Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF WILCO ELECTRONIC SYSTEMS, INC.

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Introduction and Executive Summary

The intent of the Commission to offer consumers more choice and increased competition in the video distribution market, is greatly served by the decision of the Commission's Report and Order on the Matter of Exclusive Service Contracts in Multiple Dwelling Units ("MDU") and Real Estate Developments. However, the Commission must consider the extreme effects that this regulation will also have on small and minority and women-owned businesses, if all multi-channel video service distribution ("MVPD's) providers are included into the Exclusivity Ban. The limitations, capabilities, and status of small businesses, in particular Private Cable Operators ("PCOs")[1], must be considered and weighed heavily when looking to expand MVPD's covered by this ruling. If the Commission's goal is to increase diversity and competition within the MVPD space, the Commission must consider that exclusivity agreements are not only paramount to the success and sustainability of smaller entities, but additionally offer positive benefits to MDU residents.

Wilco is a minority-owned PCO located in Philadelphia, Pennsylvania. As one of the last remaining African-American owned cable systems in the Eastern Region of the Nation, this year marks Wilco's 31st year of service to the Greater Philadelphia community. Since 1977, Wilco has been serving the Philadelphia area as a MDU provider and a cable service provider for low income residential communities. Currently, Wilco exclusively provides cable services for

[1] PCO's are also known as Satellite Master Antenna Television providers or "SMATV's". They are video distribution facilities that use closed transmission paths without using any public right-of-way, thus they fall outside of the Communication Act's definition of a cable system and are not subject to Section 628. As such, PCO's are subject to less regulatory oversight than traditional cable systems. PCO's acquire video programming and distribute it via terrestrial wiring in urban and suburban MDU's and commercial multiple tenant units such as hotels and office buildings. They are small compared to the major incumbent cable operators and incumbent LEC's. *See* Report and Order, FCC 07-189 at footnote 12, page 4. *See also,* SMATV Section of the FCC's Fifth Annual Report, Re: In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No.98-102 at 88.

the Philadelphia Housing Authority ("PHA") communities and has been doing so since 2001. Traditionally, PHA communities have been an un-served, underserved and economically disadvantaged population. It was Wilco who first began cultivating this niche market for serving predominantly minority and low-income communities and has been able to do so and maintain its competitive advantage, because of exclusive service agreements.

Due to Wilco's long-standing history of being a provider to MDU's and low-income communities for over three decades, Wilco applauds the intent of the Commission's Report and Order of the Exclusivity Ban to not only promote competition and diversity in the MVPD market, but to better serve consumers by generating a more diverse service offering and creating opportunities for new market entrants. However, Wilco urges the Commission to take into consideration the following factors and effects of the Exclusivity Ban on small businesses, particularly PCO's, and the outcomes the ban will have on residents of MDU's:

1. The specificity of the definition of a PCO creates a situation where, despite clarity provided in later regulation, the MDU market is the only available and cost effective market available to the PCO;

2. Despite the intent of the Commission to increase the competitive nature of the MVPD marketplace, the reality is that including PCO's into the Exclusivity Ban will only serve to shrink the competitive nature of the space;

3. As the demand for an increased number of services available to the consumer continues to grow, PCO's are under additional pressures of reliance on competition. A PCO must be able to compete with the services made available by MSO's and LEC's, but then rely on those same MSO's and LEC's for delivery of service, due to their inability to cross the Public Right of Way;

4. Unlike the general MVPD marketplace, PCO's due to their size, regulatory status, and ability to be creative in their service offerings, is the kind of provider that is a perfect fit for MDU communities, in particular minority residents; and

5. The only documented MVPD space which includes <u>multiple</u> minority or women-owned businesses, resides within the PCO industry, and if exclusivity bans are totally prohibited, minority ownership on a whole, will be disproportionately and adversely diminished; and

6. **Use of the PCO's inability to cross public right of way is an effective narrowly-tailored solution to assess how to appropriately delineate providers not subject to Section 628;**

Thus, the election of the Commission to extend the sunset of Section 628(c) (5) for the creation of competition in the MVPD market, is vital to the success of smaller cable businesses, in particular PCO's. Given the uniqueness and limitations of the PCO marketplace, the inclusion of PCO's into the Ban will undoubtedly cause adverse repercussions to the diversity of ownership of the total MVPD marketplace and will ultimately create a "life or death" situation for the PCO industry. However, if the Commission should prohibit all exclusivity agreements and include all MVPD providers not subject to 628, any such regulation should be narrowly tailored and based upon the limitations and regulatory status of the provider.

I. <u>THE REGULATORY AND BUSINESS LIMITATIONS OF A PCO INHERENTLY DESERVE EXCLUSION FROM THE MDU EXCLUSIVITY BAN.</u>

We are pleased to see that the Commission analyzed the effects of the proposed rulemaking, however when the Initial Rulemaking Flexibility Analysis (IRFA) was prepared, the cross-section of the MVPD market used to assess the small business was not inclusive of businesses that fall into the "smallest of the small" category. Unfortunately the Commission did not go far enough into its review to delineate the businesses which are not directly covered under Section 628, thus leaving many small companies, in particular PCO's, within a group of other companies who do not have the same regulatory constraints.

