

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

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

COMMENTS OF THE REAL ACCESS ALLIANCE

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Summary

The Real Access Alliance (the “RAA”) strongly opposes Commission regulation of exclusive contracts related to the provision of video services in multiple dwelling unit (“MDU”) buildings and other real estate developments. Such regulation would deprive property owners of a valuable tool for providing residents – who are their customers – access to the kinds of services they demand, and would exceed the Commission’s authority. The Commission has recognized in the past that exclusive agreements can help advance competition in particular cases. This remains true today, and the Commission should not change its policy. There is no market failure here that would justify government intervention.

The central issues raised by this proceeding concern the economics of building communications networks: who will pay for the facilities needed to bring competitive voice, video and data services to apartment residents, and who will get the benefit of those facilities first? Cost allocation and timing are the two key considerations that drive the decision-making of both service providers and property owners. Property owners and service providers use exclusive contracts to their mutual benefit to allocate the costs of network construction. Without the ability to recover some of their construction costs through exclusive contracts, property owners would have less incentive to assume the cost and risk of installing advanced wiring systems in their buildings. Conversely, when dealing with owners that are not prepared to assume such costs and risks, permitting such agreements gives service providers greater incentive to upgrade existing facilities or install facilities in new buildings, especially in smaller properties and properties with less affluent residents. Exclusive agreements thus advance the Commission’s goals in this area by encouraging deployment of new facilities.

The Notice of Proposed Rulemaking (“NPRM”) is open-ended, proposing no specific rules, and stating no goals beyond a general concern with promoting competition. If the Commission’s goal is to introduce two-wire competition into every home in America, banning or regulating exclusive contracts is not the answer, unless it is to be coupled with an enforceable obligation to serve every customer, regardless of location, upon request. Regulation of exclusive contracts would interfere with the rights of property owners and discriminate in favor of providers, but it alone would not achieve the goal of universal competition, because providers would retain the right to decide which services to provide in which locations.

Of course, mandating two-wire competition through a universal service duopoly scheme (even if the Commission had such broad power) would fail because it would interfere with the cost allocation and timing decisions currently made by the market. Providers could not possibly construct or upgrade facilities simultaneously in every building or development that required it. A mechanism would still be needed to decide where to extend facilities and when to do it, but those decisions would no longer be controlled by the persons making the investments. Exclusive contracts may not be a perfect mechanism for making those decisions, but on the whole that mechanism – with property owners and service providers jointly making the investment decisions – works better than any regulatory mandate ever could.

Property owners object to the concept of Commission regulation of exclusive agreements particularly strongly because providers should be encouraged to negotiate with property owners to reach mutually beneficial agreements, rather than to seek one-sided benefits through the regulatory process. There are over 500,000 apartment buildings in the United States, with hundreds more being built every year. Many of those buildings are unlikely to benefit from competitive entry in the short to mid-term, if ever, no matter what the Commission does. This is

not the fault of property owners. Instead of seeking government help, competitive providers should concentrate on listening to property owners, understanding their concerns, and working with them to make high quality, reliable services available to residents. As such providers earn the trust of other market participants, they will increase their access to the market.

In addition to ensuring efficient cost allocation, exclusive agreements allow property owners to obtain a variety of benefits for their residents. Such agreements often contain quality of service commitments designed to ensure high-quality service to residents. Agreements also may provide for specific services tailored to the needs of a community, such as particular programming packages, special community channels, and free service in common areas. These benefits would be lost if the Commission were to interfere, because service providers would have no incentive to agree to such terms.

The Commission will also need to distinguish among three different types of exclusivity. Agreements between property owners and service providers may grant exclusive marketing rights, exclusive rights to use inside wiring, or exclusive rights to serve or install facilities in a building. The NPRM does not distinguish among these three, although it seems to be most concerned with the last. Exclusive marketing and exclusive access to wiring rights do not preclude access and service by competitive providers. Therefore, there is no reason for the Commission to regulate them at all. Exclusive access agreements should not be banned, not only because of their utility for broadly promoting installation of up-to-date facilities, but because the only way to make such a ban effective would be to mandate access on specified terms. Such a rule would violate the takings clause of the Fifth Amendment.

More fundamentally, the Commission has no authority over any form of exclusive agreements between property owners and video programming providers. The Commission's

jurisdiction is limited by the language of Sections 1 and 2 of the Communications Act, which do not refer to property owners or agreements for the use of real property. The courts have repeatedly found that the Commission must be able to point to express authority over a subject if it is to regulate the activities of entities that are not engaged in the provision of communications services, such as apartment owners. Section 207 of the Telecommunications Act of 1996, for example, permits Commission regulation of apartment owners because it expressly directed the Commission to adopt rules preempting restrictions on the installation of direct broadcast satellite antennas. Congress has not adopted any statute analogous to Section 207 that would allow it to regulate any kinds of contracts between property owners and video programming providers.

The NPRM points to various statutes for authority, including Sections 623 and 628 of the Communications Act and Section 706 of the Telecommunications Act of 1996, but none of those statutes expressly permits the Commission to regulate any kind of agreement between a property owner and a video programming provider. In particular, Section 628, the principal statute cited to support the NPRM's tentative conclusion, is clearly inapposite, under the Commission's own prior rulings. Section 628 has never been understood to apply to anything other than contracts in which cable operators make programming delivered by satellite available to video programming distributors. The Commission itself has even refused to extend the statute's reach to programming delivered by terrestrial means.

Furthermore, the Commission's ancillary jurisdiction does not extend to entities that are not engaged in the communications business. The purpose of ancillary jurisdiction is to fill in gaps in the Commission's statutory authority, not to expand its authority to unregulated entities. The Commission has no ancillary authority in this case.

The Commission cannot avoid its lack of authority by attempting to regulate only the service provider. An agency cannot do indirectly what the law prevents it from doing directly.

Finally, the Commission must not consider the issues raised in the NPRM in isolation. The Commission should instead consider reviewing the scope and application of its current inside wiring rules, both cable and telecommunications, and resolving inconsistencies between them. The Commission must also bear in mind that, despite their special pleading, the incumbent local exchange carriers (“ILECs”) have substantial advantages in obtaining access to buildings. Not only do they have existing access rights, but the need and demand for their brand-name voice services, while perhaps diminishing, still gives them substantial power in discussions with property owners. To the extent that the Commission has been swayed by complaints about the behavior of certain cable operators, the Commission should understand that the ILECs do not come to the Commission with clean hands.

The RAA fears that ill-considered regulatory intervention would not only fail to advance the Commission’s goals, but in the end harm competition. The ILECs do not need regulatory assistance, and regulation founded on the assumption that they do merit relief will actually strengthen a hand that is already far stronger than the NPRM seems to recognize. Many buildings in this country may never be served by more than one broadband provider, and now that the ILECs are entering that marketplace they may develop the opportunity to establish near-monopoly control over certain sectors of the market.

The RAA urges the Commission to recognize its past wisdom, and once again refrain from attempting to regulate agreements between apartment owners and providers of video programming.

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COMMENTS OF THE REAL ACCESS ALLIANCE

Introduction

The Real Access Alliance (the “RAA”)¹ respectfully submits these Comments in response to the Commission’s Notice of Proposed Rulemaking (the “NPRM”). The NPRM solicits comment on “the use of exclusive contracts for the provision of video services to multiple dwelling units or other real estate developments.”² The Commission has previously concluded that such agreements can help promote competition and should not be regulated.³ This remains true today. Furthermore, property owners rely on such agreements to ensure that their residents have access to high-quality and reliable voice, video, and data services. Exclusive

¹ A description of the RAA and its members is attached hereto as Exhibit A.

² NPRM at ¶ 1.

³ *Telecommunications Service Inside Wiring, Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342 (2003) (*2003 Inside Wiring Order*), at ¶¶ 59-71.

agreements of various kinds are a vital market mechanism for allocating costs between property owners and service providers, and for establishing priorities for investing scarce capital.

More fundamentally, the Commission has no authority over such agreements. In particular, we emphasize at the outset that the principal statute cited to support the NPRM's tentative conclusion that the Commission has jurisdiction over such agreements is clearly inapposite, under the Commission's own prior rulings. 47 U.S.C § 628 has never been understood to apply to anything other than contracts in which cable operators make programming delivered by satellite available to video programming distributors, and the Commission has gone so far as to refuse to extend the statute's reach to programming delivered by terrestrial means.⁴ There is no legal basis for the tentative conclusion in the NPRM, and no legal or factual basis for this proceeding.

Property owners are perfectly willing to work together with service providers for the mutual benefit of the property owner, the provider, and their customers – but property owners object strongly to the idea that federal regulation is needed in this area. Property owners particularly object to the prospect of being forced to make their property available at regulated terms, when service providers, cable operators and incumbent local exchange carriers (“ILECs”) alike, insist on retaining complete control over their networks. This kind of industrial policy is inequitable, imposes hidden costs on property owners and their residents, and is contrary to the spirit of free enterprise. Accordingly, the RAA urges the Commission to abandon its attempt to regulate agreements between providers of video programming services and owners or managers of residential buildings.

⁴ *DIRECTV v. Comcast*, 15 FCC Rcd 22802 (2000), *aff'd sub nom. EchoStar Comm'ns Corp. v. F.C.C.*, 292 F.3d 749 (D.C. Cir. 2002).

I. THE COMMISSION SHOULD ALLOW MARKET FORCES TO WORK BECAUSE APARTMENT OWNERS BENEFIT FROM AND WANT COMPETITION FOR THEIR RESIDENTS.

As the RAA has repeatedly advised the Commission in other proceedings, building owners are keenly aware of the advantages of competition for the provision of communications services.⁵ This is as true of apartment owners as of any other class of property owner. Apartment owners are in the business of creating and maintaining attractive places for people to live.⁶ Owners want to retain existing residents, and attract new ones. Anything that encourages residents to stay is valuable, and anything that encourages them to leave is a potential problem. Owners must be sure that access to reliable voice, video, and broadband services is available because potential apartment residents demand them. Competitive services make a property even more attractive. In principle, therefore, owners support competition and would prefer that their residents have access to multiple providers.⁷ In practice, however, providing for such access is not a simple matter.

The Commission must bear in mind that the real estate industry is highly diverse, fragmented, and competitive. Apartment owners are subject to intense market pressure. There

⁵ Many of the legal issues and factual questions raised by this proceeding have been addressed directly or by analogy in prior RAA submissions to the Commission. A list of those submissions is attached as Exhibit B and hereby incorporated by reference.

⁶ The NPRM invited comment on the use of exclusive contracts in multiple dwelling units (“MDUs”) and “other real estate developments.” These comments primarily address the questions in the NPRM from the perspective of apartment owners, because in terms of the residential real estate market the members of the RAA primarily represent the apartment industry. The same legal principles and policy arguments, however, generally apply to other classes of properties and property owners as well. Thus, although the NPRM did not define “other real estate developments,” these comments also apply to them.

⁷ For example, a consortium of apartment owners recently completed lengthy negotiations with Verizon on the terms of a standard form agreement for access to their buildings.

are over 500,000 apartment properties⁸ in the country, and over 17,000,000 apartment units. There are also literally thousands of apartment property owners in the country. The 50 largest apartment owners combined own only 15.7% of the apartment units in the country.⁹ And approximately 50% of apartment residents move each year.¹⁰ This means three things. First, individual apartment building owners have no market power.¹¹ Second, owners compete fiercely to attract tenants. And third, property owners may differ in their approaches to addressing common issues. Over time, those owners that make the most rational decisions will be the most successful at attracting and retaining tenants. Effective property management decisions will take into account the location of the property, its age, size and type of construction, the demographics of the market, and many other issues. Among those other issues – in the context of delivery of competitive video and broadband services – will be the various costs associated with installing wiring on a property in different scenarios. There are no uniform solutions, and in a free market economy apartment managers can and should be left to make their own decisions about how to meet their tenants’ needs.

Moreover, property owners face significant external constraints on the ability to make competitive services available. Chief among these, as the RAA has advised the Commission in

⁸ Defined as a building with five units or more. *Preparing for a Rental Housing Boom, 2006 National Multi-Housing Council Annual Report* (2006), at p. 2.

⁹ For the 50 largest apartment owners and the total number of units owned by each see “Top 50 Apartment Owners” at www.nmhc.org. That total was 2,667,051 units as of Jan. 1, 2007. For total number of apartment properties and units (excluding public housing) see Quick Facts: Apartment Stock at www.nmhc.org. That figure is 17.5 million.

¹⁰ Institute of Real Estate Management, *Income Expense Report* (2006).

¹¹ In 1996, the Federal Trade Commission modified its pre-merger notification rules to exempt the real estate industry. *Premerger Notification, Reporting and Waiting Period Requirements*, 61 Fed. Reg. 13666, 13674 (Mar. 28, 1996). The FTC concluded that the real estate industry was sufficiently competitive that no single entity is likely to have enough market concentration to trigger antitrust concerns.

the past, is the economics of the communications industry.¹² If a communications provider is to bear the capital expense of installing its facilities in a building, it must be able to justify that expense, and the presence of other providers makes that equation more complicated and the building less desirable. Service providers weigh carefully the cost of installing new facilities in buildings, and the presence of a competitor in the building is always a central factor in that analysis. Competitive providers are as attuned to revenue, cost, and demographic considerations as are property owners. Competitive providers are interested first and foremost in access to properties with a high proportion of higher income customers and least interested in serving income-assisted properties and other buildings with less affluent demographics. The Commission should not imagine that the ILECs and other competitive providers of video and broadband services are prepared to install or upgrade facilities in every building in the country or even in a majority of such buildings, or that the only barrier to such competition is the existence of exclusive agreements.

In fact, viewed strictly from the regulatory perspective, the most logical thing for the Commission to do to advance the availability of competitive services inside MDUs would be to require service providers to serve any building at their expense upon the request of the property owner.¹³ Regulation of exclusive contracts would interfere with the rights of property owners and favor providers – or perhaps certain specific providers – but it alone would not achieve the

¹² See, e.g., *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Further Comments of the Real Access Alliance (filed Jan. 22, 2001) at iii, 8-24, 61-64.

¹³ Or the Commission could mandate the technology to be used by all providers, provide government funding to pay for the deployment of that technology in every apartment building, and require that every provider be permitted to connect its facilities to the common infrastructure. Of course, this approach is no more practical than mandating universal service, but it would be more effective than taking away property owners' bargaining power by regulating exclusive contracts.

goal of universal competition, because providers would retain the right to decide which services to provide in which locations.

Of course, mandating two-wire competition through a universal service duopoly scheme (even if the Commission had such broad power) would fail because it would interfere with the cost allocation and timing decisions currently made by the market. Providers could not possibly construct or upgrade facilities simultaneously in every building or development that required it. A mechanism would still be needed to decide where to extend facilities and when to do it, but those decisions would no longer be controlled by the persons making the investments. Exclusive contracts may not be a perfect mechanism for making those decisions, but on the whole that mechanism – with property owners and service providers jointly making the investment decisions – works better than any regulatory mandate possibly could.

Furthermore, just as apartment owners must respond to resident demands for video services, they must also balance those demands against the other concerns and demands of residents. Residents base their decisions about where to live on a range of factors, including among many others, the aesthetic characteristics of the building, and the complete package of amenities the building offers – not to mention the critical factor of the amount of the rent. Introducing a competitive provider into a building offers a clear benefit, in the form of a competitive choice for residents, in those cases in which the economics of serving the building can support more than one provider. But residents also care – and will complain about – disruption caused by installation work, poor service if the new provider does not measure up to expectations, deterioration in the appearance of the property if installation and repair is not done

properly, and other potential problems.¹⁴ Furthermore, as discussed in detail at Part II, below, there are benefits to exclusive contracts that must be considered as well.

If residents are unhappy with the amenities on offer, they will not rent, or they will move out. The loss of a tenant is far more harmful to the building owner than any direct benefits it might obtain from having an exclusive arrangement that does not serve the residents' needs.¹⁵ That market discipline, rather than any potential Commission rules governing exclusive contracts with MDUs, is the best means of ensuring that building owners and video services providers satisfy the communications needs of MDU residents.

II. EXCLUSIVE CONTRACTS TAKE VARIOUS FORMS, AND SERVE VITAL BUSINESS PURPOSES.

A. The Commission Must Understand the Differences Among Different Types of Exclusive Agreements.

The NPRM suggests some confusion about the precise object of its concern. The NPRM first refers to exclusive contracts for the “provision of video services” in MDUs.¹⁶ This suggests a concern with the terms of service to residents, but then the NPRM refers to the Commission’s earlier proceedings addressing exclusive contracts for “access to inside wiring” in MDUs.¹⁷ The

¹⁴ The Commission recently and correctly recognized an important aspect of this problem in *Telecommunications Service Inside Wiring, Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring; Clarification of the Commission’s Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers*, Inside Wiring Sub-loop, CS Docket No. 95-184, MM Docket No. 97-260, WC Docket No. 01-338, Report and Order and Declaratory Ruling, FCC 07-111 (rel. Jun. 8, 2007) (“*2007 Inside Wiring Order*”). Just as property owners face pressure from residents to provide good services, they face countervailing pressures regarding the consequences of providing such services.

