on incumbent providers' *access* to MDUs. The MDU Order prohibits only the enforcement of exclusivity clauses.

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[43] *See, e.g., Arizona Payphone Ass'n v. U.S. West*, 11 FCC Rcd 14469, 14474 (1996) ("A concrete showing of irreparable harm is considered the most essential prerequisite for the issuance of interim relief.").

[44] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

[45] *See, e.g.*, Stay Request at 27 (claiming that the MDU Order strips cable companies of customers and goodwill).

[46] Stay Request at 28.

"[N]othing in the rule precludes MVPDs from utilizing the wires that they own to provide services to MDUs or requires them to jettison capitalized investments."[47]

Moreover, the MDU order does not broadly "abrogate" the cable incumbents' agreements with MDUs, but instead prohibits the enforcement of a single term that completely forecloses competition. It is black-letter contract law that, as a general rule, "[i]f less than all of an agreement is unenforceable [as a matter of public policy], a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange."[48] Under that principle, for example, "a promise not to compete that is unreasonably in restraint of trade will often not invalidate the entire agreement of which it is a part."[49] Moreover, the record before the Commission showed that many contracts containing exclusivity provisions also include severability clauses providing that the remainder of the contract would remain in force.[50]

As a result, NCTA members will continue to have access to the entire market for video services in the MDUs where they currently have exclusive access provisions. Furthermore, the Order does not require NCTA members to enter into different types of contracts with end-user customers on a going-forward basis. Under the Order, NCTA members will still have the right to sign up as many new customers as they wish and enter into contracts with those customers.

47 MDU Order at ¶ 57.

48 Restatement (Second) of Contracts § 184(1) (1981).

49 *Id.* at cmt. a.

50 *See* Verizon *Ex Parte* Letter (Oct. 23, 2007).

To the extent that NCTA's members suffer a loss of customers, it will be because their customers chose a different, better and/or cheaper alternative from a competing provider.

At bottom, NCTA has alleged that its members will be harmed by having to compete in the market for end-user customers, but courts routinely reject the idea that companies are "harmed" by having to compete.[51] Indeed, one of the key authorities that NCTA relies upon[52] rejects this irreparable harm argument out of hand. In *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable*,[53] a new entrant cable provider (CQC) negotiated an exclusive agreement with the MDUs previously served by the incumbent (Adelphia). CQC then cut off the incumbent's access to its system and began using the incumbent's cables to provide service. The incumbent moved for preliminary relief (in part) to prevent CQC's exclusive agreement from taking effect. The incumbent argued that it would suffer irreparable injury if it could not provide service because of CQC's exclusive agreement. In response, CQC argued that it would suffer irreparable injury if it could not enforce the exclusivity clause in its agreement with the MDU. While the Fourth Circuit agreed that there would be irreparable harm from denying Adelphia access to the MDUs because of the MDUs' exclusive agreement with CQC, it flatly rejected CQC's counter-argument that having to compete in the market for end-user customers would also constitute irreparable harm. The court held that because "[t]he preliminary injunction [barring enforcement of the exclusive agreement] allows CQC and Adelphia to compete in an

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[51] *See, e.g., Central & Southern Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 308-309 (D.C. Cir. 1985) ("[P]etitioners had not demonstrated the irreparable harm required for a stay, because 'revenues and customers lost to competition which can be regained through competition are not irreparable . . . .'"); *Holiday Tours*, 559 F.2d at 843 n.3 ("The mere existence of competition is not irreparable harm, in the absence of substantiation of severe economic impact.").

[52] Stay Request at 28.

[53] 22 F.3d 546 (4th Cir. 1994).

open market on equal terms . . . the perceived harm to CQC [from being denied the benefits of its exclusive agreement] *does not exist.*"[54]

Finally, NCTA claims that the cable industry will be irreparably harmed if the Commission does not enter a stay because some unspecified number of NCTA members "reasonabl[y] reli[ed] on what appeared to be well-settled law" in 2003.[55] As the Commission noted, "[t]he lawfulness of exclusivity clauses has been under our active scrutiny for a decade, making parties to them aware that such clauses may be prohibited."[56] There is thus no merit whatsoever in NCTA's claim that it will be irreparably harmed by what it erroneously characterizes as a regulatory "bait and switch."[57]

B. A Stay Would Injure Consumers, New Entrants, and the Public Interest.

In contrast to the absence of any cognizable harm to incumbent providers, a stay would injure consumers, new entrants, and the public interest. Therefore, the Commission should deny the request in order to encourage increased video competition and broadband deployment.

