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February 7, 2008

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

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

Dear Ms. Dortch:

On February 6, 2008, AT&T Inc. filed Comments with the Commission in response to the Commission's Further Notice of Proposed Rulemaking. Due to some minor typographical errors, attached please find a corrected version of the Comments. Please substitute this corrected version in the record for the version filed on February 6, 2008.

Thank you for your attention in this matter. If you have any questions, feel free to contact me at (202) 457-3058.

Sincerely,

/s/ Christopher M. Heimann

**Before the
Federal Communications Commission
Washington, D.C. 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 AT&T INC.

Pursuant to section 1.415 of the Commission’s rules, 47 C.F.R. 1.415, AT&T Inc. (“AT&T”) respectfully submits these comments in response to the Commission’s Further Notice of Proposed Rulemaking in the above-referenced docket.¹

In section 601 of the Communications Act, Congress established a set of overarching objectives to guide Commission policy with respect to video services. Among other things, Congress directed the Commission to “assure . . . the widest possible diversity of information sources and services to the public.”² And, in section 628, Congress further mandated that the Commission, *inter alia*, adopt policies and rules, to promote the public interest, convenience and necessity by increasing competition and diversity in the multichannel video programming distribution market and to spur the continuing development of communications technologies.³

In the *MDU Exclusivity Order*, the Commission took vital steps to fulfill Congress’s mandate by prohibiting the enforcement of existing exclusivity clauses and the execution of new

¹ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007) (“*MDU Exclusivity Order*”).

² 47 U.S.C. § 521(4).

³ 47 U.S.C. § 548(a), (c).

ones by multichannel video programming distributors specifically identified in section 628 – including cable operators and common carriers providing video programming directly to subscribers.⁴ The Commission found that the inclusion of such clauses in agreements between MVPDs and MDU owners was widespread, and increasing with the increasing entry of wire-based competitors (such as LECs) in the MVPD marketplace.⁵ The Commission reasonably concluded that, under existing conditions, execution and enforcement of such clauses by incumbent providers of multichannel video services effectively preclude new entrant MVPDs from competing and offering an alternative source of video services and information to MDU residents,⁶ contrary to Congress’s stated objective of assuring “greater diversity of information and entertainment from more sources.”⁷ The Commission found that is particularly so for new wireline providers of multichannel video services (such as LECs) due to the economics of offering a wire-based alternative to incumbent cable services, including the significant up-front investment necessary to deploy fiber to reach potential subscribers and the potential, inefficient underutilization of that investment if a new entrant cannot offer potential subscribers a full suite of voice, video and Internet access services.⁸ The Commission thus found that such clauses not only were inconsistent with Congress’s goal of promoting diverse sources of video services but also its objective of encouraging deployment of broadband and advanced telecommunications capability to all Americans.⁹

⁴ *MDU Exclusivity Order* at ¶ 1.

⁵ *Id.* at ¶¶ 10, 27.

⁶ *Id.* at ¶ 27.

⁷ *Id.* at ¶ 17.

⁸ *Id.* at ¶ 19.

⁹ *Id.* at ¶ 47 (citing section 706 of the Telecommunications Act of 1996).

While the Commission's prohibition of execution and enforcement by certain MVPDs of exclusivity clauses in contracts between MDU owners and those MVPDs specifically named in section 628 was a necessary first step, it was by no means sufficient to achieve congressional objectives. As the Commission observed in its most recent *Video Competition Report*, "[t]he incumbent provider is not necessarily the incumbent cable operator. Private cable operators are the incumbent video provider for many MDUs."¹⁰ But regardless of whether the incumbent MVPD at an MDU is a cable operator or a provider using some other technology (such as a DBS provider or PCO), the impact of that incumbent's ability to foreclose new entry by alternative providers is the same. In either case, execution or enforcement of exclusivity arrangements by the incumbent would effectively preclude a new entrant (particularly a wireline new entrant that does not benefit from the Commission's OTARD rules) from offering an alternative source of video services and information to MDU residents, as well as impede broader deployment of fiber and broadband services to all Americans. Thus, irrespective of the technology used by the incumbent (*i.e.*, cable, DBS or a satellite master antenna system), execution and enforcement by an incumbent of exclusive access arrangements would be contrary to Congress's twin goals of promoting diverse sources of video services and promoting broadband deployment.