In the case of the PCO, Section 628 of the Communications Act is explicit on the definition of a PCO (SMATV), and the regulatory constraints under which it operates. The specificity of the definition of a PCO creates a situation where, despite clarity provided in later regulation, the MDU market is the only available and cost effective market to the PCO. Thus, Wilco contends that many of the companies who get consideration, because of their operations, when the Commission examines its' impact on PCO's, do not have the same concerns, as the remainder of the group. For example, the majority of PCO's do not have the ability to launch a satellite, or to extend their delivery capabilities beyond the terrestrial network. Although, we share many of the same concerns as those other companies, our concerns are many times truly different.

In addition, a PCO's inability to cross the Public Right of Way makes it impossible for it to play in the general public market. Although, there are assertions that a significant portion of the American populace lives in MDU's, there is still a greater percentage that doesn't, and those populations are completely excluded from PCO's. This creates a situation of inequity, where the franchised companies have an exclusive market segment for them to compete for, free from PCO competition, but are free to compete in the MDU space. This regulatory anomaly inadvertently produces a monopolistic advantage for one type of company, but a free market for another. The Commission's desire to create competition must also address that anomaly, before a true competitive landscape can be fostered. The lack of clear definition, or separation, of the companies that aren't covered under Section 628 causes PCO's to be extraordinarily affected by the current regulatory proposal. Thus, inclusion of PCO's into the MDU Exclusivity Ban creates another hurdle that has to be tackled by any company who decides to become, or remain, a PCO.

Wilco, in order to remain compliant with the Commission's definition of a PCO, is dependent upon being able to reach favorable agreements with the very companies against whom it competes. Wilco has no ownership, nor is there a shared interest in either company, in the franchised cable system, from which it buys programming and delivery of signal, but is merely in a "carrier – user" relationship. It depends upon a bulk billing agreement to continue the operations of its business and service its customers. The effort to maintain its status as a PCO and work with a competitor for the delivery of its services creates a situation of "the wolf deciding where the sheep should sleep". Although we respect the spirit and intent of the law, our future is already delimited by the cooperation of our competitors, and the inclusion of PCO's into the MDU Exclusivity Ban, only serves to take our respective futures further out of our own hands, thereby killing our ability to be competitive.

Moreover, when a PCO makes the determination of what properties that it will try to sell, there are several additional price considerations that must be considered by the PCO that are solely depreciated capital expenditures for the franchised operator. A Multiple System Operator ("MSO") has the ability to achieve economies of scale despite geographical limitations, other than franchise. For a large MSO to recapitalize the expense of deployment of equipment, it must simply assess how to market its' services to everyone around that equipment. A PCO has to make the best possible decision for the deployment of services and equipment, as a requirement, not a course of doing business. This decision is based upon maximum penetration that can be had under strict federal and local regulation, competition from the very entity that it must partner with, and its' own ability to capitalize the equipment. Fixed cost economics make the PCO's dependence upon a higher level of saturation exponentially more prevalent than is the case for an MSO. The capitalized costs involved, when coupled with the cost of programming from an, often times, competitor who would be desirous of the business if it weren't for the benefits of an exclusive contract, would make many projects too expensive for the PCO to engage, thereby ending the PCO's ability to compete in the marketplace.

Therefore, placing all companies who are not covered under Section 628 in the same category creates the predicament that the Commission was trying to avoid, death of competition from small business, and unfair regulation. The same consideration must be applied to this rulemaking, as was applied to the Commission's consideration, and subsequent exemption, from the implementation of Section 629 (Set Top Integration Ban). In that case, the Commission immediately recognized the need to not disenfranchise the low-income community, or the persons who serve it. However, the focus was primarily on the rural community, where the low-income urban population is as, or more, under-served and price constrained.

II. PCO'S AND MINORITY CABLE OPERATORS SHOULD BE INCLUDED WITHIN THE COMPETITIVE LANDSCAPE INTENDED BY THE COMMISSION

The promotion of competition is a fundamental goal and function of the Commission. As set forth in Section 601 of the Communications Act, one of the principal goals of the 1992 Cable Competition and Consumer Protection Act of 1992 was to "promote competition in cable communications."[2] Wilco and other PCO's are the type of competitive MVPD's that Congress intended to assist in the implementation of these Acts.

Wilco's status as a minority-owned PCO primarily serving the needs of the residents of the PHA, creates unique conundrums which are off the radar for many of the companies under the Commission. These issues are not only unique to small PCO's, but also unique to companies who work with the low-income. Companies like Wilco, which serve the low-income market, have pricing and service level considerations that are far outside of the mainstream, and must be taken into account. Wilco has enjoyed many years of service to the residents of Philadelphia, and has continued to operate as a PCO, as defined in Section 628. However, as a PCO, it is

[2] 47 U.S.C. § 521 (6).

dependent upon fair practices and regulatory equity to guarantee its existence. Regulatory equity that levels the playing field, and not just implied rule of law equity.