¹⁵ Declaration of Chris Acker in Support of the Comments of the Real Access Alliance (“Acker Decl.”) attached as Exh. C, at ¶ 14.

¹⁶ NPRM at ¶ 1.

¹⁷ *Id.* at ¶¶ 2, 3.

NPRM next discusses “access” and “exclusivity” without specifying what kinds of which arrangements are of concern,¹⁸ but that discussion suggests that the Commission is concerned about physical access to MDU buildings as a whole. The balance of the NPRM expresses equally vague concerns about exclusive contracts and access.

We presume that the real focus of the NPRM is on agreements granting exclusive physical access or exclusive rights to provide service in a building, but the NPRM’s vague references to “exclusive contracts” leave the impression that all “exclusive” contracts are alike and have the same effects on competitors’ ability to serve residents of a property. In reality, there are at least three different types of potential exclusivity arrangements between communications services providers and residential building owners: (1) exclusive marketing arrangements; (2) exclusive access to wiring arrangements; and (3) exclusive building access arrangements. Although one or more types of arrangements may be combined in a single agreement, each type of arrangement has a different business rationale and offers different benefits to the parties. We urge the Commission to keep these differences in mind because each type of arrangement also raises different legal issues. In order to ensure that the Commission has a clear and complete record, we will describe the characteristics and effects of each type of agreement.

1. Contracts giving exclusive marketing rights.

Exclusive marketing agreements are a common form of exclusivity arrangement between a building owner and a video services provider. Although the details can vary, the basic bargain in this type of arrangement is for the building owner to agree to serve as a marketing representative of the video services provider – that is, the building management markets the

¹⁸ *Id.* at ¶ 5.

video services provider's service offering to its prospective tenants on an exclusive basis – in exchange for certain benefits, which can include cash compensation, as well as other specifically negotiated commitments. Both parties benefit from the provider's agreement to provide services in the building, but there is no necessary connection between the right to provide services and the exclusive marketing arrangement.¹⁹

These arrangements are not unlike other forms of marketing efforts by communications providers. Their purpose is to try to encourage potential customers to buy the company's product. Typical arrangements impose the following types of obligations on property owners:²⁰

- Putting information about the provider's service in the prospective resident package.
- Telling prospective tenants that the provider's service is available in the building.
- Putting a link to the provider's website on the building owner's website to facilitate signing up for the provider's service.
- Allowing the provider to conduct on-site marketing events and other promotions.

The exclusivity term prevents the building owner only from marketing the services of other providers in the building. Thus, if another provider has access to the property, that provider can serve residents, and the property owner has no legal obligation to bar that activity.

¹⁹ Note in particular that access rights can easily be severed from marketing rights. Should the Commission try to regulate access rights, an effective regulatory scheme would also probably require regulating the marketing relationship, which in turn would raise a different set of questions about the source and scope of the Commission's legal authority.

²⁰ Acker Decl. at ¶¶ 11, 12, 16; Declaration of Stephen J. Sadler in Support of Comments of the Real Access Alliance, attached as Exhibit D ("Sadler Decl."), at ¶¶ 4, 14-22.

2. Contracts giving exclusive access to wiring.

There is more than one way to divide up the ownership of the physical components of the system needed to deliver services to the ultimate subscriber living in an apartment building. In those situations in which the building owner actually owns the wiring in the building and it is compatible with the video services provider's existing system, the video services provider may wish to use that wiring to provide its service to building residents. Another form of "exclusive" arrangement is therefore an agreement that grants a service provider the exclusive right to use wiring in a building. The basic bargain in this type of arrangement requires the building owner to let the service provider use its wiring on an exclusive basis in exchange for specified compensation.

3. Contracts giving exclusive access to a building.

The last type of arrangement is one involving exclusive access to a building. In this case, only one video provider is permitted to provide service to the building for a specified time period because the property owner has agreed to deny all other providers physical access to the building, or has agreed that only the preferred provider has the right to provide the specified service or services in the building.²¹ In return for exclusivity, the property owner sometimes receives the same types of compensation provided for in exclusive marketing arrangements. Exclusive access is typically a requirement of bulk service arrangements, in which the property owner pays the service provider a bulk fee for service in the building, and the cost of that service is passed on to residents in their rent. Bulk service agreements are relatively rare in the apartment industry, but we note them here because the Communications Act expressly permits

²¹ Declaration of Kent McDonald in Support of Comments of the Real Access Alliance ("McDonald Decl.") at ¶ 4; Acker Decl. at ¶ 4.

bulk service agreements.²² Most exclusive access agreements in apartment buildings allow individual residents to decide whether to subscribe and pay the service provider directly for the requested service. Depending on the desirability of the building to the service provider, and the property owner's negotiating skill, the agreement will also contain additional terms.

B. Reliance on Different Types of Exclusive Agreements Varies Significantly.

The RAA does not have statistics on the number of exclusive agreements that may exist, or the proportion of such agreements that may provide for any particular form of exclusivity. We can say that practices vary from company to company and property to property, based on a range of factors.

The RAA did gather information from apartment owners for purposes of preparing these comments;²³ but an analysis of that information did not present a uniform picture. If anything, it emphasizes the wide variation in approaches in the market place. We can say the following, in general terms:

- Property owners uniformly report that service providers, not property owners, regularly request exclusivity of some type. All types of service providers – franchised cable operators, private cable operators, and telephone companies – routinely request or even demand exclusivity of some kind.

²² 47 U.S.C. § 543(d).

²³ The RAA submitted a questionnaire to a selected group of large apartment owners. Eleven companies representing approximately 700,000 apartment units responded in some fashion. In addition, the RAA has provided the Commission with statements from representatives of three of these companies, describing their approach to the agreements with service providers, and their practical, every day experience in the marketplace.

- Based on very limited data,²⁴ we estimate that no more than half of the apartment buildings in the country are subject to some form of exclusive agreement. This figure varies substantially from owner to owner.
- It is difficult to say which form of exclusivity predominates, if any, because many agreements provide for more than one type, because we were not in a position to actually analyze every potentially relevant provision, and because a given property might be subject to easements or state laws that create or promote exclusivity.
- Some service providers seem to insist on exclusive building access agreements, while others request only exclusive marketing rights.
- In general, property owners prefer exclusive marketing agreements. Some property owners have a policy of refusing to grant exclusive access to buildings; some are more successful than others in effectuating that policy, depending on the providers they deal with. Other property owners have no policy, but will discuss whatever terms a provider requests.
- The terms of exclusive agreements vary substantially, typically between 5 and 10 years.

C. Exclusive Agreements Are Valuable Tools for Allocating Costs Between Providers and Property Owners.

The most important factor governing the use of exclusive agreements has to do with paying for and retaining control over the use of inside wiring. Because of the large number of

²⁴ We have no information at all on buildings with fewer than five units, or on buildings owned by small property owners. The characteristics of these buildings might not differ from those of the larger property owners we contacted, but we have no information either way.

property owners and the enormous number of individual properties in the country, there is great variation in the market as to the management of inside wiring in apartment buildings.

Historically, property owners have not considered themselves to be providers of either telephone or cable services, and have seen little benefit in investing in inside wiring facilities, particularly in view of the constant changes in technology. Consequently, the inside wiring for both cable and telecommunications services in apartment buildings is frequently the property of the respective providers. The Commission's two sets of inside wiring rules have been designed to both recognize and address this fact.

Nonetheless, service providers would just as soon not bear the capital cost of installing inside wiring if they can help it. This means that allocating the costs of inside wiring is a fundamental issue in discussions between apartment owners and service providers. Exclusive contracts are the principal method for dealing with this issue. The exact form and function of the exclusivity arrangement will depend on the particular strategies the property owner and the provider have chosen, as well as the characteristics of a particular building.

Historical industry practices notwithstanding, some property owners have come to the conclusion that they can best manage their properties if they install, own, and manage all the wiring in their buildings. These owners have elected to assume the considerable expense of installing structured wiring systems at the time of initial construction (or in some cases, rehabilitation) because it gives them control over the quality of the work and reduces subsequent complaints from residents about poor service; and because it gives them the ability to change providers if the incumbent is doing a poor job, without having a dispute over who owns the wiring.²⁵ Other owners still prefer a more traditional approach, in which the provider installs the

²⁵ Acker Decl. at ¶¶ 6-9, 12; Sadler Decl. at ¶¶ 10, 20.

wiring.²⁶ To further complicate matters, some apartment owners construct and manage their own buildings, some buy and manage existing properties, and some do both. An owner's approach to agreements with service providers can thus depend on a number of factors. In general, however, exclusive agreements are highly valued by property owners as a way of allocating the cost of wiring, as well as a means of attracting a provider that will offer high quality services. Building owners that install sophisticated structured wiring systems to support advanced services rely on exclusive arrangements to recoup some of their costs from the providers. Conversely, building owners that require service providers to install wiring must often grant exclusivity to induce the service providers to bear those costs.²⁷

Providing the communications infrastructure to support video services and other communications services to MDU residents comes at a significant and increasing cost. In new buildings, installing a sophisticated structured wiring system can cost as much as \$1500 per unit. Wiring upgrades in existing buildings cost just as much, or more.²⁸ These costs do not include the cost of the space assigned to the facilities.²⁹ Nor do these costs include the costs that providers incur to install their equipment and facilities to bring their system to the building.³⁰

Building owners that install their own wiring typically seek per unit reimbursement of at least a portion of these costs in the form of "door fees" from the service providers.³¹ Providers

²⁶ McDonald Decl. at ¶¶ 7-8.

²⁷ Acker Decl. at ¶¶ 9-10; Sadler Decl. at ¶¶ 11-13; McDonald Decl. at ¶ 8.

²⁸ Acker Decl. at ¶ 8; Sadler Decl. at ¶ 8.

²⁹ Acker Decl. at ¶ 8; Sadler Decl. at ¶ 8.

³⁰ Acker Decl. at ¶ 8; Sadler Decl. at ¶ 9.

³¹ Sadler Decl. at ¶ 13.

typically demand some form of exclusivity – either marketing, access to wiring, or access to the property – in exchange for the payment of these door fees.³²

In addition to or sometimes instead of “door fees” providers may pay commissions based on service revenues generated in the building. These commissions serve to reimburse the building owner for some of its construction costs (where the building owner bears them), and to reimburse the building owner for the marketing rights and activities undertaken on the provider’s behalf. Even with door fees and commissions, property owners typically recover no more than half of their wiring construction costs.³³

In situations where the service provider bears the costs of construction, which is more likely to occur when the project involves an upgrade to existing building wiring rather than new construction, there usually are no “door fees” paid to the building owner. Providers typically seek exclusivity arrangements for marketing or access to the building in these circumstances as well.³⁴ The sales commissions are used to compensate the building owner for the building owner’s marketing efforts, and to pay for the right to use space in the building to install the upgraded wiring.³⁵

Thus, exclusive contracts serve an important business function by allowing property owners and service providers to allocate the cost of wiring infrastructure. As discussed at Part III(B) below, exclusivity also allows apartment owners to obtain other benefits for their residents, such as quality of service commitments, rate reductions, and commitments to upgrade facilities and services. Having a direct business relationship with the provider also helps both

³² Acker Decl. at ¶¶ 9-10; Sadler Decl. at ¶¶ 11-12.

³³ Acker Decl. at ¶ 14; Sadler Decl. at ¶ 13.

³⁴ McDonald Decl. at ¶ 8; Sadler Decl. at ¶ 22.

³⁵ McDonald Decl. at ¶ 8.

apartment owners and residents, because the provider is more likely to cooperate with the property manager in responding to requests and complaints regarding service in the building.³⁶

III. REGULATING EXCLUSIVE AGREEMENTS IS UNNECESSARY AND WOULD NOT ACCOMPLISH THE COMMISSION'S GOALS.

A. Fewer than Half of All Apartment Buildings Are Subject to Any Form of Exclusivity.

As noted in the preceding section, our very rough estimate is that no more than half of apartment buildings are subject to any kind of exclusivity provision. A smaller proportion – we are not sure how many – are subject to exclusive access agreements. This is important, because it helps establish the scope of any alleged problem. Providers may sometimes be stymied by such agreements, but on a proportional basis, given that there are more than 500,000 apartment buildings in the country with more being built every year, it would seem that a large market remains wide open to entry by competitors.

B. Exclusive Agreements Benefit Subscribers.

Exclusivity arrangements can benefit not only the building owners and service providers, but apartment residents as well. Without such arrangements, all of the costs of communications infrastructure would be borne by the property owner. Ultimately these costs would have to be passed through to residents in apartment rents.³⁷ Not only do exclusive agreements thus benefit residents through lower rents, but they allocate the cost more fairly, since residents who do not subscribe to a particular service will not be charged for that infrastructure.

³⁶ Sadler Decl. at ¶¶ 16, 20, 30; Acker Decl. at ¶¶ 17-18.

³⁷ Sadler Decl. at ¶ 13.

1. Exclusive Agreements Can Provide Residents with a Range of Specific Benefits.

Property owners often obtain a variety of benefits for subscribers. Without some form of exclusivity, providers would have no incentive to incur the costs needed to provide the benefits.

Such terms can include:

- Rate Reductions. Agreements between building owners and providers may reduce subscriber rates in various ways. Service providers may agree to waive certain charges, such as installation costs or the first month's service. Bulk discounts are also a possibility, although these arrangements are not common in apartment properties.³⁸
- Amenities in the Building. Service providers may agree to provide free service in common areas and to building employees living on-site.
- Quality of Service Commitments. One of the most important benefits for residents is the quality of service commitments building owners typically require in exclusive agreements.³⁹ These agreements give the owner significant leverage to enforce a consistently high level of customer service and programming from the provider.⁴⁰ Quality of service commitments typically set a minimum standard for performance for tasks that are important to the residents, such as outage response times and installation windows.⁴¹ They also require the provider to

³⁸ Sadler Decl. at ¶ 21.

³⁹ Acker Decl. at ¶¶ 12-14; Sadler Decl. at ¶ 14; McDonald Decl. at ¶ 9.

⁴⁰ McDonald Decl. at ¶ 9.

⁴¹ Sadler Decl. at ¶ 19.

provide service upgrades comparable to those provided by other providers or in other communities throughout the term of the agreement.⁴²

2. Property Owners Sometimes Grant Exclusive Rights as an Inducement for a Provider to Extend or Upgrade Service to a Building.

Not all providers want to serve all buildings. In fact, sometimes a provider will not be interested in serving a building or even upgrading facilities in a property it already serves because of the capital investment required. For residents to receive improved service, in those cases a building owner may find that it must grant exclusive rights to induce the provider to upgrade its facilities.⁴³ Hence, the residents can benefit from better and more extensive service offerings as a result of the building owner's ability to enter into the exclusive agreement with the provider.

C. Banning Exclusive Agreements Will Not Result in Lower Rates for Subscribers.

The Commission should not imagine that banning exclusive agreements will have any positive effect on subscriber rates, and to the extent that the NPRM suggests as much, that suggestion is wrong. This is because service providers find it much easier and more effective to market their services at the same rates on a regional basis. It is feasible for them to offer lower rates to targeted subscribers, but not feasible for them to charge particular subscribers rates higher than those offered in marketing materials. One might argue that, in theory, a provider with an exclusive agreement would be free to charge residents of the community a higher rate, and therefore would. But this ignores how communications services are actually marketed and purchased. If providers are competing in the larger market, they will have strong countervailing

⁴² Acker Decl. at ¶ 16.

⁴³ McDonald Decl. at ¶ 8; Sadler Decl. at ¶ 22.

incentives to charge the same rates inside individual buildings or associations as they do in the larger market. It is very difficult to market a service at an advertised rate on television or in a newspaper, for example, and then both identify potential subscribers ordering services as residents of buildings or other community associations that are not subject to competition, and inform them they are ineligible for the advertised rate. The loss of good will, claims of false advertising, and other costs arising from such practices would tend to discourage providers from engaging in them. Consequently, the RAA believes that a survey of rates in apartment buildings would show that, as a rule, subscribers residing in buildings subject to exclusivity agreements pay the same rates as their neighbors in single family housing served by the same provider.

It is also worth noting that agreements between apartment owners and service providers frequently specify that the provider not charge any rates other than those imposed on other residents of the same franchise area.⁴⁴ In addition, rates charged by private cable operators, who rely on heavily on exclusivity, are typically comparable to rates charged by franchised cable operators, and often lower.

D. Exclusive Marketing Agreements Should Not Be Banned Because They Do Not Block Entry by Competitors In Any Way.

Exclusive marketing agreements do not prohibit entry. As discussed above, such agreements help establish a business relationship between a property owner and a provider in which the property owner makes it easier for the provider to obtain customers in the building, but such agreements do not preclude the property owner from allowing other providers to enter and serve customers in a building. If the Commission is concerned simply with the prospect that

⁴⁴ Acker Decl. at ¶ 5.

apartment residents may not have access to a choice of providers, there is no reason to ban or regulate such agreements.