NCTA alleges that new entrants like AT&T, Hargray, and Verizon will not be injured by entry of a stay because "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."[58] This is demonstrably false. As explained below, the record is replete with compelling examples of harm suffered by new entrant providers that have been denied

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[54] *See id.* at 552-53 (emphasis added).

[55] *Id.* at 26. As noted above, many of the agreements in the record long predate 2003, in some cases by decades.

[56] MDU Order at ¶ 36.

[57] Stay Request at 25.

[58] *Id.* at 29-30.

access to MDUs due to exclusivity clauses. Moreover, the incumbents' own claims of irreparable injury are in tension with their argument that these provisions do not significantly impede competitive entry. That these provisions serve as a substantial barrier to competition is proved by the fact that incumbent operators are seeking extraordinary relief from the agency to keep them in place.

The Commission carefully considered the implications of continuing to allow exclusivity provisions, and the record amply offers evidence of harm to the market, to new entrant providers, and to consumers.[59] These realities were presented, not only by new entrant video providers, but also by equipment manufacturers and homeowners' associations, among others.[60] Granting the Stay Request would cause significant harm to all of these entities.

New entrant providers, particularly those able to offer innovative video-related technologies, are the most profoundly harmed by existing exclusivity provisions. Hand in hand is the harm to consumers who are deprived of the opportunity to benefit from the effects of

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59 *See, e.g.*, GAO, *Telecommunications, Wire-Based Competition Benefited Consumers in Selected Markets*, at 24-25 (Feb. 2004) *cited in* AT&T Comments at 9 n.24; Verizon Comments at 10-12 (July 2, 2007) (quoting Manatee County Comments, MB Docket 05-311, at 4-5 (Jan. 3, 2006) ("Bright House has, on prior occasions, responded to the granting of a franchise to a new entrant by actively soliciting exclusive access agreements from existing customers")); AT&T Comments at 10 (quoting *Comcast Throws a Curve In Its Broadband Pitch*, S.F. Chron, July 19, 2006 ("Comcast has responded to AT&T's entry into the Bay Area by attempting to obtain ten-year exclusive access agreements from properties in the region")); Comments of Broadband Service Providers Associations, MB Docket No. 03-172, at 40 (Sept. 11, 2003); Surewest Comments at 4.

60 *See, e.g.*, MDU Order at ¶ 17 n. 49 (referencing Corning Comments at 5 ("exclusive access contracts discourage [fiber to premises] deployment, impede competition, and discourage innovation"); SureWest Comments at 3 ("exclusive service contracts constitute significant barriers to entry and thus greatly impede competition in the MVPD service market")); *see also*, *Ex Parte* Letter to the Commission from Palmetto Dunes Property Owners Association (Oct. 19, 2007) ("Palmetto Dunes *Ex Parte*").

competition in the video market – suffering instead from fewer options and higher prices.[61] For example, the record indicates that exclusivity provisions have been used to block competitive entry by Hargray in Hilton Head Island, denying approximately 20,000 households, or 80% of the market, the ability to choose between wireline video providers.[62] The record shows that Hargray was forced to stop providing service because of threats from the incumbent, and that Hargray has invested more than $6 million to upgrade its equipment and facilities to enable it to offer Internet Protocol video services to Hilton Head residents.[63] For more than two years, the incumbent provider (first Adelphia, and now Time Warner, which bought the systems out of bankruptcy), has aggressively defended its perceived right to be the only wireline video provider to most of Hilton Head Island's residents. The incumbent has done so notwithstanding the franchise issued to Hargray by the Town of Hilton Head Island and the strong desire of property owners associations and residents to have Hargray provide competitive video services to their communities.[64] In fact, Time Warner has argued that its license agreements with three property owners associations are not only exclusive, but also *perpetual*.[65] According to Time Warner, no other MVPD will ever be able to compete with Time Warner in these communities.