Incumbents using such other technologies (such as PCOs and DBS providers) surely will argue (and indeed have argued in comments and *ex partes* in prior rounds of this proceeding) that such arrangements are necessary to ensure a predictable return on investment and thus justify investment in facilities to serve MDUs. But, as AT&T previously has observed, these claims are

¹⁰ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, 21 FCC Rcd 2503, ¶207 (2006).

vastly overstated.¹¹ Numerous alternative providers of multichannel video services (including small-to-medium providers, like SureWest and Embarq, as well as larger providers like AT&T¹²) have made or expressed a willingness to make the investment necessary to serve MDUs without the guaranteed stream of revenues that can be achieved through exclusivity arrangements. Plainly, Congress's goals of promoting diverse sources of video services and further broadband deployment would be better achieved, and the public (particularly residents of MDUs) better served, by ensuring that incumbent MVPDs cannot bar access to MDUs to new entrants willing to invest and offer alternative video and broadband services to MDU residents without the "protection" of exclusive access arrangements, rather than propping up inefficient competitors. Accordingly, the Commission promptly should extend the prohibition against exclusivity clauses to all MVPDs, and not just those specifically named in section 628.

There can be little doubt that the Commission has authority to extend the exclusive access prohibition to all MVPDs, as AT&T proposes. As the Supreme Court has long recognized, the Commission has expansive authority under sections 1, 2(a), 4(i), 201(b) and 303(r) to regulate video services, and "issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."¹³ So too, the Commission has acknowledged that "Congress delegated to the Commission the task of administering the Communications Act," and granted

¹¹ See Reply Comments of AT&T Inc., MB Docket No. 07-51 at 9-14 (filed Aug. 1, 2007) (*AT&T Reply Comments*).

¹² *Id.* at 12. In the interests of competitive neutrality, AT&T has strenuously advocated adoption of rules applicable to all MVPDs that would prohibit execution or enforcement of exclusive access arrangements. *Id.*; Comments of AT&T Inc., MB Docket No. 07-51 at 13-15 (filed Jul. 2, 2007) (*AT&T Comments*).

¹³ *United States v. Southwestern Cable Co.*, 392 U.S. 157, 181 (1968); see also *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979); *Capital Cities Cable v. Crisp*, 467 U.S. 691, 700 (1984) (holding that the Commission's authority to regulate cable services extends "to all regulatory actions necessary to ensure achievement of the Commission's statutory responsibilities").

the Commission both “broad responsibility to forge a rapid and efficient communications system, and broad authority to implement that responsibility.”¹⁴

The courts have routinely upheld the Commission’s authority to promulgate rules to promote video competition and deployment pursuant to section 303(r) and other provisions of the Act, and, indeed, did so well-before Congress granted the Commission express authority and jurisdiction over cable services in the Cable Act. As the D.C. Circuit explained, “[t]he Commission’s power under Section 303(r)” extends to all “rules that the Commission has found necessary to carry out its mandate under the Communications Act” that are “reasonably adopted in furtherance of a valid communications policy goal.”¹⁵ Section 201(b) likewise grants the Commission broad authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.”¹⁶ And the Supreme Court has emphasized that section 201(b) “means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act.’”¹⁷

In the Cable Act, Congress granted the Commission explicit jurisdiction and authority over “cable services,”¹⁸ and, as noted above, specifically charged the Commission with exercising that authority, *inter alia*, to “provide the widest possible diversity of information sources and services to the public.” Since then, courts repeatedly have affirmed that both sections 201(b) and 303(r), as well as section 4(i), grant the Commission rulemaking authority

¹⁴ *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television and Consumer Protection Act of 1992*, MB Docket No. 05-311, Report and Order & Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, ¶ 54 (2007) (*Franchising Reform Order*) (quoting *Southwestern Cable*, 392 U.S. at 167-68).