Furthermore, the building owner is not the only source of information regarding which service providers are available in a building. Providers principally advertise through mass marketing techniques, television commercials, direct mailings, and the like. In some cases, the building owner may not even know that a service provider can provide service to its building. Exclusive marketing arrangements do not prohibit other service providers from engaging in mass marketing that may reach residents of any buildings that happen to be subject to such arrangements. Therefore, if a building owner represents only one service provider for marketing purposes, that arrangement alone cannot be said to “harm” competitive entry – any more than any other marketing effort that may influence residents’ choice of provider.

Regulation of such agreements might seem logical if the Commission’s goal were to remove all potential advantages that one provider might have over another in a particular market, but we do not understand this to be the Commission’s goal, nor would such a policy actually make any sense. In a free market economy, the purpose of regulation is not to ensure equality of outcomes, but to correct market failures. All providers are free to seek such agreements with property owners and there is no market failure to correct. Furthermore, if this were the Commission’s policy, the Commission would also need to consider a myriad of other factors, beyond contractual relationships between property owners and providers, that might bear on a provider’s ability to compete. Again, ours is not a command-and-control economy, and preventing property owners from entering into marketing relationships with providers – or preventing providers from enhancing their marketing abilities through such agreements – is not a fit subject for Commission regulation.

E. Exclusive Access To Wiring Agreements Should Not Be Banned Because They Do Not Prohibit Entry By Competitors.

Exclusive access to wiring agreements do not prohibit entry. Under such an arrangement, a competitor is still free to enter a building, if it has the owner's consent and if it is willing and able to install new infrastructure to reach its customers. Such arrangements are essentially rental agreements, where the property owner leases the wiring to the service provider, or ownership arrangements where the provider holds title to the wiring. Therefore, exclusivity is not only perfectly reasonable, but any attempt to interfere with such an arrangement would raise Fifth Amendment issues. If the wiring in question is owned by the property owner, the property owner cannot be forced to allow shared use of the wiring without effecting a taking. The same applies if the wiring is owned by the provider.

These arrangements are not unlike other arrangements recognized and validated by the Commission. Cable operators do not have to share their facilities with other providers. The ILECs are not required to share their residential fiber installations with other providers. And so building owners are and should be free to lease wiring that they own to providers of their choosing. Exclusive access to wiring arrangements in themselves do not prohibit other video services providers from installing their own wiring to serve residents of buildings subject to such agreements. Indeed, where existing wiring is not compatible with a service provider's system, a provider would have no other choice but to install its own wiring, irrespective of the absence or presence of any exclusive access to wiring arrangements.

In addition, depending on the type of wiring, the system architecture, and the technical needs of the competitor's system, the wiring may not be of any use to a competitor in the first place. Banning or regulating such agreements would therefore not advance the Commission's stated goals.

F. Banning Exclusive Access Agreements Would Be Tantamount to Mandatory Access, and Would Not Accomplish the Commission’s Goals.

Regulation of exclusive access agreements threatens, sooner or later, to take the form of mandatory access. This is because merely banning exclusivity provisions does not guarantee that a second provider and a property owner will come to terms. Once this were to become evident, the Commission would be faced with calls for regulations mandating access on certain terms, or forcing property owners to permit access prior to completion of an agreement, at which point the provider would have no incentive to engage in any further meaningful negotiations. At that point, all the negotiating power would shift to the provider. The power to deny access is ultimately the property owner’s only power, the only thing an owner can trade in return for strong service and upgrade commitments from the service providers. For this reason, the RAA cannot support any regulation of exclusive access agreements, even though some property owners might welcome the opportunity to void some existing contracts to introduce competitors for new services. Any Commission regulation purporting to mandate access would not only exceed the Commission’s authority, as discussed below, but violate the Fifth Amendment.⁴⁵

If the Commission is not prepared to force the ILECs to provide video and broadband service to any individual building upon request, it should not force property owners to accept the burdens of access by service providers upon demand.

The Commission has previously correctly recognized the anti-competitive effects of state mandatory access statutes.⁴⁶ Many such statutes grant the incumbent cable operator, and only the incumbent cable operator, the right to enter buildings on specified terms, regardless of the

⁴⁵ *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

⁴⁶ *See, e.g., 2003 Inside Wiring Order* at ¶¶ 35-38.

objections of the property owner.⁴⁷ Some, however, apply more broadly.⁴⁸ The effect of mandatory access statutes has been to entrench the incumbent operator and make it more difficult for property owners to introduce private cable operators as competitors. Similarly, regulation of exclusive contracts or other steps designed to allow the ILECs to provide any services they choose on any property they choose would hinder true competition. The Commission should not confuse the theoretical prospect of creating a partial duopoly with effective competition. Subscribers in some buildings might then have two choices of providers, but they would lose any opportunity for improved services or amenities negotiated by the property owner. Furthermore, most buildings would still not enjoy the minimal benefit of the duopoly: as discussed below at Part VI, the ILECs may well end up as the sole provider of voice, video and data in many buildings, and in others they may prove unable or unwilling to upgrade their facilities.

G. Perpetual Agreements Remain Rare, and Few New Such Agreements Are Being Executed.

The NPRM asks several questions regarding the effects and persistence of perpetual contracts in the marketplace. The RAA's position remains the same: perpetual agreements are anticompetitive and many property owners subject to such agreements regret that they granted such rights or that properties they have acquired are subject to them.⁴⁹ Nevertheless, the RAA does not believe that the Commission has any power to ban or overturn perpetual agreements, and rejects all suggestions that the Commission should seek to interfere with established

⁴⁷ See, e.g., 68 PA. CONS. STAT. §§ 250.501-B(5), 250.503-B.

⁴⁸ See, e.g., MINN. STAT. §§ 238.22, 238.23, 238.241.

⁴⁹ See *Telecommunications Services Inside Wiring, Customer Premises Equipment, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring*, CS Docket No. 95-184, MM Docket No. 97-260, Joint Comments of BOMA *et al.* (filed Dec. 23, 1997); Sadler Decl. at ¶ 35.

contracts for any reason. Furthermore, perpetual agreements are not a significant problem in the market as a whole. In 2002, NMHC surveyed its members and informed the Commission that very few such agreements existed, and that even fewer new agreements were being executed, if any.⁵⁰ This remains true. The property owners surveyed in connection with this proceeding uniformly reported that they have very few, if any, “perpetual” agreements and that it is their policy not to sign such contracts. Only one respondent reported entering into any such agreements in the last five years, and these were limited to agreements with one provider in one market.

The Commission must also bear in mind that the grant of an easement can have the same effect as a perpetual agreement. An exclusive easement that runs with the land is effectively a perpetual exclusive access agreement. This merely reinforces the point that the Commission has no power over this issue: the right to grant an easement is a quintessential property right, and the interpretation of the enforceability and scope of such a grant is quintessentially a matter of state real property law. These are matters well outside the Commission’s purview, and any attempt to regulate them would raise the prospect of a Fifth Amendment taking.

IV. THE FCC DOES NOT HAVE THE AUTHORITY TO BAN OR REGULATE THE TERMS OF AGREEMENTS GRANTING ACCESS TO PRIVATE RESIDENTIAL BUILDINGS OR DEVELOPMENTS.

The NPRM “tentatively concludes that the Commission has authority to regulate exclusive contracts for the provision of video services to MDUs or other real estate developments where we find that such contracts may impede competition and impair deployment of those services.”⁵¹ The NPRM, however, gives no explanation for this conclusion, which is

⁵⁰ See *2003 Inside Wiring Order*, at ¶ 76, n.195.

⁵¹ NPRM at ¶ 9.

quite remarkable in light of the language of the Communications Act, and its interpretation by the courts. None of the handful of sections of the Act cited by the NPRM gives the Commission express authority over any type of agreement between a property owner and a provider of video services, and the Commission's ancillary jurisdiction does not extend to property owners.

Therefore, the Commission has no power.

Furthermore, the NPRM is analytically confused as to the nature of the agreements the Commission seeks to regulate.

A. The NPRM Fails To Define the Basis for the Commission's Alleged Authority or Clearly Specify the Types of Agreements that Concern the Commission.

A careful reading of the NPRM suggests that the Commission needs to analyze and explain further exactly what the Commission is trying to accomplish. The ostensible concern of the Commission, as described in the caption of the NPRM, is “exclusive service contracts *for provision of video services* in multiple dwelling units and other real estate developments.” (emphasis added). In Part III.B, the NPRM tentatively concludes that the Commission has authority “to regulate exclusive contracts *for the provision of video services to MDUs* or other real estate developments” where it finds that such contracts “may impede competition and impair deployment of video services.” NPRM at ¶ 9 (emphasis added). The discussion in Parts III.A and C of the NPRM, however, is directed not to the provision of video services in MDUs, but rather to the narrower issue of physical access to MDU buildings by potential competitors of existing video service providers. Hence, what the Commission is really asking is whether it has authority over access to MDU buildings, not the provision of service.

The foregoing distinction is significant for two reasons. First, it reveals that the NPRM is blurring the various discrete elements that may be involved in an “exclusive agreement” between

a video provider (or any other service provider) and a property owner. As discussed above, there are three principal classes of exclusive arrangements in the MDU marketplace – exclusive wiring access arrangements, exclusive service arrangements, and exclusive marketing arrangements. Although it is not unusual for more than one type of exclusivity arrangement to be combined in the same agreement, the three elements involve completely separate legal concepts and hence must be analyzed separately. This the NPRM does not do.

Second, the distinction reveals the lack of any connection between the alleged “harm” – access to MDU buildings – and the bases for the Commission’s alleged jurisdiction: programming access rules, consumer rate regulation, and deployment of advanced telecommunications. The NPRM actually cannot point to any statutory basis for regulating MDU building access. Instead, it attempts to stitch together such authority through selective quotation and interpretation of disparate sections of the Communications Act.

If the NPRM’s concern is solely with physical access to buildings, the Commission should clarify that point, and specify exactly how the Communications Act grants the necessary authority. Conflating various policy concerns in order to create the illusion of authority is not the same thing as having authority.

B. The Communications Act Gives the FCC No General Jurisdiction Over the Real Estate Industry.

As the RAA has repeatedly made clear in previous filings, the Communications Act does not authorize the Commission to regulate the real estate industry.⁵² Building owners are in the business of leasing space. When a video provider requests access to a building, it is requesting the right to occupy space in the building. Commission regulation of video service providers that

⁵² See, e.g., *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Joint Comments of BOMA *et al.* (filed Aug. 27, 1999).

has the effect of regulating the terms of building access is a regulation of the property owner's business, not a regulation of the terms of video service, and is therefore beyond the Commission's general jurisdiction. Without express authority from Congress, the Commission cannot regulate such agreements: "the Communications Act does not explicitly address the landlord-tenant relationship, nor does it explicitly grant the Commission jurisdiction over the real estate industry, an area that is normally outside the Commission's scope of authority."⁵³

Section 2(a) of the Act limits the application of the Act "with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI." Apartment owners are not cable operators, and they are not engaged in providing cable service or other video programming services. Consequently, they fall outside the ambit of Section 2(a) and the Commission's reach. The Act simply does not apply to the real estate industry. As the D.C. Circuit recently reminded the Commission:

The FCC, like other federal agencies, "literally has no power to act . . . unless and until Congress confers power upon it." The Commission "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." Hence, the FCC's power to promulgate legislative regulations is limited to the scope of authority Congress has delegated to it.

American Library Ass'n. v. FCC, 406 F.3d 689, 698 (D.C. Cir. 2005) (citations omitted).

Furthermore, the courts have long held that when an agency, acting through an entity that is subject to the agency's jurisdiction, attempts to regulate the business of a third party, it is exceeding its authority.⁵⁴ The drafters of the Communications Act never imagined that the Act

⁵³ *Building Owners and Managers Ass'n Int'l v. FCC*, 254 F.3d 39 (D.C. Cir. 2001) ("*BOMA v. FCC*").

⁵⁴ See, e.g., *Ambassador, Inc. v. United States*, 325 U.S. 317, 323 (1945); *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 173-74 (1st Cir. 1989).

would be read to permit regulation of real estate agreements, and the Commission cannot use its powers over service providers to interfere in the affairs of property owners.

This is amply illustrated by the Commission's own statements in *California Water & Tel. Co.*, 40 R.R.2d 419 (1977), and the subsequent adoption of the Pole Attachment Act.⁵⁵ Thirty years ago the Commission stated:

The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not sufficient basis for finding that the leasing of those facilities is wire or radio communications. If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right of ways essential for the laying of wire, or even access and rents for antenna sites.

Id. at ¶ 15. The Commission recognized then that just because property was useful in the delivery of communications services did not mean the Commission could regulate the terms of its use by cable operators without Congressional authority. Congress agreed, and in 1978, Congress enacted the Pole Attachment Act, "to establish jurisdiction within the [Commission] to regulate the provision by utilities to cable television systems of space on utility poles, ducts, conduits, or other rights-of-way owned or controlled by those utilities."⁵⁶ The conclusions of the Commission in *California Water & Telephone* apply with equal force now. The right to install facilities inside buildings is directly analogous to installing facilities on poles.⁵⁷ If the Commission needed express authority from Congress to regulate pole attachments, it surely needs it now.

⁵⁵ 92 Stat. 35 (1978), codified at 47 U.S.C. § 224.

⁵⁶ S. REP. 95-580, 95th Cong., 1st Sess. at p. 1.

⁵⁷ Because the Pole Attachment Act applies only to "utilities," 47 U.S.C. § 224(1)(1), it does not apply in this context.

C. None of the Specific Provisions of the Communications Act Cited in the NPRM Explicitly Grants the Commission Authority Over Contracts Related to Access to Buildings.

BOMA v. FCC and *American Library Ass'n v. FCC* both make it very clear that the Commission must be able to point to express statutory language if it is to regulate the kinds of agreements discussed in the NPRM. The NPRM relies primarily on three statutes, Sections 623 and 628 of the Communications Act, and Section 706 of the Telecommunications Act of 1996, to support its claim of authority, but none of those statutes provides any authority – express or implied – that might apply in this case.

1. Section 628 of the Communications Act Does Not Apply to Contracts Related to Access to Buildings.

a. *The Legislative History and Language of Section 628 Make It Clear that in Enacting Section 628 Congress Only Intended To Regulate Contracts for the Sale of Satellite Programming by Cable Operators to Their Competitors.*

The NPRM's claim for Commission authority rests primarily on Section 628(b) of the Act, which makes it "unlawful for a cable operator . . . to engage in unfair methods of competition or unfair or deceptive acts or practices." Based on this language, the NPRM concludes that the Commission may have jurisdiction to regulate contracts between video services providers and apartment building owners "where we find that such contracts may impede competition and impair deployment of those services." NPRM at ¶ 9. This is a remarkable conclusion. The genesis for this novel reading of Section 628(b) appears to have been an *ex parte* submission in another proceeding.⁵⁸ A relative newcomer to the cable industry might be excused for such a far-fetched reading of the statute, but the Commission's past

⁵⁸ Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene Dortch, Secretary, FCC, MB Docket No. 05-311 (filed July 6, 2006).

interpretation of Section 628, as well as the legislative history of the statute and the language of the provision itself, make any such conclusion untenable.

The prohibition in Section 628(b) has nothing at all to do with contracts for access to buildings or even for video services inside buildings. The statute never refers to access to buildings, or physical property, in any way. Section 628's sole concern is with contracts for the acquisition of video *programming* by competitive programming providers. Even the most cursory reading of its legislative history leaves no doubt that the entire focus of concern was with ensuring that video service providers have fair access to satellite programming.⁵⁹

It is well-known and well-established that Congress was concerned with preventing cable operators that also controlled certain programming channels from hindering competition by refusing to sell programming to direct broadcast satellite vendors and other competitors. This is very clear upon reading Section 628 as a whole, as well as the Commission's own regulations:

- Section 628(b) by its terms applies only to cable operators, satellite cable programming vendors and satellite broadcast programming vendors.
- Section 628(c), which directs the Commission to adopt regulations, describes very specifically what Congress wanted the Commission to do. Section 628(c)(2)(A) addresses the sale of programming by various types of programming vendors to unaffiliated multichannel video programming distributors. Section 628(c)(2)(B) similarly addresses terms of transactions between programming vendors and programming distributors. Sections 628(c)(2)(C) and (D) prohibit exclusive contracts – but only exclusive contracts between programming vendors and cable operators.

⁵⁹ SEN. REP. NO. 92, 102d Cong., 1st Sess. at 64; 91-93 (1991) (“SEN. REP. NO. 102-92”).