The Commission has put effort in trying to ensure that smaller companies have a place in the MVPD marketplace, and has worked for parity in its rulemaking. However, the inclusion of all PCO's in the ban on MDU exclusivity is the equivalent of serving a death sentence to many smaller companies. Therefore, Wilco urges, in regard to this inclusion of MVPD providers, that the Commission's standards for measuring the impact of regulation on small businesses should be reexamined to ensure that it fully measures the impact on all companies.

Nothing before has indicated that the Commission has not intended to grow opportunities for minority participation in the MVPD marketplace. However, the commission must consider the shape and scope of minority operators and their ability to be a viable competition to the larger cable and DBS operators. The MSO market is shrinking and becoming less diverse in its' shape and scope, thereby leaving the consumer with less choice, despite the belief of many. The five major MSO's offer much of the same programming, and pricing models, in that they don't have to compete with anyone other than themselves. Despite the intent of the Commission, consumers will be left with choosing which provider they will use from an ever dwindling group of providers.

Thus, if the Commission is truly desirous of creating competition in the MVPD marketplace, then they must examine the role that PCO's play in the market, and expand that role to make them more, not less competitive to the MSO's. The PCO marketplace is still the last bastion of minority participation in the MVPD space, and if that marketplace shrinks, so does minority participation, accordingly. Failure on the part of the Commission to consider the negative impacts of the Exclusivity Ban on the PCO marketplace will only serve to controvert the intention of creating a more competitive landscape.

III. COMPETITION IS DECREASED, RATHER THAN INCREASED BY THE INCLUSION OF PCO'S IN THE MDU EXCLUSIVITY BAN.

Despite the intent of the Commission to increase the competitive nature of the MVPD marketplace, the reality is that including PCO's into the Exclusivity Ban will only serve to shrink the competitive nature of the space. PCO's will never be a real competitive source for MSO's in the general sense, but do provide a reasonable alternative to MDU owners and their residents. PCO's by nature are effectively eliminated from any market segment other than MDU's, and therefore cannot compete with the MSO's in the non-MDU marketplace. However, the MSO's don't have any such restriction which "locks" them to any particular client space or forbids them from participating in any area of the marketplace.

Wilco contends that the intent of the Commission will not be served by the inclusion of PCO's into the Exclusivity Ban, in that the fallout will be a further monopolistic landscape. In many areas of the country, there is a single incumbent MSO, who effectively has secured an unfair market advantage through interpretation of franchising rules and political pressure. Revenue generated by the current franchising rules, to the municipality, creates a problem of loyalty, both implied and actual, which has to be defeated before any other MVPD provider will be able to effectively negotiate the path to franchise. Until such time as the true competitive landscape changes, the only competitive option in some of these areas is the PCO. DBS providers add to the competition in many of those areas, but are also effectively eliminated from many MDU's because of the equipment they use for delivery of signal. Philadelphia, as an example of many major metropolitan cities in the country, is going through an urban renewal, and most of the new construction in the city is MDU's. Many of the new constructions do not allow their residents to even have the option of DBS, and use the premise equipment required to receive the DBS signal as the reason. This further demonstrates the need for the PCO, which uses many different delivery methods, to allow for any type of effective competition to the incumbent MSO for these situations. If there were no PCO's then the incumbent MSO would have an effective monopoly on these new constructions which forbid DBS equipment from being attached to the physical structure of the building.

IV. PCO'S AND OTHER SMALL BUSINESSES ARE BEING BOUGHT AND REGULATED INTO A CORNER

The number of PCO's is shrinking, at an alarming rate, but so is the number of MSO's. As regulation and the general cost of doing business create additional costs to MVPD providers, as a whole, there are a number of smaller cable operators who are finding it very difficult to exist. In addition, there have been a significant number of smaller operators who have been acquired, at significant prices per subscriber, by the Top 5 MSO's, which have continued to grow. Conversely, a number of the PCO's have also been acquired by the larger MSO's at significantly lower price economics per subscriber. A large portion of the cost disparity between the acquisitions is the limitation on PCO's imposed by the Commission. Inability to cross Public right of Way creates not only regulatory inequity, but also has served to create inequity in the value economics applied to PCO's versus MSO's.

The diminishing number of cable operators in the marketplace will not serve to increase the amount of choice available to the consumer, but will create a situation of one or two choices available to everyone. Further regulation and the subsequent increased cost derived from those regulations will add to the shrinking of the competition in the MVPD marketplace. Despite the

Commission's best intentions, regulation has had a more significant effect on smaller operators than larger operators, which has caused many PCO's to have to make a decision of whether or not they can afford to be in the business. If the continuing trend is higher levels of regulation and rising costs, then the fallout of the number of competitive cable operators will continue to rise equally.