Verizon has experienced similar roadblocks to its deployment of competitive video service in several states, including California, Florida, and Maryland, where it is deploying its

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61 *See, e.g.*, MDU Order at ¶ 17 (explaining that exclusivity provisions prevent MDU residents from experiencing "lower rates and better features").

62 MDU Order at ¶ 10.

63 Hargray *Ex Parte* at 3.

64 *See* Palmetto Dunes *Ex Parte*.

65 *See* Hargray *Ex Parte* at 4. It is notable that NCTA makes no effort to explain how MDUs subject to arguably perpetual exclusive access provisions should be considered. According the rationale offered by NCTA, the Order will *never* reach these MDUs.

FiOS network.[66] As it explained in its Comments, even at this early stage of its FiOS rollout, Verizon has uncovered or been informed of exclusive access agreements covering scores of properties with tens of thousands of units in at least five separate states.[67] Indeed, Verizon, like Hargray, provided examples of several properties where it had deployed its FiOS network, only later to receive a demand that it must stop marketing its video services in light of earlier exclusive access agreements with cable incumbents.[68] For instance, after Verizon sought to provide FiOS video to residents of the River Chase apartment complex in Tampa, it was contacted by attorneys representing incumbent provider Bright House Networks and the apartment complex itself who demanded that Verizon cease and desist its efforts to provide video service to residents of the property, on the ground that Bright House possessed "the exclusive right to build a multi-channel video services system on the property and the exclusive right to provide multi-channel video services to the property."[69] In many other instances, the existence of an exclusive access contract deterred Verizon from deploying its FTTP technology at all to certain properties.[70] Similarly, the Commission found that AT&T has been impeded by exclusivity agreements in "virtually every market where AT&T has begun to enter the video services market."[71]

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66 *Id.* A Verizon survey reported to the Commission indicated that at least 42% of the MDUs in Tampa, Florida are subject to exclusive access provisions. *Ex Parte* of Verizon, MG Docket No. 05-311, at 3 Aug. 9, 2006) ("Verizon August 2006 *Ex Par*te") *cited in* AT&T Comments at 10.

67 Verizon Comments at 12.

68 *Id.* at 8-13.

69 Id. at 10.

70 *Id.* at 8-13.

71 *Id.* (quoting AT&T Comments at 10).

Further, the current harm to new entrant providers, which have been locked out of the market in many areas of the country, and to consumers, who have been unable to enjoy the benefits of new competition and increased deployment of next-generation broadband facilities, will be significantly exacerbated if the requested stay is granted. Incumbent providers will likely use the stay period to actively solicit long-term agreements from existing customers,[72] thereby blunting the ability of new entrants to solicit customers when the stay is lifted. Verizon, in particular, has offered evidence in the record that it has received notice of long-term contracts from incumbents where the contracts were dated immediately prior to or after Verizon's attempt to enter the video programming market.[73] Granting the stay here would only allow incumbent providers to further extend the benefits of their former monopoly franchises and further delay competitive entry.

Even more significantly, the interests of consumers and the public – including their substantial interest in increased video competition and broadband deployment – require the denial of NCTA's Stay Request. It is well-settled that the public interest should be given considerable weight when determining whether to enter a stay.[74] Here, the public interest weighs decidedly in favor of denying NCTA's Stay Request. As Congress, the FCC, and the GAO have all recognized, the relief requested by NCTA runs contrary to the public interest. Given the unique history of the video marketplace and the current lack of wireline competition, the

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72 *See* Verizon Comments, MB Docket No. 07-51, at 10-11 (July 2, 2007).

73 *Id.* at 10.

74 *See, e.g., Virginia Petroleum Jobbers*, 259 F.2d at 925 ("In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes."); *see also* 11A Charles A. Wright *et al.*, *Federal Practice and Procedure*, § 2948.4 ("[W]hether the public interest either might be furthered or might be injured by an injunction should be given considerable weight." (citations omitted)).

enforcement of exclusivity provisions would restrain consumer choice, increase the costs of video services, stifle technological innovation and developments, and decrease the quality of video offerings. In fact, the record here shows that cable incumbents have used these provisions as a method of deterring and preventing video competition and extending the legacy of their previously exclusive franchises.