- Section 628(e) authorizes the Commission to order appropriate remedies, including “prices, terms and conditions of sale of programming to the aggrieved multichannel video programming distributor.” Again, this demonstrates what Congress was concerned about, and authorizes no remedies that would affect contracts with building owners.⁶⁰

The legislative history states the specific concerns of Congress in the same terms. Section 628 is not a general prohibition on every kind of anticompetitive behavior by cable operators, but a prohibition on unfair practices with respect to transactions between programming vendors and programming providers, arising out of vertical integration in the cable industry.⁶¹

Until now, the Commission has respected the purpose and limitation of Section 628. The NPRM’s apparent willingness to consider Verizon’s attempt to apply the statute to agreements between property owners and service providers is truly surprising given that the Commission has spent years defending a much narrower interpretation of its authority under the very same provision.

When the Commission first adopted rules to implement Section 628 in 1993, it described Congress’s motives this way:

In enacting the program access provisions of the 1992 Cable Act, Congress expressed its concern that potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public.⁶²

⁶⁰ Section 628(e)(2) does permit the Commission to apply other remedies available under the Communications Act – none of which apply to building owners.

⁶¹ SEN. REP. NO. 102-92 at 24-29, 64, 91-93.

⁶² *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming*

Later in the same decision, the Commission explained who was subject to Section 628:

To address this problem, Congress chose program access provisions targeted toward cable satellite programming vendors in which cable operators have an “attributable” interest and toward satellite broadcast programming vendors regardless of vertical relationships. Thus, an initial issue to be addressed is what entities come within the statutory prescription and whether these entities are to be regulated in their program sales throughout the United States or only in those specific markets or situations where an actual vertical relationship exists.

Id. at ¶ 21. The Commission left no doubt that the focus of the rules under Section 628 was on programming and specifically vendors of programming. *Id.* at ¶¶ 27-30. The rules were never intended to apply to entities leasing building space to cable providers.

Further, over the years the Commission has interpreted its jurisdiction under this section strictly, even refusing to extend the rules beyond “satellite programming” to include “terrestrially-delivered programming.” This issue first arose in 1998 when the Commission considered amending the rules it had adopted in the 1993 *Program Access Order*.⁶³ In the *Ameritech Order*, the Commission considered whether disputes over access to terrestrially-delivered programming might be covered by Section 628 in the specific situation where programming was moved from satellite to terrestrial delivery to evade the application of the program access rules. The majority declined to take action, noting both that there was little evidence of a competitive problem and that there were doubts as to the Commission’s jurisdiction over access to terrestrially-based programming. *Ameritech Order*, ¶ 71.

Specifically, the majority observed: “We note that Congress is considering legislation which, if

Distribution and Carriage, MM Docket No. 92-265, First Report and Order, 8 FCC Rcd 3359, ¶ 9 (1993) (“*Program Access Order*”).

⁶³ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 97-248, RM No. 9097; *Petition for Rulemaking of Ameritech New Media, Inc.*

enacted, would introduce important changes to the program access provisions, including clarification of the Commission’s jurisdiction over terrestrially-delivered programming.” *Id.* In his dissenting statement, Commissioner Furchtgott-Roth agreed, stating:

Congress, rather than this Commission, is the appropriate governmental entity to redress any competitive issues that may exist with respect to programming that is not transmitted (or retransmitted) by satellite. In fact, legislation was recently introduced by Congressmen Tauzin and Markey that would extend the program access rules to govern terrestrially-delivered programming. To my mind, the introduction of this legislation is a further indication that current statute does not cover such programming. We should, at the very least, stay our hand while Congress debates the matter.

Id. at 15881.

Subsequent to the *Ameritech Order*, two program access complaints were dismissed by the Cable Services Bureau.⁶⁴ The complainants had alleged, among other things, that it was unfair under Section 628(b) for a cable operator to move a programming service from satellite delivery to terrestrial delivery if it meant that a competing MVPD would no longer be afforded access to the programming. In the *Echo Star Order*, the Bureau analyzed the scope of the Commission’s jurisdiction under Section 628(b) as follows:

In enacting Section 628, Congress determined that while cable operators generally must make available to competing MVPDs vertically-integrated programming that is satellite-delivered, they do not have a similar obligation with respect to programming that is terrestrially-delivered Congress did not prohibit cable operators from delivering any particular type of service terrestrially, did not prohibit cable operators from moving any particular service from satellite to terrestrial delivery, and did not provide that program access obligations remain with a programming service that has been so moved. Thus, given our prior finding that Defendants’ actions do not amount to an attempt to evade our [program access] rules, we decline to find that, standing alone, Defendants’

Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, 13 FCC Rcd 15822 (1998) (“*Ameritech Order*”).

⁶⁴ *DIRECTV v. Comcast*, 13 FCC Rcd 21822 (CSB 1998); *EchoStar v. Comcast*, 14 FCC Rcd 2089 (CSB 1999) (“*EchoStar Order*”).

decision to deliver SportsNet terrestrially and to deny that programming to EchoStar is “unfair” under Section 628(b).

EchoStar Order at 2102 (citations omitted). The Commission itself subsequently upheld the Bureau’s rulings.⁶⁵ The Commission’s order in turn was upheld by the United States Court of Appeals for the District of Columbia Circuit.⁶⁶

More recently, the Commission again described the limited scope of its program access jurisdiction under Section 628 in its 12th Annual Video Competition Report to Congress.⁶⁷ In that report, the Commission also noted that various commenters urged the Commission to ensure that all competitors have access to so-called “must have” programming and that the Commission should eliminate the terrestrial exemption or recommend that Congress do so.⁶⁸ This is further proof of the common understanding of the limited reach of Section 628.

The history of congressional and Commission action regarding Section 628 demonstrates that Congress was concerned only with video service provider access to programming, and the Commission has never strayed from that interpretation. Further, the Commission has interpreted those rules strictly, to cover only satellite delivery of the programming. In light of this solid and consistent history, for the Commission now to adopt the novel and strained interpretation of Section 628 first proposed by Verizon, would be to commit a serious error in judgment. As the

⁶⁵ *DIRECTV v. Comcast; EchoStar v. Comcast*, 15 FCC Rcd 22802 (2000).

⁶⁶ *EchoStar Commn’s Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002).

⁶⁷ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, 21 FCC Rcd 2503, ¶ 169 (2006) (“*Video Competition Report*”). We note in passing that while the Commission expressed concern in this Report about competitive issues in the MDU market, that issue was discussed under a different part of the report from the discussion of Section 628. *Id.* at ¶¶ 149-150, 207-208.

⁶⁸ *Video Competition Report* at ¶ 170.

D.C. Circuit has noted, “[t]he fact that an administrative practice is novel does not, of course, mean that it is wrong. However, novelty is a warning signal that all may not be well”⁶⁹

b. The Federal Trade Commission Act Is Not Relevant Here.

The NPRM seeks comment on “the relevance to our interpretation of Section 628(b) of any interpretation of similar language by the FTC or federal courts.” NPRM, ¶ 9. The point of this reference is unclear. As a general matter, the Supreme Court has long recognized that the Commission has no jurisdiction to regulate antitrust matters.⁷⁰ When Section 628 was enacted, Congress specifically stated that antitrust laws were unaffected:

The legislation provides new FCC remedies and does not amend existing antitrust laws. All antitrust and other remedies which can be pursued under current law by multichannel video programming distributors are therefore unaffected by this section. Such existing remedies would still be available to challenge practices of both affiliated and independent programmers.

SEN. REP. 102-92 at 29. Moreover, the Commission has already noted that, although the language of Section 628(b) and of Section 5 of the Federal Trade Commission Act (FTCA) have “certain facial similarities,” analogies based on mere facial similarities between the two provisions are “unpersuasive.” *Ameritech Order* at ¶ 15. Consequently, interpretations of the FTCA are of no relevance to determining the scope of the Commission’s authority under Section 628(b).

c. Even if Section 628 Applied, Exclusive Contracts for Access to Buildings Do Not Violate the Statute.

Assuming purely for the sake of argument that Section 628 applied, by its own terms exclusive agreements between property owners and service providers would not violate the statute. Section 628(b) only bars “unfair methods of competition or unfair or deceptive acts or

⁶⁹ *MCI v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

practices;” as discussed in detail below, property owners, service providers and residents all obtain significant benefits from exclusive agreements. They are not unfair or deceptive.

Indeed, the Commission has recognized in prior proceedings that exclusive contracts for access to buildings can actually help foster competition.⁷¹ Exclusive contracts continue to foster competition, and banning them might result in unfairly advancing the interests of the incumbent local exchange carriers.⁷² Hence, *even if the Commission did have jurisdiction*, there is no reason for the Commission to take action here.

2. Section 623 of the Communications Act Does Not Authorize the Commission to Regulate Contracts Related to Access to Buildings.

Section 623 is of no benefit to the Commission’s bootstrapping effort. The statute only directs the Commission to adopt a rate regulation scheme for the benefit of cable television subscribers, subject to certain parameters. It does not direct the Commission to regulate any aspect of any agreements between property owners and video service providers, and its only references to MDUs argue against the application of rate regulation in that context. Furthermore, the rate regulation provisions of the Act are only concerned with competition at the “franchise area” level, and not with respect to individual buildings. *See* 47 U.S.C. §§ 623(d), 623(l)(1) (references to “franchise area”).⁷³

⁷⁰ *United States v. Radio Corp. of America*, 358 U.S. 334, 346 (1959).

⁷¹ *2003 Inside Wiring Order*.

⁷² *See* Part VI, *infra*.

⁷³ As then-Commissioner Martin stated in his separate statement accompanying the *2003 Inside Wiring Order*, 18 FCC Rcd at 1400, primary responsibility for cable rate regulation rests with local franchising authorities and relying on Section 623 for other purposes raises significant questions.

To the extent that the Commission is concerned that exclusive contracts might result in subscribers who live in apartment buildings being charged higher rates than other subscribers in a franchise area, the Commission need have no fear. There is no evidence that subscribers who live in MDU buildings are paying higher rates than other subscribers, and for good reason: Section 623(d) requires uniform rates throughout a franchise area. Section 623(d) permits divergence from the uniform rate structure requirement in just two circumstances. First, it expressly permits bulk discounts in MDUs. Second, the uniform rate requirement does not apply where there is effective competition, and Section 623(l) specifically defines “effective competition” in a way that renders this entire debate moot. In fact, the Commission once rejected a request on the part of cable operators for authority to negotiate rates on a building-by-building basis with MDUs to match competitors’ offers, because that proposal conflicted with the statutory requirement to provide uniform rates in the entire franchise area.⁷⁴ Any suggestion that the Commission can now, under the same provision, regulate “access” on a building-by-building basis should also be rejected.

The NPRM notes that Verizon has suggested that incumbent providers are soliciting exclusive contracts when a potential competitor is seeking a franchise to provide video services in the incumbent’s franchise area. NPRM ¶ 8. Even this is true, the Act eliminates the Commission’s authority over rates in just these circumstances: the Act defines effective competition to include any case in which a local exchange carrier or its affiliate is providing video service in a franchise area. 47 U.S.C. § 623(l)(1)(D). As soon as Verizon or any other local exchange carrier is providing a video service in a particular franchise area, the incumbent

⁷⁴ *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 191 (D.C. Cir. 1995).

may seek an effective competition ruling and the Commission loses any authority it may have had under Section 623.

The Commission thus finds itself with no authority in either case: if there is no effective competition, the Commission can regulate rates, but regulation of MDU rates is unnecessary because the uniform rate requirement applies. On the other hand, from the moment that the Commission finds “effective competition” in respect of a cable system, the authority to regulate rates in the franchise area is extinguished both in general terms (under Section 623(a)(2)), and specifically in regard to bulk discounts and predatory pricing to MDUs (under Section 623(d)).⁷⁵

Moreover, the Commission has already declared more than a thousand communities to have effective competition under one or the other of the three other tests in Section 623(l).⁷⁶ Thus, in those franchise areas, rate regulation – and the Commission’s power under Section 623 – has *already* been eliminated. This means that any uniform national regulation that relies on

⁷⁵ See, e.g., *Altrio Comm’ns v. Adelphia Comm’ns Corp.*, 17 FCC Rcd 22955 (MB 2002); *American Cable Co. and Jay Copeland v. TeleCable of Columbus, Inc.*, 11 FCC Rcd at 10093; *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 191 (D.C. Cir. 1995) (“where ‘effective competition’ exists, the consumer is left to the wiles of the marketplace; both the language and the purpose of the 1992 Cable Act make clear that the rates charged by such systems are beyond the Commission’s regulatory reach. The Commission’s arguments highlighting problems with the choice made by Congress are insufficient to overcome this clear evidence of congressional intent.”)

⁷⁶ By the Commission’s tally in its recent report on cable prices, as of January 1, 2005, 1,128 communities had been relieved from rate regulation pursuant to an “effective competition” finding by the Commission. The Commission further noted that: “Our list of communities relieved from rate regulation is limited to adjudicated findings of effective competition. We are unable to take into account those areas of the country where the conditions for a finding are present, but no finding has been requested or made.” See *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, MM Docket No. 92-266, 21 FCC Rcd 15087, ¶¶ 3-4 (2006).

Section 623 for its authority is impossible: any Commission rules would perforce have no effect in areas subject to effective competition.⁷⁷

In any event, the Commission has no jurisdiction under Section 623 to take any regulatory action regarding building access agreements.

3. Section 706 of the Telecommunications Act of 1996 Is Not a Grant of Authority.

Section 706 of the Telecommunications Act of 1996 affords the Commission no power to regulate exclusive contracts. The Commission has already concluded on several occasions that Section 706 is not an independent grant of authority.⁷⁸ Section 706 envisions regular inquiries by the Commission into the deployment of advanced telecommunications capability, and directs the Commission to improve the pace of deployment by various means, but the statute does not add to the Commission's powers. Furthermore, Section 706 pertains only to telecommunications, and does not apply to cable services or information services.

In the *Advanced Services Order*, the Commission specifically stated that:

in light of the statutory language, the framework of the 1996 Act, its legislative history, and Congress' policy objectives, the most logical statutory interpretation is that section 706 does not constitute an independent grant of authority. Rather, the better interpretation of section 706 is that it directs us to use, among other authority, our forbearance authority under section 10(a) to encourage the deployment of advanced services.

⁷⁷ Nor can the Commission now seek to redefine the relevant market and assert there is a difference between the market for cable services inside MDUs and outside them. The Commission's effective competition orders have never considered the proportion of franchise areas residents living in MDUs as a factor in evaluating the existence of effective competition. Furthermore, Section 623 provides only for regulation at the franchise area level.

⁷⁸ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Docket No. 98-147, 13 FCC Rcd 24012, 24044-8 (F.C.C. 1998) (*Advanced Services Order*).

Id. (citations omitted). The Commission subsequently affirmed its decision in response to several petitions for reconsideration.⁷⁹ The *Advanced Services Order* addressed a specific proposal for the application of the Commission’s forbearance authority, but this does not affect the fundamental point that Section 706 is an exhortation to act, not a grant of specific powers.

D. The Commission’s Ancillary Jurisdiction Extends Only to Entities that Are Engaged in Activities Subject to the Communications Act.

With no general jurisdiction over property owners, and no specific Congressional grant of authority under Sections 623 or 628 or 706, the NPRM also seeks, without saying so explicitly, to rely on “ancillary jurisdiction.” The NPRM seeks comment on whether Section 623 of the Act, in conjunction with Sections 4(i) and 303(r), “can or should serve as a basis for regulating exclusive contracts for the provision of video services to MDUs or other real estate developments.” NPRM at ¶ 10. The NPRM observes that the Commission has relied on those provisions in the past for authority to establish procedures for the disposition of MDU home run wiring upon termination of service.⁸⁰ In that earlier proceeding, the Commission concluded that the procedures, “by facilitating MVPD competition, are an appropriate and reasonable method of fulfilling Section 623’s mandate.”⁸¹

The RAA has always expressed doubts over the Commission’s legal authority to adopt the home run wiring rules.⁸² Relying on rate regulation authority to address agreements that

⁷⁹ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration, CC Docket No. 98-147, 15 FCC Rcd. 17044, 17047-8 (2000).

⁸⁰ *Id.*, citing *2003 Inside Wiring Order* at 1345-46.

⁸¹ *2003 Inside Wiring Order* at ¶ 6, n.10.

⁸² See, e.g., *Telecommunications Services Inside Wiring, Customer Premises Equipment; Implementation of the Cable Television Consumer Protection Competition Act of 1992: Cable Home Wiring*, CS Docket No. 95-184, MM Docket No. 92-260, Further Joint Comments of

contain no rate terms and have only the most indirect effect on rates (if any) never really made sense, but at least at the time the Commission was actively engaged in regulating cable rates. Today it makes no sense at all. Section 623 on its own does not even permit the Commission to regulate rates in MDUs, much less the terms of access to property. The Commission's ancillary jurisdiction adds nothing.