PCO's will be hardest hit by the combination of an ever shrinking number of MVPD businesses, and a regulatory environment which puts them in further, unbalanced, competition with the larger MSO's. Many would contend that there is no responsibility for any regulation to provide any exceptions which would foster the success of any business segment, <u>but they fail to take into consideration that it is regulation which limits the success and creates disparity between businesses in the same business segment.</u> "Survival of the Fittest" is the highest law, but even Darwin's theory of Natural Selection assumed that the playing field was level, and not made uneven by any factor other than the creature itself, or in this case the MVPD. The exclusion of PCO's from the MDU Exclusivity Ban is the only way to level the playing field, unless the Commission allows PCO's to deliver services to the non-MDU marketplace, in the same way that CLEC's deliver services.

V. <u>IF PCO'S ARE INCLUDED INTO THE EXCLUSIVITY BAN, PCO'S WILL BE INCREASINGLY RELIANT UPON COMPETITORS.</u>

As the demand for an increased number of services available to the consumer continues to grow, PCO's are under additional scrutiny to be able to compete with the services available through the MSO's and LEC's. Current PCO deployment strategies are generally decentralized, and require a tremendous capital expenditure, per location, to deliver advanced services. Franchised providers benefit from their ability to deliver centralized services to their subscriber base, and realize lower total cost of operation (TCO). A PCO's inability to cross public right of way creates a situation where the only way to remain competitive is to make every attempt to deliver those same services, and still remain a cost effective option to their customer base. Many PCO's have chosen to engage outside companies for the delivery of advanced services, such as MSO's and other common carriers, to deliver the services to meet the needs of their subscribers. However, these are the very same MSO's and common carriers that the Commission now intends for PCO's to fully compete against within the marketplace. The decided advantage that this will provide to the PCO's competition will be insurmountable, and will decrease the possibility that the competitors will provide those services to PCO's at a cost effective rate. While we don't believe that it will be the intent of the Commission or the competitive market to create a pricing model which will eliminate the small market, the increased reliance upon competitors could inherently create that scenario.

A. USE OF THE PCO'S INABILITY TO CROSS PUBLIC RIGHT OF WAY IS AN EFFECTIVE NARROWLY-TAILORED SOLUTION TO ASSESS HOW TO APPROPRIATELY DELINEATE MVPD PROVIDERS NOT SUBJECT TO SECTION 628.

In light of the unique history and regulatory limitations imposed on PCO's, specifically a PCO's inability to cross public right of way, Wilco has proposed a narrowly-tailored rule that would effectively address the competitive, the consumer, and the parity concerns raised in this proceeding. Namely, Wilco suggests that the Commission utilize the inability to cross public right of way, as a mechanism to delineate what providers should be subject to the Ban that are not subject to Section 628 of the Communications Act. As previously mentioned, the PCO market is inherently limited. Unlike, MSO's, LEC'S, DBS providers, or even most small cable operators, since PCO's can not cross public right of way, PCO's are limited to only offering services in multiple dwelling units. Unfortunately, this makes it impossible for a PCO to play and compete fairly in the general public marketplace against any of the other MVPD providers subject, and not subject, to Section 628.

Due to this unique regulatory limitation, the PCO industry encompasses the method for how the Commission should look to carve out and regulate the Exclusivity Ban prohibitions. If PCO's are the only providers, due to their status, that are regulated to serving MDU's, and due to this limitation, have honed the ability to serve and offer better services to MDU's, the Commission should evaluate this type of regulatory constraint as a viable method to narrow the regulation when reviewing the various parity issues surrounding this particular matter.

Therefore, while PCO's try their best to be self-sustaining and self sufficient, they are still hindered by their inability to create the leverage power enjoyed by the MSO's to purchase programming and services for their customer base. Any attempts to centralize their services or to utilize economies of scale for the growth and sustainability of their businesses, makes them even more reliant upon those businesses, and puts them in direct "lopsided" competition against those same businesses within the marketplace. Therefore, as the Commission continues to determine how to demarcate a provider's ability to compete in the MVPD market without interfering with existing consumer relationships, denying provider's ability to compete, and imposing permanent or intrusive regulation, the Commission should look to the PCO's regulatory definition as a way to begin carving out a true method of separating MVPD's who should be subject to the Exclusivity Ban.

VI. PCO'S PROVIDE TAILORED AND COMMUNITY FOCUSED SERVICES AND PROGRAMMING FOR RESIDENTS OF MDUs.

One of the fundamental arguments against exclusivity agreements revolves around the ability for a consumer to choose and obtain services which best fit their needs. We are not arguing against this sentiment, however, we are urging that the Commission consider that exclusivity agreements, as it pertains to PCOs, do allow for consumer choice and do provide services that are specific to residents who live in MDU's. Unlike the general MVPD marketplace, PCO's due to their size, regulatory status, and ability to be creative in their service offerings, is the kind of provider that is a perfect fit for MDU communities, in particular minority residents.

As Chairman Kevin J. Martin emphasized in his speech to the Rainbow Push Coalition and the Citizen Education Fund, 40% of all households headed by people of color live in MDU's, despite representing only 27% of all households nationwide.[3] According to the Commission, this circumstance has limited MDU residents, and for the most part a disproportionate population of minority MDU residents, in their ability to choose providers for video and broadband services. However, the biggest advantage of the PCO industry is the ability for a PCO to customize and tailor programming, packages, and prices to the consumers they serve, the MDU resident. This advantage exist because PCO's are not regulated like other cable franchises, and since PCO's only serve the MDU market, they have honed the ability to listen, customize, and offer services for the MDU resident.