At least as early as 1992, Congress expressly recognized that the public interest is served by competition for the provision of video services: "consumers benefit greatly from the existence of two competing cable systems operating in a given market."[75] Indeed, "[t]he legislative history to both the 1984 and 1992 Cable Acts identifies a national policy of encouraging competition in the multichannel video marketplace. . . ."[76]

Though NCTA suggests that the public interest would be served by denying choice and stifling competition, this cannot be squared with the reasoned decisions of the Commission on this precise question. As the Commission has noted, "[i]ncreased competition can be expected to lead to lower prices and more choices for consumers . . . ."[77] As the Commission observed, "[s]everal studies, most notably several released by the . . . GAO . . . have shown that

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75 H.R. Rep. No. 102-628, at 46 (1992); *see also* H.R. Conf. Rep. No. 862, 102d Cong. 2d Sess. 77 (1992) ("[E]xclusive franchises are directly contrary to federal policy and to the purposes of the [the 1992 Cable Act], which is intended to promote the development of competition.") *reprinted in* 1992 U.S.C.C.A.N. pp. 1133, 1231, 1259.

76 Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, 22 FCC Rcd 5101, 5158, ¶ 130 (2007) (the "Section 621 Order"); 1997 Inside Wiring Order, 13 FCC Rcd 3659, 3754, ¶ 203 (1993) (exclusivity clauses "raise anti-competitive concerns because they 'lock up' properties, preventing consumers from receiving the benefits of a newly competitive market.").

77 *Section 621 NPRM*, 20 FCC Rcd at 18581, ¶ 1.

competition constrains cable prices."[78] Moreover, "[c]ompetition in the delivery of video programming services has provided consumers with increased choice, better picture quality, and greater technological innovation."[79] Indeed, Congress has already squarely determined that video competition is desirable by banning exclusive franchises for cable service.

Furthermore, the public interest benefits of denying NCTA's request are not limited to the video marketplace. New entrants in the video market, including AT&T, Hargray, and Verizon, offer a variety of services, including video, voice, and broadband Internet access over a single network. In fact, it is the ability to receive multiple revenue streams from a variety of services that justifies the substantial investment in the next-generation fiber networks over which these services are delivered. The FCC has noted that the economic case for the deployment of broadband often depends on the provider's ability to offer a full range of services to consumers, including the so-called "triple play."[80] In other words, granting NCTA's Motion would not only disserve the public interest by preventing competition in the market for cable services, it would also have a negative impact on the public's interest in increased choice and competition in the broadband market as well.[81]

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[78] *Id.* at 2519, ¶ 41; *see also Section 621 Order*, 22 FCC Rcd at 5126, ¶ 50 ("[T]he presence of a second cable operator in a market results in rates approximately 15 percent lower than in areas without competition – about $5 per month.").

[79] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report*, 21 FCC Rcd 2503, 2506, ¶ 5 (2006) (the "*Twelfth Annual Report*").

[80] *See Section 621 Order*, 22 FCC Rcd at 5108, ¶ 13 ("Competitive entrants in the video market are, in large part, deploying new fiber-based facilities that allow companies to offer the 'triple play' of voice, data, and video services. New entrants' video offerings thus directly affect their roll-out of new broadband services. Revenues from cable services are, in fact, a driver for broadband deployment").

[81] *See id.* at 5103, ¶ 2 ("Ultimately, both types of companies [traditional phone companies and traditional cable companies] are projected to offer customers a 'triple play' of voice, high-speed Internet access, and video services over their respective networks. We believe this

For the foregoing reasons, NCTA has not carried its burden of demonstrating that the public interest would be served by entering a stay. To the contrary, the public interest would be significantly harmed if the Commission granted NCTA's Stay Request and decreased competition video services and deployment of broadband facilities.

CONCLUSION

For the reasons set for above, the Commission should deny NCTA's Stay Request.

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December 18, 2007

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competition for delivery of bundled services will benefit consumers by driving down prices and improving the quality of service offerings.").

CERTIFICATE OF SERVICE

I , Sean C. Day, hereby certify that on December 18, 2007, I caused a copy of the foregoing Joint Opposition to Stay Pending Judicial Review be mailed via first-class postage prepaid mail to the following:

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