The Supreme Court has held that the Commission may exercise authority that is “reasonably ancillary to the effective performance of the Commission’s various responsibilities.”⁸³ The term “ancillary jurisdiction” ultimately derives from this statement, but the phrase is actually a misnomer; it should be more accurately referred to as “ancillary authority.” The Commission’s *jurisdiction* is limited by Section 2 of the Communications Act. The Commission has *authority* to engage in the specific activities set forth in the remainder of the Act; where its authority is not express, it may rely on its ancillary jurisdiction. Note, for example, that the Commission’s authority over cable television in *Southwestern Cable* derived from its jurisdiction over broadcasting. In other words, Sections 4(i) and 303(r) confer authority but not jurisdiction. Consequently, the Commission’s ancillary jurisdiction does not extend to entities over whom the Commission has no jurisdiction to begin with.

In every case in which the Supreme Court has found that the Commission properly exercised ancillary jurisdiction, the Court has also found that the Commission already had jurisdiction over the activity or over the party pursuant to the Communications Act. The farthest afield the courts have allowed the Commission to go has been the regulation of cable television as an extension of the Commission’s authority over television broadcasting, *see Southwestern*

BOMA, *et al.*, at 2 (filed Sep. 25, 1997). The RAA is in good company. *See 2003 Inside Wiring Order*, separate statement of Commissioner Martin, 18 FCC Rcd at 1400.

Cable, and the regulation of telephone holding companies to prevent cross-subsidization, *see North American Telecommunications Ass'n v. FCC*, 772 F.2d 1282 (7th Cir. 1985). The courts have never found that the Commission has ancillary jurisdiction based solely upon Section 4(i) or Section 303(r), or both. The purpose of ancillary jurisdiction is to ensure that the Commission can fill in gaps in its authority over entities and activities it is empowered to regulate, *see, e.g., Lincoln Tel. and Tel. Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981) (finding ancillary jurisdiction to impose upon *telecommunications carriers* interim billing method for interconnection charges); *New England Tel. and Tel. Co., et al. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987) (finding ancillary jurisdiction to order *telecommunications carriers* to reduce telephone rates), not to expand that authority to include otherwise unregulated entities or activities.

For this reason, the Commission may not regulate an activity that is unrelated to the communications industry. *GTE Service Corp. v. FCC*, 474 F.2d 724, 735-36 (2d Cir. 1973) (Commission cannot regulate data processing services provided by regulated entities); *American Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (Commission cannot regulate consumer electronic products that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission). Similarly, even in the case of a matter that does affect the communications industry, the Commission's ancillary jurisdiction does not extend to building owners. *Illinois Citizens Committee*, 467 F.2d at 1400 (noting restrictions on scope of *Southwestern Cable*).⁸⁴

⁸³ *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

⁸⁴ *BOMA v. FCC* is not to the contrary. That case, which cited *Illinois Citizens Committee*, turned on an interpretation of Section 207 of the Telecommunications Act of 1996, which the court interpreted as a narrow, express grant of authority. *Id.*, 254 F.3d at 96.

In the current proceeding, the Commission has no jurisdiction because building owners do not engage in communications by wire or radio. The general jurisdictional grant under Title I covers “interstate and foreign commerce in communication by wire and radio.”⁸⁵ As the court in *American Library Association* noted, when the matter the agency seeks to regulate is not encompassed by the agency’s general jurisdictional grant, it creates an “insurmountable hurdle” to the assertion of ancillary jurisdiction.⁸⁶

When enacting the Pole Attachment Act, for example, Congress was careful to point out that it was not expanding the Commission’s general jurisdictional grant, but merely granting specific, narrow authority to address the pole attachment issue. In particular, Congress did not grant cable operators any right to access poles or land at all.⁸⁷

The legislative history of the Pole Attachment Act demonstrates that the Commission lacks jurisdiction to regulate access to private property under its general jurisdictional grant. It

⁸⁵ 47 U.S.C. § 151.

⁸⁶ *American Library Ass’n v. FCC*, 406 F.3d at 700.

⁸⁷ The Senate report explains:

S. 1547, as reported, would not require the commission, as it stated in its *California Water and Telephone Co.* decision, noted above, ‘to regulate access and charges for use of public and private roads and right-of-ways essential for the laying of wire, or even access and rents for antenna sites.’ The communications space must already have been established, meaning that FCC jurisdiction arises only where a pole, duct, conduit, or right-of-way has already been devoted to communications use, and the communications space must already be occupied by a cable television system. Hence any problems pertaining to restrictive easements of utility poles and wires over private property, exercise of rights of eminent domain, assignability of easements or other acquisitions of right-of-way are beyond the scope of FCC catv pole attachment jurisdiction. Any acquisition of any right-of-way needed by a cable company is the direct responsibility of that company, in accordance with local laws. S. 1547, as reported, is not intended to disturb such matters in any way.

S. REP. No. 580, 95th Cong., 1st Sess. at 124. Only in 1996 did Congress expand Section 224 to include a right of nondiscriminatory access, and even that right does not extend beyond “utilities.”

therefore follows that none of the authority conferred by the Communications Act can be applied to building owners as building owners - it does not matter whether that authority is express, or based on ancillary “jurisdiction,” because building owners are entirely outside the Commission’s reach. Nor does the Commission’s power to regulate communications extend to real property issues, including contractual issues between owners and carriers.⁸⁸ It does not matter if the property is used in a regulated activity – the authority extends only to the activity itself, not the property where the activity is taking place.⁸⁹

As the court in *North American Telecommunications Ass’n* warned, 772 F.2d at 1292, “Section 4(i) is not infinitely elastic.” The D.C. Circuit recently reminded that “the Commission’s ancillary authority has limits.”⁹⁰ We urge the Commission to recognize its limitations and heed them.

V. BEFORE PROCEEDING WITH ANY ATTEMPT TO REGULATE IN THIS AREA, THE FCC MUST EXAMINE ALL RELEVANT FACTORS, INCLUDING THE PRACTICES OF THE ILECs, AND THE EFFECTS OF THE COMMISSION’S INSIDE WIRING RULES.

Providing subscribers with the greatest range of competitive options inside an apartment building is not a simple task, and involves many issues beyond the questions raised in the NPRM. Exclusive contracts, or more generally the terms of agreements between video service providers and property owners, are only one factor in a complex equation. Consequently, the Commission must not consider the questions raised in the NPRM in isolation. For example, incumbent telecommunications providers already have access to practically every apartment

⁸⁸ See *Regents v. Carroll*, 338 U.S. 586 (1950).

⁸⁹ See *id.*; *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972); *Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

building in their service areas and have wiring inside those buildings; the existence of those facilities and the terms of the telecommunications providers' access are highly relevant to this discussion. A number of other issues arise out of existing Commission regulations, such as the cable inside wiring rules,⁹¹ the telecommunications inside wiring rules,⁹² and the intersection between those sets of rules in an environment in which both types of providers are now providing both types of services. Under the current regime, different entities have different advantages and disadvantages because they are subject to different rules. If the Commission intends to use its examination of exclusive contracts to address perceived competitive imbalances, it runs the risk of favoring parties that in fact do not need any assistance, if it does not consider the entire practical and legal environment in which property owners and service providers interact. In particular, the Commission must bear in mind the advantages and typical behavior of the ILECs in this environment, which demonstrates that the ILECS have no need for regulatory intervention.

Of course, the RAA believes more fundamentally that the highly fragmented and competitive real estate market is capable of responding to the changes in tenant demands that flow from changes in technology. There is a market at work, albeit one in which the Commission has no expertise and over which it has no jurisdiction. Nevertheless, if the Commission assesses the entire situation fairly, we believe it will recognize that, notwithstanding questions over its authority, regulatory action would be ill-advised.

⁹⁰ *American Library Ass'n v. FCC*, 406 F.3d at 700.

⁹¹ 47 C.F.R. §§ 76.800-806.

⁹² 47 C.F.R. §§ 68.105, 68.110.

A. Telecommunications Providers Exert Great Power Over Property Owners Regarding the Timing and Terms of Access.

Telecommunications providers are most emphatically not at the mercy of property owners, in any respect. While serving any particular building is in the end optional for a telecommunications provider, having telecommunications service available in a building is mandatory for property owners. Providers clearly need access to buildings to reach their customers, but each individual building is only a piece of the market. For a property owner, the building is the entire market, and tenants will neither move into nor stay in a building that does not have telephone service. This means that telecommunications providers have the upper hand in dealing with property owners, with respect to both obtaining access and in the conditions of that access.

For example, although an increasing number of apartment residents rely on cellphones as their only source of voice service, and others may use IP-based services, a substantial number still demand brand name voice service from the ILEC.⁹³ This means that under current market conditions and for the foreseeable future owners have no choice but to allow the ILECs access to their properties – and the ILECs are perfectly willing to tie other demands to requests for voice service. And because property owners lose or make money on fairly narrow occupancy margins, they must respond to demands from relatively small numbers of potential residents regarding key issues. The RAA does not know at what level property owners will be able to ignore the desires of prospective residents for access to wireline telephone service, but it could be quite low. Consequently, ILEC market power over the terms of access will remain a factor for some time.

⁹³ Sadler Decl. at ¶ 28.

The Commission should also be aware that access to wireline services is effectively mandated by law in most jurisdictions.⁹⁴ Before a property owner can allow a resident to move in, the owner must have obtained a certificate of occupancy from the local fire marshal or other responsible safety official. This is required to ensure that fire alarms, elevator alarms, and other safety systems function properly.⁹⁵ While this does not necessarily mean that a property owner must give a telephone company the right to provide service in the building, it does ensure physical access to the building for at least some purposes – and more importantly gives the provider additional leverage in discussions with the property owner over the right to serve residents.

The same issue arises with respect to construction scheduling. Even if the property owner is installing all internal wiring itself, the property owner is dependent on the provider's cooperation to install facilities that must cross the property to reach connection facilities inside the building. Trenching after external site work has been completed – landscaping, walkway construction and parking lot paving – is expensive and disruptive, and owners need to have that work done in a timely fashion. If providers do not cooperate, they can hold up construction activities, or impose substantial additional costs on the property owner later. Thus, even the suggestion of a delay can be enough to induce a property owner to agree with the provider's

⁹⁴ The International Building Code (“IBC”), for example, requires that sprinkler systems be capable of being remotely monitored. IBC § 903.2. Although the IBC does not expressly require a telephone line, in practice that is how the requirement would be met. The IBC is the law in most jurisdictions, having been adopted at either the state or local level. *See, e.g.*, Va. Admin. Code § 5-63-10(B) (adopting IBC as part of the Uniform Statewide Building Code). *See also* Sadler Decl. at ¶ 27.

⁹⁵ Sadler Decl. at ¶ 26.

terms. To avoid these potential disruptions, some property owners build out the communications infrastructure to the property line, at their cost.⁹⁶

The Commission should have no illusions about which party has the advantage in this process.

B. Telecommunications Providers Have Been Known To Refuse To Provide Telephone Service in MDUs and Other Real Estate Developments in Order To Obtain the Right to Provide Other Types of Services.

Telecommunications providers have also demonstrated a willingness to use their control over voice services as leverage in negotiations with apartment owners and other real estate developments. The RAA does not necessarily object to this practice: property owners understand that different entities have different advantages in the competitive marketplace. But the RAA would object to the adoption of regulations based on any presumptions about alleged disadvantages faced by telecommunications providers, because that is simply not how the market currently works.

Property owners report instances in which they have been informed by an ILEC that the ILEC would not install facilities for the delivery of voice service unless the property owner also agreed to allow the ILEC to provide video service.⁹⁷ Property owners also report cases in which the ILEC has demanded exclusive access for multiple services. In Florida, for example, despite their obligations as the carriers of last resort (“COLR”) within their service areas, BellSouth, Verizon and Embarq have threatened not to install their telephone networks in buildings and developments that have exclusive contracts with cable operators for video and data but not wire

⁹⁶ Sadler Decl. at ¶ 10.

⁹⁷ Sadler Decl. at ¶ 29. In this case, the ILEC was already serving the building and ultimately continued to provide voice service only when the property owner refused.

services.⁹⁸ A newly-enacted Florida statute, Fl. Stat. § 364.025(6), permits a COLR in Florida to refuse to provide voice service in a building or development if the property owner has entered into an exclusive contract with another provider for voice service or voice replacement service, requires residents to prepay for voice services in their homeowner fees or rents, or requires the property owner to deny the COLR access to the property.

BellSouth, Verizon and Embarq asked the Florida PSC to adopt a rule interpreting the statute to create a “good faith waiver” when a property owner entered into an exclusive contract for video or data services.⁹⁹ The Florida Commission refused to adopt a blanket rule, instead leaving the matter to case-by-case determination.¹⁰⁰ Three matters have come before the Florida Commission to determine whether various fact patterns meet the terms of the statute and in each case the Florida Commission has ruled against the carriers.

⁹⁸ Attached as Exhibit F are copies of correspondence between BellSouth and a property owner on this issue. Competitive service providers have had similar experiences. As Atlantic Broadband once informed the Commission:

We have witnessed first hand the anticompetitive tactics BellSouth uses to intimidate customers who choose Atlantic Broadband as their video and Internet provider. The attached letter is an example of BellSouth’s heavy handed threat to withhold basic telephone service for an Atlantic Broadband customer who chose us for television and high speed Internet service.

Application for Consent to Transfer of Control Filed by AT&T, Inc. and BellSouth Corporation, Docket No. 06-45, Comments of Atlantic Broadband (filed Oct. 20, 2006).

⁹⁹ See Florida Public Service Commission, *Proposed Adoption of Rule 25-4.084, F.A.C., Carrier-of-Last-Resort; Multitenant Business and Residential Properties*, Docket No. 060554. All documents in the docket are available at <http://www.floridapsc.com/dockets/cms/docketFilings2.aspx?docket=060554>

¹⁰⁰ See, e.g., Florida Public Service Commission, *Complaint and petition for declaratory relief against BellSouth Telecommunications, Inc., for refusal to provide telephone service to a new development, by Litestream Holdings, LLC*, Docket No. 060684.

Lennar Complaint against BellSouth.¹⁰¹ On November 7, 2006, Lennar Homes, Inc. (“Lennar”) filed a complaint against BellSouth for failure to provide service in violation of its COLR obligation. In the process of developing the “Echo Lake” project, Lennar had held discussions with BellSouth regarding the provision of telecommunications service in Echo Lake. As a result of those discussions, BellSouth sent a letter to Lennar stating that if any homeowner or condominium association were to enter into an exclusive marketing agreement, exclusive service agreement, or bulk service agreement with a provider of any voice, data, or video service, within 18 months of first occupancy, Lennar would be responsible to BellSouth for any “unrecovered costs associated with the engineering and installation of the initial facilities.” The staff of the Florida Commission directed BellSouth to cease using the letter and rewrote the letter to bring it into conformance with the new Florida statute.¹⁰²

BellSouth Petition for COLR Relief (Nocatee Development).¹⁰³ On December 22, 2006, BellSouth filed a petition for relief from its COLR obligations to provide service at certain private communities in the development known as Nocatee. The Florida Commission rejected BellSouth’s claim that limiting a COLR to voice service in a development where another

¹⁰¹ Florida Public Service Commission, *Complaint regarding BellSouth Telecommunications, Inc.’s failure to provide service on request in accordance with Section 364.025(1), F.S., and Rule 25-4.091(1), F.A.C., by Lennar Homes, Inc.*, Docket No. 060732-TL.

¹⁰² <http://www.floridapsc.com/dockets/cms/docketFilings2.aspx?docket=060732>

¹⁰³ Florida Public Service Commission, *Petition for relief from carrier-of-last-resort (COLR) obligations pursuant to Florida Statutes 364.025(6)(d) for two private subdivisions in Nocatee development, by BellSouth Telecommunications, Inc.*, Docket No. 060822-TL. All documents in the docket are available at:

<http://www.floridapsc.com/dockets/cms/docketdetails.aspx?docket=060822>

competitor has been granted exclusive video and data rights rises to the level of a good cause waiver of COLR obligations.¹⁰⁴

*Embarq Petition for COLR Relief (Treviso Bay).*¹⁰⁵ On November 20, 2006, Embarq filed a petition for relief from its COLR obligations in the Treviso Bay subdivision. The Florida Commission rejected Embarq's claim, holding that limiting a COLR to voice service in a development where a competitor has been granted exclusive video and data rights, and homeowners dues are used to pay for video and data services, does not rise to the level of a good cause waiver from the carrier's COLR obligations.

C. Telecommunications Providers Often Request Exclusive Agreements Themselves, and Demand Unreasonable Terms.

Property owners uniformly report that telecommunications providers often request exclusive agreements, both for voice services and for video and data services. These are typically marketing agreements, but can include exclusive access agreements. For example, one owner's representative reports that he recently contacted an ILEC regarding service in a new building, and requested a proposal for a non-exclusive agreement for marketing rights and access for both voice and broadband service. The provider responded by e-mail saying "I know you mentioned interest in non-exclusive high speed Internet but did you intend to include non-exclusive voice as well? If so, I would have to get approval from way up [the] ranks through

¹⁰⁴ Florida Public Service Commission, Memorandum and Order, *Petition for relief from carrier-of-last-resort (COLR) obligations pursuant to Florida Statutes 364.025(6)(d) for two private subdivisions in Nocatee development, by BellSouth Telecommunications, Inc.*, Docket No. 060822-TL (March 13, 2007).