[3] Remarks of FCC Chairman Kevin Martin, Rainbow Push Coalition and Citizen Education Fund and Media & Telecommunications Symposium, October 12, 2007.

The MDU resident benefits from a PCO because the PCO is able to provide flexibility in the price offerings to MDU communities. For example, PCO's can offer special senior citizen rates or specific low-income public housing rates that are more affordable to those specific communities than what other incumbent or franchised providers can offer. Contrary to the statements made by US Telecom that elderly and low-income consumers are hurt by exclusive agreements, when a PCO is the provider for these communities, under an exclusive agreement, the ability to provide affordable pricing to seniors or low-income residents, is a positive benefit to residents of MDU's rather than a negative circumstance.[4] Wilco, for example, offers positive benefits by providing as much as 30% in lower rates, for video services to the urban communities of Philadelphia. Wilco's status as a PCO and the exclusive agreements it has with these MDUs allows the company to offer a rate more suitable to low income housing, than the incumbent cable operator. In the case of City Cable, this PCO also prides itself on being able to significantly reduce the rates for its customers. City Cable states that they are able to save their residents 25%-50% from the best rates the residents could get from the local franchise cable company or the local bell company in that service area.[5] This flexibility in price is a PCO feature beneficial to the MDU resident.

The MDU resident additionally benefits from a PCO 's ability to provide customized and community focused programming that caters to MDU communities. Unlike the "one size fits all" programming options of other MVPD providers, PCO's can offer MDU residents and real estate owners customized video programming options that appeal to the target audiences of

[4] See US Telecom Ex Parte Notice, dated October 24, 2007.

[5] See Letter written by Martha Perez Schneider, President of City Cable Services. The Letter was received and adopted by the Commission on December 3, 2007. The letter was posted on the Commission's ECFS on December 7, 2007. City Cable Services serves a predominantly minority and low-income residential community in the East Michigan area.

those communities. Ultimately, this allows consumers to receive and choose more desirable programming options and packages that are better suited for their needs and interests. For instance, Wilco serves MDU's in low-income housing neighborhoods, which for the most part are highly populated by minorities and elderly residents. Because of this reality, Wilco is able to offer various services geared to this group of MDU residents. One of these services is an original programming channel created specifically for the needs and interests of its service community. The programming includes televised shows in regard to health and wellness for senior citizens and televised job skill training and financial planning classes for residents of PHA. An additional service is the offering of programming lineups that cater to the varying ethnic demographics of these communities which has pleased many of the residents who live in PHA. In other areas of the country, there are PCO's who also offer specific programming that appeals to a particular ethnic group that resides in unique residential communities. As stated by Bryan Rader, CEO of Bandwidth Consulting, one of Bandwidth's clients has created a "specialized" channel line-up and product offering for a predominately Spanish resident profile. Without exclusivity provisions, the ability for this particular PCO to offer unique and special programming for their customers, would not be possible since the local cable company in that area only offered a few Spanish Channels.[6] While Wilco agrees that exclusivity agreements can limit choices to consumers whose provider(s) only offer "one size fits all" programming tiers, Wilco contends that PCO's offer programming specifically geared to providing benefits for residents of MDU's, based off of the choices of the residents for programming and the demographic that resides in those communities.

[6] See Letter written by Bryan Rader, CEO of Bandwidth Consulting, dated January 15, 2008, MB Docket No. 07-51.

In addition to the arguments of tailored programming and flexibility of pricing, PCO's have the increased ability to provide a greater level of self-sufficiency and choice in the providing of video services, for MDU residents. The Commission should consider that there are many differing opinions of consumer groups and organizations, who are in favor of exclusive agreements, because the lack of exclusivity clauses hampers the ability for minority and low-income communities to effectively negotiate better deals of telecommunication services for themselves.[7] State Representative Sheryl Williams Stapleton of New Mexico reiterates this point and states that the Commission should consider the negative effects that prohibiting exclusive contracts will likely have on minority communities since small cable operators are often more willing to significantly lower their prices and offer better customer service in return for the security that comes along with exclusivity.[8] Organizations and institutions such as the Latino Coalition and the First Mount Zion Baptist Church, also echo Representative Williams' statements by adding that lower rates for minority and low-income residents as well as the inability to negotiate cable discounts with cable operators for urban renters, will adversely impact many minority communities who reside in MDU's around the country. [9] Thus, in the case of PCO's, the act of *choosing* from among a multiplicity of competitors is done at a different stage in the customer/provider relationship, and in many cases the choice and voices of residents dictate what provider can come in and what services and prices they are offered. If a

[7] See Letter written by State Representative Sheryl Williams Stapleton, dated October 23, 2007. Representative Williams states: "Without price breaks created by exclusive contracts, many minority residents living in apartments in city centers simply wouldn't be able to afford cable service or broadband Internet. Prohibiting these contracts would force minorities in rented housing to drop cable and Internet services at an alarming pace, enlarging the digital divide."