¹⁵ *United Video v. FCC*, 890 F.2d 1173, 1183 & n. 4 (D.C. Cir. 1989).

¹⁶ 47 U.S.C. § 201(b).

¹⁷ *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

¹⁸ 47 U.S.C. § 152(a).

over services and matters governed by the Cable Act, as well as “broad authority to take actions that are not specifically encompassed within any statutory provisions but that are reasonably necessary to advance the purposes of the Act.”¹⁹ As discussed above, and as the Commission recognized in the *MDU Exclusivity Order*, rules prohibiting incumbent MVPDs from executing and/or enforcing exclusive access arrangements in agreements with MDU owners would directly promote congressional objectives and thus are well within the Commission’s broad rulemaking authority to ensure that the objectives of the Act are met. That is particularly so with respect to those incumbent MVPDs (such as DBS providers and SMATVs) offering video services pursuant to Commission authorizations (such as satellite and earth-station licenses) granted consistent with the public convenience, interest and necessity.

Finally, the Commission independently is required under section 706 of the Act to take action to encourage deployment of broadband and other advanced telecommunications services by “utilizing measures that promote competition . . . or other regulating methods that remove barriers to infrastructure investment.”²⁰ That mandate is particularly relevant here, insofar as the Commission has already acknowledged that “the ability to offer a viable video service is ‘linked

¹⁹ *Continental Airlines; Petition for Declaratory Ruling Regarding the Over-the-Air Reception Devices (OTARD) Rules*, ET Docket No. 05-247, Memorandum Opinion and Order, 21 FCC Rcd 13201 at n. 112 (2006), citing *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (upholding Commission's exercise of ancillary jurisdiction pursuant to Section 201(b)); *United States v. Southwestern Cable*, 392 U.S. 157 (1968) (upholding the Commission's authority to regulate cable television); *National Broadcasting Comm'n v. United States*, 319 U.S. 190, 219 (1943) (Congress "did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency"); *North American Telecomm. Ass'n v. FCC*, 772 F.2d 1281, 1292-93 (7th Cir. 1985) ("Section 4(i) empowers the Commission to deal with the unforeseen even if [] that means straying a little way beyond the apparent boundaries of the Act--to the extent necessary to regulate effectively those matters already within the boundaries") (citations omitted). See also *City of New York v. FCC*, 486 U.S. 57, 70 n.6 (1988) ("§ 303 of the Communications Act continues to give the Commission broad rulemaking power 'as may be necessary to carry out the provisions of this chapter,' 47 U.S.C. § 303(r), which includes the body of the Cable Act as one of its subchapters."); *City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999) ("[w]e are not convinced that for some reason the FCC has well-accepted [rulemaking] authority under [section 201(b)] but lacks authority to interpret [section 621 of the Cable Act] and to determine what systems are exempt from franchising requirements").

²⁰ 47 U.S.C. § 157 nt.

intrinsically' to broadband deployment,"²¹ and that enforcement by incumbent MVPDs of exclusivity clauses in agreements with MDU owners effectively preclude new entrants (particularly wireline new entrants) from offering alternative sources of video services and information to MDU residents, thereby impeding broader deployment of fiber and broadband services.²²

The Commission thus has authority to extend the MDU exclusive access prohibition to all MVPDs, and should do so without delay.

Respectfully submitted,

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²¹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket Nos. 07-29 and 07-198, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 17791, ¶ 116 (2007) (*Program Access Extension Order*) (citations omitted).

²² *MDU Exclusivity Order* at ¶ 19.