¹⁰⁵ Florida Public Service Commission, *Petition for waiver of carrier of last resort obligations for multitenant property in Collier County known as Treviso Bay, by Embarq Florida, Inc.*, Docket No. 060763-TL. All documents in the docket are available at: <http://www.floridapsc.com/dockets/cms/docketdetails.aspx?docket=060763>

Legal to obtain approval for non-exclusive voice as this would be a first. Please confirm.”¹⁰⁶ To the extent the Commission has been swayed by the special pleading of the telecommunications providers, we urge it to conduct a further and more detailed analysis of the alleged problem.

D. Telecommunications Providers Already Have Access Rights.

The ILECs already have some form of access right in practically all existing buildings for telephone service. Furthermore, in new construction they routinely request some form of easement to install their facilities on a property.

The easements ILECs hold or request may take the form of an easement to cross a property as far as an equipment closet in the basement of a building, but telecommunications providers may also adopt a policy of seeking easements all the way through a building to reach each individual unit. While such an easement may not refer to the provision of other types of services, this is not necessarily dispositive, as in some states such easements may be read broadly enough to include any class of service the provider chooses to offer. If such easements are not expressly limited to a particular period of time, they may effectively grant the provider the right to cross the property in perpetuity.¹⁰⁷ Many older buildings are subject to such easements, since the ILECs may have obtained rights to enter such buildings before the advent of competition. Knowledgeable owners today resist such broad, one-sided terms, but not all owners are so well informed, or always in a position to negotiate. Furthermore, on many older properties ILECs may have easements by prescription, because the law in many states provides that if a person

¹⁰⁶ Sadler Decl. at ¶ 24.

¹⁰⁷ For example, attached as Ex. G is a proposed agreement on Verizon’s standard form in use in Pennsylvania. While not exclusive, it provides for a “permanent” right of access. Furthermore, although it allows the provider to install facilities “for the provision of communications services” it neither limits those services nor requires the provider to actually provide them. It effectively

installs facilities for a prescribed period of time and the owner does not object, the owner will be deemed to have granted an easement.¹⁰⁸

The common use of such easements suggests that ILEC complaints may be exaggerated, although in fairness existing easement rights may not be broad enough to encompass new services, depending on the express language of the easement, and state law. Nonetheless, if an ILEC or other provider has such an easement in a building, it may already be able to provide video services without any authorization from the property owner. This can only be determined on a case-by-case basis.

This practice also illustrates the complexity of the problem, because the grant of an easement is a property right: any ban on “agreements” that grant exclusive access will be ineffective if it does not include exclusive easements as well as contract terms. And the right to grant an easement and the rights contained in an easement, are property rights, which the Commission has no power to preempt.¹⁰⁹ In other words, banning exclusive access agreements, even if the Commission had the power to do so, would not prevent service providers from demanding easement rights – that is, acquiring defined property rights– that would accomplish the same ends.

E. The Deployment of New Technologies by the ILECs Imposes New Burdens on Property Owners and Undermines Their Existing Legal Rights.

The RAA appreciates that the Commission wants very much to promote the extension of broadband networks, in particular technologically advanced networks such as Verizon’s Fiber-

gives the provider everything it wants and gives the owner nothing, other than a limited indemnity.

¹⁰⁸ See generally 25 Am. Jur. 2d, Easements and Licenses, §§ 2, 39.

¹⁰⁹ See *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

to-the Premises (“FTTP”) deployment. Deployment of an entire new infrastructure in a nation of 300 million people is an enormous task. Not only does it inevitably take time, but it also raises numerous technical, legal and practical issues, because it does not happen in a vacuum.

For example, Verizon’s FTTP deployment has raised many concerns and practical problems for property owners. Although owners recognize the value of that deployment for their residents and want to encourage it, they have to deal with the day-to-day practicalities of making the deployment work. These issues need to be addressed, and the burden is primarily on Verizon – which is both seeking to change how things are done and imposing new demands on property owners – to work on solutions. Verizon’s FTTP network requires an optical network terminal (“ONT”) to convert optical signals to electronic ones before the signals are distributed to subscribers’ end-user devices. The system was originally designed for deployment to single family residences and the company’s original design required an ONT at each subscriber’s premises. This design creates significant problems for apartment owners; not only does the ONT take up considerable space in each unit, but it is a new requirement – it does not replace a comparable device that would ordinarily be located in an apartment unit.¹¹⁰ In addition to the ONT itself, each individual installation requires a power supply and a battery back-up unit. These devices take up considerably more space than traditional installations. A typical ONT has dimensions of 16.5” x 13” x 5”, a battery back-up unit is 7” x 7” x 4”, and a power supply is 8” x 5”. In practice, the only place this equipment can be installed in most apartment units is in the master bedroom closet. Other locations are feasible, but they tend to be unattractive and inconvenient. Even installation inside a closet is a problem, because it takes up valuable space, interferes with installation of shelving, and makes access for service cumbersome and intrusive.

¹¹⁰ See generally Sadler Decl. at ¶¶ 31-33; Acker Decl. at ¶¶ 20-23.

Other significant problems posed by the FTTP deployment have been:

- The single family ONT requires installation of fiber optic cable to each unit. This imposes additional costs because installing fiber is more complex than installing traditional Category 5 wiring.
- All-fiber systems are not self-powered, the way the traditional telephone network is. This means that to extend service to a new subscriber, the new technology requires access to a power outlet. While not insurmountable, the need for access to electrical power imposes additional cost and design constraints on the system, which the telephone company has often sought to shift to the property owner.
- The lack of internal power also means that, in the event of a general electrical power outage, the system requires a battery back-up system to operate. Without a battery back-up, residents would be unable to contact emergency services during a power outage – and, of course, the battery back-up will not function if the batteries are not periodically replaced. This technological limitation creates new potential liabilities. Owners have been particularly concerned that residents would not replace batteries in ONTs within their units, and later seek to hold the property owner liable for harms arising when the resident is unable to reach emergency service during a power outage.
- Finally, and most important to this discussion, under the single family ONT design, Verizon has been effectively setting the demarcation point for its facilities at the ONT in each unit. This is not a change in the single family context, but many apartment property owners have policies of setting the demarcation point at the minimum point of entry (“MPOE”), which allows them to retain control over their inside wiring, pursuant to the Commission’s rules. Verizon’s design makes this impossible and

forces owners to choose between having access to the fiber network and ceding control of facilities, in effect subverting the intent of the Commission's inside wiring rules. In fact, in many cases owners have had no choice because Verizon has refused to extend its copper network to new buildings in areas where it is installing the FTTP network.

Adapting to Verizon's new requirements has been time-consuming and expensive for property owners. Many owners have had no choice but to adapt to Verizon's requirements on short notice and their own expense, because they needed service in buildings that were already under construction and there was no time either to wait for Verizon to develop an alternative, or to redesign the property.

When property owners became aware of Verizon's new requirements they quickly made the company aware of the problems being created. At least partially in response to these concerns, Verizon began work on a multifamily ONT, which does not require installation of equipment in each individual unit. This took the company several years, however, and even today it appears that it is not the company's policy to deploy the multifamily ONT unless an owner requests it. We speculate that Verizon is fully aware of the legal benefits of installing the single family ONT and prefers it for that reason, even though the multifamily version is now available. While the Company's technological initiative is laudable, it should not be allowed to limit future competition by manipulating the Commission's rules.

Because AT&T's approach to delivering video services permits the company to use more of its existing infrastructure, property owners face fewer problems with physical intrusions on their property. Nevertheless, this is not uniformly true. For one thing, like Verizon, AT&T often attempts to place its demarcation point at the unit, rather than the MPOE. And AT&T still often

requires upgrades to its facilities or individual properties in order to provide video service.

AT&T representatives have been known to make unauthorized changes to building wiring, and to claim that work is needed to upgrade service without disclosing that the company intends to provide video service.¹¹¹ The company's access rights under current law may or may not permit provision of new services. If not, property owners are within their rights to object.

F. The Commission Must Consider the Inconsistencies and Uncertainties Created by Its Existing Inside Wiring Rules.

In addition to considering various aspects of the behavior of the ILECs, the RAA urges the Commission to consider the effects of its existing inside wiring regulations before it embarks on adopting new regulations. The rights of owners and providers vary significantly today, depending on whether the provider is a cable operator or a telephone company, and there is often confusion about which rules apply. Furthermore, those rules are often ineffective in terms of their intended goals, which has been in large part to promote competition. A significant reason for that ineffectiveness has been that the Commission has been properly reluctant to adopt rules

¹¹¹ See generally Sadler Decl. at ¶ 34. With AT&T's video service offering, it may also be possible to begin providing service to some MDU buildings without doing any work in the building itself. AT&T has tested buildings for service and then started marketing to residents without advising the building owner in advance. *Id.* The RAA is concerned primarily with protecting the ability of property owners to manage their buildings, and thus is primarily concerned with regulations permitting service providers to physically enter buildings and conduct activities on those buildings without the owner's consent. The RAA has never objected to Commission regulations governing the use of communications infrastructure by providers that do not require physical access to a property, or the delivery of new or different services over existing infrastructure. For example, in response to the Commission's public notice in WC Docket No. 01-338, which ultimately led to the *2007 Inside Wiring Order*, the RAA filed comments stating that the real estate industry had no objection to the requested relief, so long as that relief did not include a mandate for physical access to the building without the owner's consent. Thus, although activities such as AT&T's might raise contractual issues for some property owners, the RAA has no position on such developments. On the other hand, if a provider is entering a property and upgrading facilities to provide a new or different service, and not informing the property owner or misleading the property owner by suggesting that the work is needed merely to maintain or upgrade existing service, that is another matter.

that would affect the Fifth Amendment property rights of the providers. We fully appreciate that concern, and can only ask that the Commission be equally respectful of the rights of apartment owners. The Commission has never given property owners the right to seize wiring owned by service providers,¹¹² and we hope the Commission will never go so far as to give service providers the right to install their facilities on private property without the owner's consent.

In any event, the current regulatory situation is very confusing. For example, by their terms, it would appear that the cable inside wiring rules apply to facilities installed by the ILECs inside buildings. Those companies are using those facilities to provide video services, and in the case of Verizon typically hold cable franchises. An ILEC would seem to fall within the definition of "multichannel video programming distributor" under 47 C.F.R. § 76.800(c), yet the ILECs assert that those rules do not apply to them. Instead, the ILECs assert that only the telephone rules apply to them. When combined with a policy of placing the demarcation point at each individual unit, the ILECs can then assert the right to control wiring inside a building all the way through the building, regardless of the services being provided over the wiring.

In fact, under its FTTP deployment using the single family ONT, Verizon effectively demands that the property owner waive its rights under 47 C.F.R. § 68.105, thus circumventing the intent of that rule, even though the rule was designed to advance competition by allowing a property owner to take control of wiring and permit multiple providers to connect to the wiring.

¹¹² We do not so interpret the Commission's latest inside wire ruling, *2007 Inside Wiring Order*, but to the extent the Commission's cable home wiring rules may have that effect in a specific case, we would argue that they are unenforceable.

Verizon's practice also subverts the efforts of property owners that have installed structured wiring systems to allow any provider to serve a property without installing new wiring.¹¹³

The RAA believes that, rather than pursuing the possible regulation of exclusive contracts, the Commission should consider issuing a notice of proposed rulemaking examining all of its inside wiring rules and their application to providers of multiple services. As part of this proceeding, the Commission could consider steps that would promote the installation of advanced wiring systems by property owners, so that owners can install systems that can be used by multiple providers. The Commission should also consider requiring service providers who do install wiring inside buildings to make that wiring available to competitors. These ideas may not prove practical, but the Commission will be ignoring "an important aspect of the problem"¹¹⁴ if it does not at least try to do so before regulating exclusive contracts.

VI. BANNING EXCLUSIVE AGREEMENTS WILL HARM COMPETITION IN THE LONG RUN BY STRENGTHENING THE INCUMBENT TELEPHONE COMPANIES AT THE EXPENSE OF ALL OTHER PARTIES.

That the ILECs have finally decided, after years of prodding and cajoling by Congress and the Commission, to move into the video market is a good thing. Property owners welcome this development. The Commission should not, however, ignore the law of unintended consequences. The ILECs are large and well-established companies that have proven their staying power over decades. They do not need regulatory favors, especially at the expense of property owners, who are by comparison much smaller and more vulnerable to market forces. The incumbent telecommunications providers already have such a strong competitive position –

¹¹³ The telephone companies also are able to take advantage of this regulatory uncertainty to gain access to MDU buildings to perform unauthorized work to ready their facilities and the building owner's inside wiring for the provision of video services. Sadler Decl. at ¶ 34.

¹¹⁴ *Motor Vehicle Mfrs. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

regardless of their protestations to the contrary – that acting to address their complaints at the expense of smaller companies will only harm competition in the long run.

The ILECs are among the largest companies in the country. Their annual revenues and market capitalizations dwarf even the largest owners of apartment properties,¹¹⁵ and they dominate their markets in a way apartment owners could never dream of. The demand for their services is such that they are able to command the attention of apartment owners and largely dictate the terms of their entry. Whatever problems the telecommunications industry may have in developing new services and markets, that industry does not need the Commission’s assistance in making the transition.

Among the questions raised in the NPRM is whether the Commission should consider a provider’s market power as a factor in any regulations it might adopt. Had the Commission any authority in the matter this might be a reasonable issue for the Commission to consider – but even then it would beg the question of what the Commission considers the relevant market. We would hope that the Commission would not analyze the question in terms of traditional distinctions among different classes of communications services, particularly when all of the providers are offering some version of the “triple play.” The fact is that the traditional Bell companies have, if not market power in the provision of telephone service, then at least a highly recognized brand name, that virtually guarantees their entry into apartment buildings for that service. They have large and established customer bases and powerful brand names in the voice market that they can and do use effectively to market other services. Furthermore, apartment

¹¹⁵ Verizon is No. 13 on the Fortune 500 list, AT&T No. 27, and Qwest No. 178. AIMCO, the largest apartment owner in the country, is not on the list. Five other apartment owners do appear on the list, but all those companies (General Electric, Morgan Stanley, Wachovia, Northwestern Mutual and PNC Financial) are primarily financial conglomerates, rather than apartment owners, and those 5 companies combined own less than 2% of all apartment units.

owners and managers report that despite the increase in the number of apartment residents that rely on cellphones or IP telephony for voice service, enough potential renters still demand brand-name voice service that as a business proposition it is essentially impossible for them to operate a building without service from the local ILEC. In fact, as discussed above, a property owner cannot get a certificate of occupancy from state or local safety inspectors unless there is wireline voice service available in the building.¹¹⁶ Thus, the ILECs have little trouble getting physical access to buildings for their networks.

We also note that the Commission itself has taken steps to promote the ability of the ILECs to introduce new broadband networks into buildings,¹¹⁷ which threatens to reduce the availability of competition for voice service from the CLEC industry. Thus, the Commission has effectively increased the market power of the ILECs in MDU environments. To compound this advantage, as discussed above, the ILECs often insist on placing the demarcation point for their new networks at each individual unit in a building, notwithstanding the Commission's rules permitting building owners to establish the demarcation point. Thus, the ILECs are able to use the need for their voice services to maintain control over their facilities in a building, defeating the pro-competitive intent of the Commission's inside wiring rules, and increasing the cost of introducing a competitor.

In fact, because of all of these advantages, the ILECs are in a much better competitive position than any other group of providers, which poses the threat that, if given further regulatory benefits, they will reinstate monopoly control in many markets. Many apartment buildings are marginal investments for service providers, especially smaller buildings outside major

¹¹⁶ Sadler Decl. at ¶ 26.

¹¹⁷ See, e.g., *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496 (2004).

metropolitan areas, or buildings serving low-to-middle income residents. These buildings may not be lucrative enough markets to be able to support more than one broadband infrastructure. Now that the ILECs are providing voice, video and broadband services, competitors may be reluctant to install facilities in buildings served by the ILECs, and the ILECs may well have an advantage in obtaining access in the first instance, for all the reasons discussed above. Apartment owners are very concerned that without exclusive agreements they will frequently find that they – and their residents – will have not one choice, but no choice.

The RAA does not advocate that market power be considered at all, but were it potentially a factor in the Commission's analysis, it should be only to ensure that smaller companies, such as the private cable industry, are protected against their larger, better capitalized competitors. Under no circumstances would it be reasonable to grant any form of regulatory favors to the ILECs.