[8] <u>See Id.</u> Small cable operators and PCO's are the only cable operators who have the ability to be flexible in pricing and offer lower rates, since these entities are not regulated as franchise cable operators.

[9] See Letter written by Robert G. De Posada, President of the Latino Coalition, dated October 14, 2007; Letter written Dr. Luke E. Tatum, Pastor of the First Mount Zion Baptist Church, Dumfries Virginia, dated October 24, 2007.

PCO is the provider for an MDU residential community, choice to the consumer still persists and exclusive agreements offer the leverage and empowerment for those communities to chose whom and what they desire for themselves.

VII. IF PCO'S ARE INCLUDED INTO THE BAN, THE COMMISSION WILL DISPROPORTIONATELY AND ADVERSELY AFFECT AND DIMINISH SMALL MINORITYAND WOMEN-OWNED BUSINESSES.

The PCO marketplace is as diverse as the populace that it serves. One of the most important features of this unique marketplace is that the PCO industry provides the largest cadre of small MVPD businesses that serve the general marketplace. Subsequently, the majority of minority and women-owned cable operators in the MVPD marketplace reside at the PCO level as well.[10] While the numbers of minority owned and women owned PCO's have not sufficiently been documented in the past by the industry or the Commission, the numbers do exist and always become more apparent as the regulatory hurdles become harder for these companies to get beyond. On the other hand, what has been documented, and is a well known fact is that to date, there are no majority or wholly-owned minority or women-owned MSO's, there are no majority or wholly-owned minority or women-owned DBS providers, and there is only one known majority or wholly-owned LEC.[11] The only documented MVPD space which includes multiple minority or women-owned businesses, resides within the PCO industry, and if exclusivity bans are totally prohibited, minority ownership on a whole, will be disproportionately and adversely diminished.

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[10] See Independent MultiFamily Communications Council Website (IMCC), www.imccc-online.com. IMCC is an organization comprised of private cable operators. According to IMCC Executive Director, William Burhop, there are several women-owned and minority-owned private cable operators either affiliated with or are members of IMCC.

[11] GVC Winstar is lauded for being the first national minority-owned facilities based telecommunications company in the Nation. Please see: www.gvcwinstar.net.

Historically, it has always been easier for minority or women-owned businesses to enter the MVPD market by obtaining an exclusive contract for an MDU, then providing signal and programming as a PCO / SMATV to that residential building. The reason why many minorities and women were and are able to enter the PCO market with more ease is due to the fact that it is easier to obtain financing to enter the PCO market, it is easier to obtain and negotiate programming and deliver a signal to MDU's, and it is easier to attain and maintain a growing success rate, but only when a PCO is able to obtain exclusive agreements with MDU's and subsequently recoup expenses in order to make a profit from the investment of the PCO distribution system. For example, Wilco started in 1977 as a SMATV provider gathering contracts to serve apartment buildings around the city of Philadelphia for five (5) or ten (10) year periods. The opportunity to obtain exclusive agreements provided the foundation for Wilco, and other minority or women-owned PCO's in the Nation, to become larger and/or successful MDU providers by bidding for exclusive contracts to provide cable programming as wholly owned minority companies. Overall, companies like Wilco have contributed to the Commission's goal of advancing and promoting diversity and minority ownership. Although the amount of minority owned companies is diminishing, the PCO marketplace, has been one industry that has provided numbers of growth and sustainability of the Commission's initiatives, through the use of exclusive agreements.

However, in order to continue the creation and growth of minority and women-owned cable operators, the Commission must consider the consequences that will inhibit and create barriers of entry to the viability of minority and women-owned PCO's, if exclusive agreements are prohibited. The ability to continue to use exclusive agreements has been the saving grace for PCO's, in particular minority and women-owned PCO's. As evidenced by the many PCO's that have filed numerous letters and notice to the Commission concerning this pending regulation, it is clear that should the Commission prohibit the total use of exclusive agreements, many PCO's will be severely impacted, including many of the last remaining glimpses of minority ownership in the MVPD space.

A. THE COMMISSION HAS STATUTORY AUTHORITY TO PROMOTE AND ADVANCE MINORITY OWNERSHIP AND SMALL BUSINESSES.

The Commission has previously recognized the anti-competitive implications of market barriers to entry as it pertains to minority ownership and small businesses. Recently, both Commissioner's Copps and Adelstein have expressed their opinions and concerns in regard to the lack of serious attention and resolve to the promotion of minority ownership and the dearth and decline of minority owned and small business communication facilities.[12] The authority that grants the Commission authority to regulate diversity in the marketplace resides within Section 257 of the Communications Act, which requires the Commission to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services."[13] In the past, the Commission has failed to consider the many impacts of its policies on small businesses, particularly small

[12] Both Commissioner's Copps and Adelstein have expressed their concerns in Statements on the Deletion of Minority Media Ownership Item from the Agenda Meeting, held November 27, 2007. In addition, the dissenting arguments made by Commissioner Copps and Adelstein in Re: Section 257 Triennial Report to Congress, Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses, FCC-07-181, Released December 6, 2007.

[13] 47 U.S.C. § 257 (a)

women and minority-owned cable operators.[14] Commissioner Adelstein states that, "while the Commission claims that it fully recognizes the role that small communications businesses play in a robust American economy, the Commission does not report the fact it has delayed meaningful relief to minority entities and has repeatedly increased the regulatory burden on small cable businesses." [15] Thus, due to the current dismal state of affairs as it pertains to minority ownership and small businesses within the MVPD market, the Commission must act within its authority to provide federal solution to this problem and take action to prevent impediments to the sustainability and entry of minority providers.

We urge that the Commission consider the use of exclusive agreements as a way to combat the demise of small and minority businesses. Exclusivity agreements create opportunities that actually prevent market barriers to entry and allow for minority and small businesses to continue growth in the market and add to the overall goals of sustaining minority ownership in the MVPD industry. In order to fulfill federal policy in favor of promoting diversity and competition in the provision of MVPD services, the Commission should act to allow the continued use of exclusivity agreements for small businesses, such as PCO's, and the group of minority and women-owned businesses, who reside in the PCO industry,

The Commission has stated that it has not kept good record of documentation of minority and women-owned businesses within the MVPD

[14] See Commissioner Adelstein's Dissenting Opinion, Re: Section 257 Triennial Report to Congress, Identifying and Eliminating Market Entry Barriers For Entrepreneurs and Other Small Businesses, FCC-07-181, Released December 6, 2007.

[15] See Id.

space.[16] For the most part, minority and women-owned business issues, analysis, and data has been regulated to the broadcast television industries. However, these types of businesses do exist as PCO's. They are out there, quiet, but operating fully in the cable business. As regulatory hurdles present themselves, many of these PCO's begin to come forth and advocate for their survival. This was seen this past summer, during the Section 629 set top ban integration. Due to the constraints of having to file waivers based on the size and limitations of those small operators, the Commission learned of many of these companies and will continue to do so if the Commission fails to consider how legislation will impact small businesses and subsequently, minority businesses. Thus, due to the fact that there are minority operators in the market, and more and more that continue to come to the attention of the Commission as stringent regulatory burdens are further imposed, this provides a basis for the Commission to take action and prevent the further occurrence of draining an already shrinking pool of small and minority and women-owned MVPD businesses.

VIII. EXCLUSIVITY BAN POLICY SUGGESTIONS

The desire of the Commission to create competition in the MVPD marketplace would be best served by creating a true feeling of a free market economy, for both the benefits of the consumer and the businesses in the space. Although, the Exclusivity Ban is a step in the right direction, it is a large step backwards for the market, as a whole. The inclusion of PCO's in the Exclusivity Ban will only cause the death of the one true competitive posture of the MVPD marketplace. As the MVPD space continues to shrink, in the face of continued mergers,

[16] See Id.

acquisitions and companies who are unable to compete, the landscape becomes less competitive and more monopolistic. Baby steps towards the creation of a competitive environment only exacerbate the lack of competition, and will make the number of choices smaller for the consumer. Instead, more broad sweeping changes to the competitive nature of the space will best serve the consumer. At the current pace of change, the consumer will be faced with a limited number of options, as the appearance of competition makes it more difficult for smaller companies to compete. The more difficult the landscape of the MVPD marketplace becomes, the more difficult it is for the smaller company to finance its' own existence,

Ultimately, the competition created by a robust and diverse multiplicity of providers, with the aid of narrowly tailored regulation, provide for an environment better suited for consumer choice, consumer focused programming, and consumer friendly prices. PCO's are the exact type of provider that is key to creating and maintaining such a diverse and flourishing marketplace. For one, PCO's are the prototypical "small business" that creates alternatives and provides for lower prices in the market. However, PCO's are also that small business that needs federal policies in place to help sustainability, particularly in an industry that is under mass conglomeration by larger providers. Further, PCO's speak to the voice of the people. Because of their size, PCO's are able to hear what residents of MDU's want and offer programming and packages that reflect the ethnicities, ages and needs of consumers who reside in MDU communities. Lastly, the PCO industry encompasses the last large group of minority and women-owned businesses existing in the MVPD marketplace. With a fundamental goal of the Commission to promote and advance minority ownership and diversity, the PCO industry is the one area that can attain and fulfill this ever important Commission objective. However, the only way for this unique and multifaceted industry to thrive and survive, is through the ability to either compete in the general marketplace, or through the continuation of exclusive agreements. Thus, Commission action to prohibit or drastically curtail new and existing exclusivity agreements for PCO's would result in less, not more, consumer choice, as smaller providers such as Wilco and hundreds of other small PCO's would be driven out of the market. This ultimately would impede competition and result in fewer options for building owners and or housing owners, thus fewer options for residential consumers.

Therefore, in review of the Exclusivity Ban, we urge the Commission to consider the unique nuances of the PCO industry as a clear point of delineation of the companies which should remain exempt from the Exclusivity Ban.

Wilco submits the following policy considerations to assist the Commission in delineating and opining on this legislation.