We understand that some smaller companies, including SureWest, have joined Verizon in seeking Commission action on this issue. It is possible that such companies, depending on the markets in which they are operating, believe they would do better in a regime in which exclusive contracts are banned or regulated. This may be true of some individual companies, particularly those that do not face competition from the ILEC for video services. As a general rule, however, such positions are short-sighted. Without exclusive agreements, smaller companies faced with competition from both cable MSOs and the ILECs will find it very difficult to gain market penetration. Even if a property owner can be convinced to allow installation of a third set of wiring in a building, the return on investment for a market split between three companies in the apartment environment is unlikely to justify entry by such smaller companies, and if larger

providers are free to enter their markets, they face a greater risk of being forced out by price competition as the larger competitors recover their costs over a larger customer base.

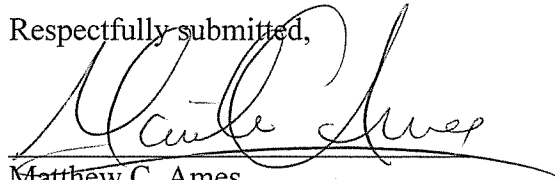
The apartment market is enormous and diverse, and there is ample room for providers to compete for the right to service individual buildings. Banning exclusive agreements will not only favor providers at the expense of property owners, but it will probably favor large providers over small providers, and the ILECs most of all. Commission intervention would defeat the goal of advancing competition and in the long run harm consumers. Consequently, the RAA again respectfully urges the Commission to avoid interfering with the private right of contract.

CONCLUSION

For all the foregoing reasons, the Commission should once again refrain from addressing issues related to exclusive agreements to provide video services in apartment buildings.

Congress has not given the Commission any authority over such agreements .

Respectfully submitted,



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July 2, 2007

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EXHIBIT A

DESCRIPTION OF THE COMMENTERS

The Real Access Alliance (“RAA”) is an *ad hoc*, unincorporated coalition of trade associations whose members include the Building Owners and Managers Association International, the Institute of Real Estate Management, the International Council of Shopping Centers, the National Apartment Association, the National Association of Industrial and Office Properties, the National Association of Realtors, the National Association of Real Estate Investment Trusts, the National Multi-Housing Council, and The Real Estate Roundtable. The RAA was formed to encourage free market competition among telecommunications companies for services to tenants in commercial and residential buildings, and to safeguard the constitutional property rights of America’s real estate owners. Descriptions of the RAA’s member associations appear below.

The members of the RAA are:

- The Building Owners and Managers Association (BOMA) International is an international federation of 108 local associations. BOMA International’s 19,000 members own or manage more than 9 billion square feet of downtown and suburban commercial properties and facilities in North America and abroad. The mission of BOMA International is to advance the performance of commercial real estate through advocacy, professional competency, standards and research.
- The Institute of Real Estate Management (“IREM”) educates real estate managers, certifies the competence and professionalism of individuals and organizations engaged in real estate management, serves as an advocate on issues affecting the industry, and enhances and supports its members’ professional competence so they can better identify and meet the needs of those who use their services. IREM was established in 1933 and has 10,000 members across the country.
- The International Council of Shopping Centers (“ICSC”) is the trade association of the shopping center industry. ICSC now has over 50,000 members worldwide in the United States, Canada, and more than 70 other countries, representing owners, developers, retailers, lenders, and all others having a professional interest in the shopping center industry. ICSC’s approximately 45,000 United States members represent approximately 44,000 shopping centers in the United States.
- The National Apartment Association (“NAA”) has been serving the apartment industry for 60 years. It is the largest industry-wide, nonprofit trade association devoted solely to the needs of the apartment industry. NAA represents approximately 29,597 rental housing professionals holding responsibility for more than 4,911,000 apartment households nationwide.
- The National Association of Industrial and Office Properties (“NAIOP”) is the trade association for developers, owners, and investors in industrial, office, and related commercial real estate. NAIOP is comprised of over 9,500 members in 46 North

American chapters and offers its members business and networking opportunities, education programs, research on trends and innovations, and strong legislative representation.

- The National Association of Real Estate Investment Trusts (“NAREI”) is the national trade association for real estate investment trusts (REITs) and publicly-traded real estate companies. Its members are REITs and other businesses that own, operate, and finance income-producing real estate, as well as those firms and individuals that advise, study and service those businesses.
- The National Association of Realtors (“NAR”) is the nation’s largest professional association, representing more than 720,000 members. Founded in 1908, the NAR is composed of residential and commercial realtors who are brokers, salespeople, property managers, appraisers, counselors and others engaged in all aspects of the real estate industry. The association works to preserve the free enterprise system and the right to own, buy, and sell real property.
- The National Multi-Housing Council (“NMHC”) represents the interests of the larger and most prominent firms in the multi-family rental housing industry. NMHC’s members are engaged in all aspects of the development and operation of rental housing, including the ownership, construction, finance, and management of such properties.
- The Real Estate Roundtable (“RER”) provides Washington representation on national policy issues vital to commercial and income-producing real estate. RER addresses capital and credit, tax, environmental, technology and other investment-related issues. RER members are senior executives from more than 200 U.S. public and privately owned companies across all segments of the commercial real estate industry.

EXHIBIT B

Comments Filed By Members of the Real Access Alliance in Related Dockets:

CS 95-184: Inside Wiring
MM 92-260: Cable Home Wiring
CC 96-98: Local Competition
WT 99-217: Competitive Networks

	Date	Docket	Name of Filing
1.	3/18/96	CS 95-184	Joint Comments of Building Owners and Managers Association International, National Realty Committee, National Multi-Housing Council, National Apartment Association, Institute of Real Estate Management, and the National Association of Home Builders
2.	3/18/96	MM 92-260	Joint Comments of Building Owners and Managers Association International, National Realty Committee, National Multi-Housing Council, National Apartment Association, Institute of Real Estate Management, and the National Association of Home Builders
3.	3/18/96	CS 95-184	Comments of the National Association of Real Estate Investment Trusts
4.	3/18/96	CS 95-184	Comments of the International Council of Shopping Centers
5.	3/18/96	CS 95-184	Comments of the National Association of Industrial and Office Properties
6.	4/17/96	MM 92-260	Joint Reply Comments of Building Owners and Managers Association International, National Realty Committee, National Multi-Housing Council, National Apartment Association, National Association of Real Estate Investment Trusts, and the Institute of Real Estate Management

	Date	Docket	Name of Filing
7.	4/17/96	CS 95-184	Joint Reply Comments of Building Owners and Managers Association International, National Realty Committee, National Multi-Housing Council, National Apartment Association, Institute of Real Estate Management, and the National Association of Real Estate Investment Trusts
8.	6/3/96	MM 96-98	Joint Reply Comments of the Building Owners and Managers Association International, National Realty Committee, National Multi-Housing Council, National Apartment Association, International Council of Shopping Centers, and the Institute of Real Estate Management
9.	12/27/96	CS 95-184	Joint Request for Official Notice of Building Owners and Managers Association International, National Realty Committee, National Multi-Housing Council, National Apartment Association, Institute of Real Estate Management, National Association of Real Estate Investment Trusts, and the International Council of Shopping Centers
10.	9/25/97	CS 95-184 MM 92-260	Further Joint Comments of Building Owners and Managers Association International, Institute of Real Estate Management, International Council of Shopping Centers, National Apartment Association, National Housing Council, and the National Realty Committee
11.	10/6/97	CS 95-184 MM 92-260	Further Joint Reply Comments of Building Owners and Managers Association International, Institute of Real Estate Management, International Council of Shopping Centers, National Apartment Association, National Multi-Housing Council, and the National Realty Committee
12.	1/15/98	CS 95-184 MM 92-260	Opposition to Petitions for Reconsideration
13.	3/15/98	CS 95-184 MM 92-260	Joint Surreply Comments of Building Owners and Managers Association International, Institute of Real Estate Management, International Council of Shopping Centers, National Apartment Association, National Multi-Housing Council, and the National Realty Committee

	Date	Docket	Name of Filing
14.	8/27/99	WT 99-217 CC 96-98	Joint Comments of the Real Access Alliance
15.	9/27/99	WT 99-217 CC 96-98	Joint Reply Comments of the Real Access Alliance
16.	1/22/01	WT 99-217 CC96-98 CC 88-57	Further Comments of the Real Access Alliance
17.	2/21/01	WT 99-217 CC 96-98 CC 88-57	Further Reply Comments of the Real Access Alliance

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EXHIBIT C
BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of

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

Notice of Proposed Rule Making

MB Docket No. 07-51

**DECLARATION OF CHRIS ACKER IN SUPPORT OF
COMMENTS OF THE REAL ACCESS ALLIANCE**

I, Chris Acker, declare as follows:

1. I submit this declaration in support of the Comments of the Real Access Alliance in the response to the Commission's Notice of Proposed Rule Making in the above-captioned matter.

2. I currently serve as Director of Building Technology Services Group for Forest City Residential Group, Inc. ("Forest City"), a top-50 U.S. apartment owner according to the National Multi Housing Council's most recent survey data. *See* "Top 50 Apartment Owners (Rankings)" reported on NMHC's website at:

<http://www.nmhc.org/Top50/SurveyDetail.cfm?SurveyID=13&Sort=Owners>. Forest City Residential Group, Inc. is ranked number 23.

3. I have served in my current position as Director of Building Technology Services Group since April 2006. In this position, I am responsible for managing and coordinating the provision of communications services in the Forest City apartment buildings. This includes

soliciting proposals from providers to provide these services to new and existing buildings, negotiating the terms of the service and related agreements, monitoring the performance of the agreements, and negotiating any renewals. My group is also responsible for performing the design work, and working with architects to develop the communications infrastructure systems deployed in Forest City's buildings. From 2003 until I was appointed Director in 2006, I served as Manager of Ancillary Services for Forest City and had similar responsibilities for negotiating agreements with service providers related to the provision of communications services to Forest City's buildings.

Background

4. Forest City currently owns a total of 124 apartment properties (39,000 residential units) located in 16 states. About one quarter of Forest City's apartment buildings (32 buildings in 10 different states) are covered by exclusive agreements of one form or another. All of those agreements include exclusive marketing arrangements, meaning we commit to actively marketing the provider's video service. Some of our exclusive marketing agreements do also grant the provider exclusive access to the inside wiring owned by Forest City. To the best of my knowledge, only one agreement also grants the video provider the exclusive right to provide video services to the building. With that one exception, the agreements permit us to grant access to competitive providers to deliver video services in Forest City's buildings, however we are precluded from marketing the competitor's services, and in some cases competitors would have to install their own inside wiring in order to deliver their service. Forest City's newer agreements tend to grant exclusivity only for marketing, and not for use of inside wiring or access to the building. The buildings that do not have exclusive contracts are typically older buildings that were constructed before Forest City started installing structured wiring systems in

its buildings, or are buildings which may have had an exclusive contract at one time, but the contract expired and was never renewed.

5. In my experience, we have not witnessed any increase in requests for such agreements from video service providers in recent times.

Ownership and Cost-Sharing

6. At all of its new development projects Forest City designs and installs its own structured cabling system to accommodate voice, data and video services. This means Forest City will install and own the entire telephone distribution cabling (from the minimum point of entry (MPOE) to the unit jacks) as well as the data distribution cabling. With the coaxial infrastructure, Forest City will install and own the cabling from the unit jack to a floor communications closet, and the service provider will install its distribution system into the property, as well as the riser cabling to connect to Forest City's infrastructure in the floor communication closet.

7. In existing buildings, Forest City also prefers to do its own construction and retain ownership of upgrades to the communications infrastructure. We perform these building upgrades when resident demand for new and/or improved services to the building warrant making the investment in better infrastructure.

8. For Forest City, the average cost of the internal structured wiring system that Forest City installs in new builds to provide voice, data and video services is between \$850 and \$1000 per unit. The cost for upgrades to existing buildings would be comparable or higher, depending on the particular building design and status of its existing infrastructure. These costs do not include the space required for equipment or additional conduits for the provider distribution systems. Naturally we look to the communications services providers who will

profit from the use of our structured wiring system to reimburse us for some of the costs of installing that system.

9. When in discussions with communications providers about bringing service to a building, it is the provider who brings up the exclusivity requirement during the early stages of discussions. In many instances, the provider makes the case that, in order for the owner to receive any reimbursement for its infrastructure costs, there must be exclusivity (whether for all services offered, or part of the provider's service offering). Providers also want exclusivity to ensure that they can recoup their own infrastructure costs to serve the building.

10. Forest City will enter into exclusive agreements with providers in order to help with initial infrastructure costs or wiring upgrade costs as well as to provide additional ancillary income to the property. These include exclusive agreements with cable companies for video (and sometimes data) service, and telephone companies for voice (and sometimes data) service. Typically, Forest City is only able to recoup about half of the cost of the structured wiring system through the exclusive agreements entered into with telephone and video services providers.

Additional Benefits of Exclusive Contracts

11. Exclusive agreements provide several other important benefits in addition to providing a communications infrastructure cost-sharing mechanism between building owners and the communications providers.

12. Exclusive marketing and access to wiring agreements with service providers, combined with ownership of the infrastructure, have the benefit of providing more control over the quality of the services being offered at the property. It seems that every service provider talks about providing excellent customer service, but often they fall short on their promises.

From Forest City's perspective, the ability to use exclusivity language, in particular for a private cable operator or other smaller (regional or local) service provider, is important. These agreements permit us to negotiate specific service level components which will allow the owner to diligently pursue a higher level of service from the smaller provider to the residents of the property.

13. We take the negotiation and enforcement of customer service obligations seriously for two reasons. One is that we typically have annual turn over rates of 35 percent. In order to attract and retain residents, we believe that it is important to maintain high quality ancillary services, including video services.

14. The other is that if we, as the owner, decide to actively marketing a provider, the owner is, in effect, lending its name and reputation to that of the provider. It costs an owner far more money to lose a prospective resident, have a resident opt not to renew a lease (or attempt to terminate a lease) because of a service provider's inability to live up to customer service obligations, than the ancillary revenue the property may receive under the exclusive marketing agreement.

15. We also have language in each exclusive marketing agreement stating that the provider is to charge our residents no more than the residents in the surrounding area. We do not typically enter into bulk rate deals with the providers because including communications services in the unit rental cost would make our rents less competitive when compared to rents in buildings without bulk agreements.

16. Many exclusive agreements also have language protecting system maintenance and upgrades. Since the owner is making a significant investment in structured wiring, the providers who are granted access to the wiring are required to maintain it in a professional and

workmanlike manner, and in some cases they are also required to upgrade the system to offer new or higher quality services as technology advances.

Additional Burdens on Property Owners/Residents Due to Multiple Providers

17. Although in principle we support competition and would like to have competitive providers in our buildings, there are drawbacks to having multiple providers. Their presence often results in greater disruption to residents and expenditure of management time dealing with problems cause by the providers. When there are multiple competitors in a building sharing the same telecommunications closets and other infrastructure, there is an increased risk that the providers may, accidentally or intentionally, damage each other's facilities on-site, or even the building owner's wiring.

18. These occurrences result in increased service disruptions for residents, increased complaints to the building owner, and potentially increased maintenance and repair costs for the owner. We also have to dedicate more staff time to supervising providers in the building when there are multiple providers on-site. For example, in one building in Boston we discovered that Comcast had been making its service connections for telephone service past the minimum point of entry. The problem came to light when several residents who were getting voice service from Comcast moved out and the new residents ordered voice service from Verizon. Verizon installed the connections at its connect point in the basement of the building but the voice service would not work. Verizon wanted to charge each resident to investigate and fix the problem because it had the right to do so for work done on the other side of the demarcation point. Normally, each resident would have been stuck with the \$95.00/hour charge. However, the residents complained to the management office and in order to maintain a good relationship with the residents, Forest City absorbed the charges from Verizon. We then had to seek recourse from Comcast. Because

we were in negotiations for an exclusive agreement with Comcast at another property at the time, we were able to get Comcast to agree that it would make telephone cross-connects only at the minimum point of entry, but Comcast did not agree to reimburse our costs.

Experience with Telephone Companies

19. As mentioned earlier, we have entered into exclusive agreements with telephone companies for voice services for the same reasons we entered into exclusive agreements with cable providers.

20. Now that telephone companies are beginning to offer video services, their demands on building owners are changing. For Forest City, space is the one of the biggest issues of concern with the new Verizon deployment. An owner must either allocate appropriate space to accommodate two (2) communications panels within the unit (1 for the owner's structured wiring, and 1 for Verizon's SFU ONT) or sufficient space within the communications closet to accommodate Verizon's MDU ONT that will serve multiple units in the building. Verizon prefers the first, more onerous installation, that is, to install its SFU ONT within each unit. This approach also requires an additional electrical outlet for Verizon's equipment. Since Forest City does not normally install electrical outlets in bedroom closets, this electrical outlet is an additional burden on the building owner generated only by Verizon's choice of equipment. In addition, the backup battery unit for the Verizon equipment will also be installed in the bedroom closet of the unit, which places the additional burden of maintaining the backup batteries on to the resident and the building owner rather than Verizon.

21. Allowing Verizon (or others) access into the individual units gives rise to two additional potential concerns for Forest City. One is that this will cause additional disruption for the residents. No one likes service providers performing work in their bedroom closet. That is

why we have worked hard to install structured wiring systems that keep all providers and equipment out of the units as much as possible.