1. <u>Narrowly-Tailored Regulations</u>

The Commission should consider an exemption from the Exclusivity Ban for companies that can not cross the Public Right of Way, namely PCO's. As mentioned, companies that can not cross public rights of way are relegated to only serving the MDU market. Since these companies are highly limited to serving a niched marketplace and because of their regulatory status, not able to compete within the general MVPD space, the Commission should utilize this inability as a mechanism / carve out to delineate what providers should and should not be subject to the Exclusivity Ban. The period of carve out should be dictated by the length of time needed for such companies to recoup expenses and reap the investment of the distribution system. These exclusive agreements should be reflective of the Commission's considerations on the expense incurred by the company for serving the marketplace, and considerate of the need for economic success to service other areas.

2. Minority Media Ownership Opportunities

The Commission should consider and view the PCO industry as an opportunity to create, grow, and encourage minority media ownership. Commissioner Adelstein stated, "Given the crisis we face in ownership, we need real actions, not just token gestures. We need to heed the many calls from Congress and diverse voices across America who are demanding we act to improve women and minority ownership before, not after, we vote on media ownership rules." [17] Thus, due to the Commission's goals of advancing and promoting minority ownership, the PCO industry should be evaluated and sufficiently documented and tracked, of its minority ownership numbers. When the Commission considers legislation and commissions studies on minority ownership, in addition to the broadcast industry, PCO's should be included in these reviews. The Commission should enlighten and urge support from organizations such as the Minority Media Telecommunications Council and other relevant industry groups, about the ownership opportunities within the PCO industry. The Commission should additionally participate with industry Conferences and Summits advocating that the PCO industry is a viable area of growth and venture capital investment in regard to minority ownership opportunities.

[17] Statement by Commissioner Jonathan Adelstein in Response to the Deletion of the Minority Ownership Item from Today's Agenda. Dated November 27, 2007.

3. The Office of Communications Business Opportunities

The dissenting statements made by Commissioners Copps and Adelstein, in the Section 257 Triennial Report to Congress, expressed the need for the Office of Communications Business Opportunities ("OCBO") to take a more serious approach to developing opportunities for small, minority and women-owned businesses. The OCBO office should advocate and make recommendations in favor of legislations that will favor the sustainability and future growth of small businesses, and minority and women-owned businesses. The recommendations should mirror the regulations that are pending either against or in favor of small businesses. The OCBO should additionally meet formally with small businesses to attain the perspective of the small business market and how regulations can either help or hinder their growth. The OCBO should market favorable regulations or specific legislations as areas of growth for small and minority and women-owned businesses, to the Commissioners as well as the Commission's Bureau departments.

4. A PCO Advisory Group

The Commission should correspond with a small advisory group of PCO's, who operate within the market, to offer perspective and insight about the concerns and issues affecting PCO's and other small businesses in the MVPD marketplace. Since small cable operators face serious financial and technological resource constraints, this group will assist the Commission when in review of regulations that will impact small businesses, in particular PCO's. The group can meet quarterly with members of the Media Bureau or the OCBO. To attain a quality viewpoint to offer to the Commission, the PCO Advisory Group should be a diverse mix of size of company, ownership of company, and demographic of the community that the company serves. This group should be invited to attend all open hearings and have the opportunity to meet with Legal Advisors on issues adversely impacting small businesses and the PCO industry.

5. <u>The Re-opening of the Last Mile Rule</u>

The Commission should consider a true opening of the MVPD marketplace which would be more reflective of the success seen in the creation of competition in the Telecom arena. The creation of the "last mile" rule effectively allowed for the growth and creation of competition in the Telecom space. PCO's would greatly benefit from, as well as the consumer and intent of the Commission, the ability to serve the consumer in the general public, by compensating the MSO, LEC, CLEC or ILEC for carriage of the signal across the Public Right Of Way, to a point of demarcation. This would truly create competition and would also create additional opportunities for financial investment into the MVPD space. The consumer would benefit from increased choice, and many new innovative businesses would flourish. The consumers in the Telecom space have benefited greatly from the competitive nature of deregulation with the creation of companies, such as Cavalier and IDT, who have also spawned technical developments, to the benefit of the consumer. Those same types of benefits could be delivered to the MVPD space, if not solely dependent upon uptake by the five MSO's, who control the space, for their market success. Opening of the general marketplace, to PCO's, via a "last mile" rule, would potentially offer enough of a footprint to those companies, to allow their innovation sand development efforts to obtain a foothold.

CONCLUSION

For the foregoing reasons, Wilco respectfully submits that exclusivity agreements are not only paramount to the success, sustainability, and existence of smaller entities, in particular PCO's, but also promote advancement and opportunity for minority ownership. The use of exclusive agreements by PCO's allows us to provide positive benefits that cater to MDU residents, especially residents of color, and residents who live in real estate developments. Thus, the Commission should not act to prohibit PCO's from the positive use of exclusivity agreements, when as such they are beneficial, pro-competitive and pro-consumer. If the Commission nevertheless acts to limit such agreements, any such regulation should be narrowly-tailored and based upon the limitations and regulatory status of the provider(s).

Respectfully submitted,

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