22. The other is that the companies will have effectively gained control of the infrastructure in the building all the way to the individual residents' units. This means the building owners lose control of the wiring in their buildings, and the providers will then be able to effectively limit the number/type of competitors in the building because the providers do not have any obligation or incentive to make their networks available to competitors. For example, Verizon's preferred solution is to install SFU ONTs in each unit so it only has to use the building owner's inside wiring in the units to deliver its service. It has expressed reluctance to put MDU ONTs in the floor telecom closets and use the building owner's horizontal distribution run. It has even rejected our offer to install our own fiber in a building, though it has the same specifications as Verizon's fiber.

23. Since Verizon requires coaxial cabling within the unit in order to provide its video service even with the use of SFU ONTs, in the interests of cutting down on the potential disruption for residents, it may be necessary for building owners to install 2 coaxial infrastructures *within each unit* – one for Verizon and one for the cable operator. Exclusive agreements provide a reasonable means for recouping some of these additional costs.

24. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 13 day of June, 2007, at Cleveland, Ohio.



Chris Acker

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EXHIBIT D

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of

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

Notice of Proposed Rule Making

MB Docket No. 07-51

**DECLARATION OF STEPHEN J. SADLER IN SUPPORT OF
COMMENTS OF THE REAL ACCESS ALLIANCE**

I, Stephen J. Sadler, declare as follows:

1. I submit this declaration in support of the Comments of the Real Access Alliance in the response to the Commission's Notice of Proposed Rule Making in the above-captioned matter.

2. I currently serve as Director, Ancillary Services for Post Properties, Inc. ("Post"), a top-50 U.S. apartment owner according to the National Multi Housing Council's most recent survey data. *See* "Top 50 Apartment Owners (Rankings)" reported on NMHC's website at: <http://www.nmhc.org/Top50/SurveyDetail.cfm?SurveyID=13&Sort=Owners>. Post Properties, Inc. is ranked number 47.

3. I have served as Director, Ancillary Services since 2001. In this position, I am responsible for managing and coordinating the provision of communications services in Post's apartment buildings. This includes soliciting proposals from providers to provide these services

to new and existing buildings, negotiating the terms of the service and related agreements, monitoring the performance of the agreements, and negotiating any renewals.

Background

4. Post currently owns a total of 60 apartment properties (21,563 residential units) located in seven states and the District of Columbia. About two-thirds of Post's properties are located in Georgia and Texas. Approximately 50 of Post's apartment buildings are covered by exclusive agreements for video services. These agreements are principally exclusive marketing agreements. These agreements lock us into actively marketing only one provider for a given service. Our marketing efforts include placing a link to the service provider's website (to sign up for service) on our website, providing marketing information in the resident lease packet, verbal marketing efforts, and permitting the service provider to hold events and promotions on site.

5. The exclusive marketing agreement may also grant the provider exclusive access to the inside wiring if Post controls such wiring, as well as an easement or license to install related facilities on the property. These exclusive marketing agreements allow us to grant access to another provider to deliver video services; we would, however, be precluded from marketing the other provider's services. If we do not have multiple home runs in a building, any additional providers would also have to install their own inside wiring in order to deliver their services.

6. In my opinion, Post has not experienced any increase in requests for exclusive marketing agreements in recent times. Providers of all types of communications services have sought and continue to seek exclusive contracts.

Ownership and Cost-Sharing

7. Post was involved in the construction of a large number of apartment buildings in 1995 through 2003, and is now in another phase of new building construction. When Post

constructs a new building or a new phase in an existing development, Post readies the building for communications services by dedicating building space to these services, and installing its own structured wiring system. The structured wiring system typically includes the following components: (i) the internal wiring inside each unit, (ii) the home run wire; (iii) telecommunications closets; (iv) conduit between closets; and (v) environmental controls, access controls, and power in the telecommunications closets. Post retains ownership of the structured wiring system and seeks proposals from communications providers to serve the building.

8. Post first began installing structured wiring systems in 1996. Changes in technology and in the varying types of providers have required owners including Post to install sophisticated structured wiring systems to accommodate all of the possible provider systems. This has driven the average cost of the building wiring from around \$300 per unit prior to 1996 to around \$1,500 per unit currently. This cost does not include the additional space required for equipment, environmental controls necessary for the operation of networking hardware, or additional conduits for their distribution systems.

9. The various communications services providers that serve the building will, at their own cost, install their distribution systems into the property and to each of the telecommunications closets where they make their connections to the owner's structured wiring system.

10. We typically begin negotiations once we break ground on a piece of property. We work to have providers selected and under contract prior to the need to do trenching and outside conduit work. In order to avoid the trenching and construction coordination problems, and construction delays which are inevitable when there are multiple providers making

installations at a single site, we typically take on the extra expense of installing conduit to the property line for the use of all the various communications services providers.

11. Exclusive marketing agreements serve both the building owner and the provider by allocating costs. For the building owner, these agreements are the only means of recovering its costs of constructing the structured wiring system, and making space available to service providers.

12. In most cases, the providers tell us that they need exclusivity in order to get a sufficient customer base in the building to generate a reasonable return on their system investment and to make their contribution to Post's structured wiring system costs.

13. The exclusive marketing agreements typically have two compensation components for the building owner – a one-time “door fee” or per unit payment, and/or a commission on annual revenues generated by subscribers in the building. Even with a modest door fee and on-going revenue share over a 10 year term, the owner will be lucky to receive a 50% payback on infrastructure costs. If costs continue to climb and owners lose the ability to reach agreements with providers, the only other recourse will be to raise rents to cover the costs of the structured wiring systems, or scale back the capabilities of the structured wiring systems to reduce infrastructure costs, such that it may reduce an owner's ability to support multiple providers or even specific provider types.

Additional Benefits of Exclusive Contracts

14. In addition to the cost-allocation benefits of the exclusive agreements, we negotiate agreements that also offer several other benefits to owners and the residents who subscribe to the video services. Principal among these benefits is higher customer service standards.

15. In my experience, cable companies are not particularly adept at handling customer service issues for MDU residents as a result of the unique nature of our business and the constant churn of residents. The initial service installation and ongoing troubleshooting of service problems with cable service typically requires more direct customer interaction than with the activation of other communications services. These include requiring the resident to be home for activation of video service, and for the investigation of service complaints. As telephone companies move into the video business, they will also have to adjust their customer service operations to include more direct customer interaction with installations and ongoing service issues.

16. Virtually all ILECs and MSOs have structured their service operations around responding to calls at single family homes, and their customer service structure does not translate well to a multi-family unit building. For example, most of Post's MDU buildings are in gated and controlled-access communities. In addition, because we have multiple providers who jointly use our telecom closets and fill them with valuable equipment, we keep the telecom closets locked. In order to gain access to the telecom closets, providers are told to send service technicians out to our buildings when the leasing office is open (that is, during regular business hours, typically Monday to Saturday, between 10 AM and 6 PM) so that the technician can be given the key or combination to unlock the telecom closet and perform the service call. It is commonplace for the providers' customer service representatives to ignore (or be unaware of) these restrictions and schedule service calls outside of our business hours. Sometimes the technician arrives, finds the office closed, and simply leaves. But on other occasions, rather than rescheduling the service call to a more suitable time, technicians who find the leasing office

closed will jimmy open the door to the telecom closet or break the lock to gain access and perform their work.

17. As another example, if a resident of an apartment does not formally request that the service be disconnected when the resident moves out, new residents have a difficult time convincing the service provider to sign them up for service because, according to the service provider's records, there is already an account in another person's name at that address. It often takes the intervention of our building management to verify that the new resident has moved in to the unit in order to get the new service account established.

18. The average churn rate in the apartment sector is between 50% and 60% per year which equates to millions of truck rolls and account changes per year. If providers are unable to manage that churn, it translates into bad customer service which in turn translates into a bad resident experience and ultimately costs us residents. This is another reason why we feel it is important that we are able to control which providers serve our properties; it is ultimately our reputation and our business that is on the line.

19. Therefore, we typically insist on including customer service standards in our exclusive marketing agreements. These standards offer several benefits for our residents. First, the agreements put a level of power in the owner's hands to enforce a consistently high level of customer service from the provider. Post will include Service Level Agreements (SLAs) in the contracts which set a minimum standard for performance. Items that we focus on in the SLAs include outage response times, install windows, and stay competitive clauses.

20. In my experience, these SLAs are typically more stringent than a local franchise might call for and therefore they put an additional level of pressure on the provider to provide good quality services. We have an account representative assigned to our account who we

contact with problems as they arise. We also survey our residents annually on a variety of topics, including the performance of service providers, to make sure that residents are satisfied with the current providers. If a provider delivers bad service or is non-competitive, the owner can also place that provider in default which will lead either to improved service or the replacement of the poor performing provider. The owner also has the option to not renew the agreement, and go with another video provider.

21. Another benefit of the exclusive agreements is that some providers, particularly the private cable operators (PCOs), will sometimes offer specials for the residents in the building, such as waiving installation charges, or providing the first month of service for free. The PCOs also commonly offer analog programming that is customized to appeal to the residents of the building. PCO's also resell satellite programming from one of the large satellite providers (DishNetwork and DirecTV) that offer service in the area. These services are frequently less expensive than the video services offered by the cable providers; however, in order to induce PCOs to invest in a building, they usually require exclusivity.

22. In some cases where we have older buildings that do not have sophisticated wiring systems, we will partner with a provider who can assist us in making the necessary wiring upgrades of an entire community. Often providers will approach us with a request to upgrade the wiring in one of our buildings at their cost, but only if we agree to grant the provider an exclusive marketing and/or service agreement for the building. While this limits our ability to have multiple providers for a time, a well-chosen provider will add much improved services with access to newer wiring. Typically these deals are 7 to 10 years in length and ownership of the upgraded wiring is transferred to the property owner at the end of the term. If exclusives are

eliminated we would likely see an end to provider-funded wiring improvements and thus a delay in delivery of new technology to MDU residents.

Experience with Telephone Companies

23. The communications providers that Post seeks to provide service when it constructs a new building or a new phase of an existing development are not limited to video services providers, but also include telephone companies, and sometimes internet service providers. Post does not typically enter into exclusive agreements with internet providers because the cost of delivery is lower than video and a single property can often support 2, 3, or even 4 providers of data service. Today, Post averages 3 data providers on all properties with quality structured wiring systems in place. Where there is no structured wiring there are typically only 2 providers of data service.

24. It is commonplace for Post to enter into exclusive marketing agreements for voice services with telephone companies such as Verizon and AT&T. In fact, the telephone companies expect these agreements to be exclusive. For example, Post is currently constructing a condominium project in Texas. For that project, I requested a proposal from AT&T for a non-exclusive marketing and access agreement for telecommunications services. In response, I received an email from an AT&T representative which indicated that they *never* enter into non-exclusive agreements for voice services. The email dated June 5, 2007 from AT&T in Texas to me, stated the following: "Hi, Steve. I know you mentioned interest in non-exclusive high speed Internet but did you intend to include non-exclusive voice as well? If so, I would have to get approval from way up [the] ranks through Legal to obtain approval for non-exclusive voice as this would be a first. Please confirm. Thanks." These exclusive agreements may cover a

different communications service but they are otherwise very similar in purpose and compensation arrangements to the video services agreements described above.

25. The relationship between building owners and telephone companies does differ in some important respects from that described earlier concerning cable providers. Most importantly, as a building owner, Post is usually required to equip its building with land lines from the local telephone company. Land line telephone service is required for three main reasons.

26. First, building owners must pass inspections from local municipal building code enforcement officers and fire marshals before a building can be occupied by residents. Since these inspections and approvals do not occur until very late in the construction process, we have to select proven technologies for use as life safety lines (fire alarm, elevators, etc.). That means life safety lines must be facilities based from either the ILEC or a CLEC. In my experience, VoIP telephony service is not sufficiently proven for inspectors to be comfortable approving such configurations.

27. Second, when buildings are located within an ILEC's footprint, the ILEC can argue that it has the right/obligation to serve residents of the building as the provider of last resort.

28. And third, although resident demand for land line telephone service has dropped precipitously in the last few years, we still have a land line penetration rate of more than 30 percent in our buildings. Not everyone wants to or can use a cell phone as their primary phone service. Some residents prefer to have a land line as their primary phone and many others simply can't get good enough cell coverage in their apartments to make it reliable enough for primary use. In a business as competitive as the apartment rental business, we cannot risk losing

prospective or current residents by not offering land line telephone service, even if demand for the service is low and falling. The end result is that our buildings must have land line telephone service. This gives the telephone companies considerable negotiating leverage.

29. Now that telephone companies are beginning to offer video services, we anticipate that they may use their leverage in order to gain exclusivity related to their video services. While we have not yet observed this type of behavior in our recent construction efforts, recently Post has had a similar experience related to the renewal of existing voice-only exclusive marketing agreements with Verizon for some buildings in Tampa, Florida and Washington, DC. Post had entered into voice-only exclusive marketing agreements with Verizon (then GTE) in about 1998, at a time when Verizon did not have the capability to provide data or video services. When those agreements recently expired, Verizon refused to renew the exclusive marketing agreements for voice unless Post also agreed to expand them to include data and video services. Post had existing exclusive marketing agreements with different providers for data and video services that we were compelled to honor. In the end, the exclusive marketing agreement with Verizon expired and was not renewed, but Verizon continued to serve the building.

30. A second difference between cable companies and telephone companies which Post has had to address in its buildings relates to the establishment of provider demarcation points. Telephone companies such as Verizon and AT&T prefer to place the demarcation point within the unit. About 5 to 7 years ago, Post began a deliberate process of moving all provider demarcation points out of the apartment units and back into the telecom closets. We did this because it eliminated the confusion created by the "inside wire" rules by placing demarcation points for all providers in the telecom closet and allowed Post to own and control all inside wiring to and through each apartment. This also made it easier to remove a provider from the

property for poor performance. Thus far we have completed this process on all of our existing properties.

31. For new construction projects we are now working on, the demarcation point issue has come up again, with some additional complications. Verizon again is expressing a preference to have the demarcation point in the unit. In addition, in order to ready the unit for FiOS services, Verizon wants to install a single family optical network terminal (SFU ONT), and a backup battery unit (BBU) in the master bedroom closet of each unit.

32. Post prefers that Verizon install a single multi-dwelling unit (MDU ONT) in each building for several reasons. First, the space requirements of the SFU ONT are such that they take away a significant portion of the apartment's limited closet space, compared to the standard communications recess panel. Second, with the use of the SFU ONT, the resident and ultimately the property owner are responsible for maintenance and replacement of the batteries that support the phone system in a power outage. Third, the SFU ONT is surface mounted and will be vulnerable to damage from other items placed in the bedroom closet. Fourth, the residents will be subject to more frequent disruption due to the need to enter the individual units for maintenance of the SFU ONTs.

33. To the contrary, the MDU ONT, which is installed in the telecommunications closets, offers several advantages. Most importantly it places responsibility for replacing batteries and other maintenance back on Verizon, where it should be. In addition, instead of taking up residential closet space, it requires a modest increase in space in the telecom closets (depending on how many units are served out of each closet). Finally, the use of MDU ONTs also reduces the number of times that a technician might have to enter a resident's apartment.

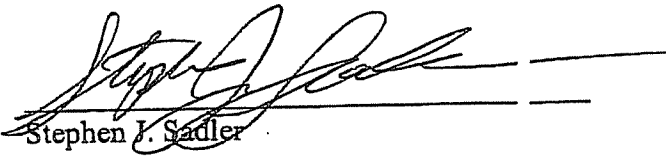
34. Telephone companies also try to apply regulated telecom rules to their cable product as well. Verizon and AT&T frequently push to have us recognize their demarcation point for video services in the same location as the demarcation point for telephone services. Moreover, AT&T has used its existing voice service as a pretext for gaining access to our buildings to perform unauthorized installations and changes to ready the site for its video service. For example, AT&T engineers recently came to one of our buildings in Houston, Texas and claimed they needed access to “upgrade DSL service”. When the building manager became suspicious and escalated the matter to my office, the engineers finally admitted that they were really intending to ready the building for AT&T’s u-verse service. In another example, in a neighborhood in Houston, Texas, AT&T installed a V-RAD nearby one of our buildings and then determined it could provide u-verse video service to our building. AT&T then began direct mailings to our building residents, and began installing service to residents in our building without our approval, which included making unauthorized changes to Post’s inside wiring. We have asked AT&T to cease, but it has so far failed to comply with our request.

Perpetual Agreement in Fairfax County, VA

35. Finally, I want to comment on the perpetual agreement that the Commission mentions in reference to Post in the Notice of Proposed Rule Making at footnote 21. Post does have one building in Fairfax County, VA that is subject to a perpetual contract. Post acquired that property approximately 3 years ago, and it had had a perpetual agreement in place prior to our purchase. With that one exception, Post is not a party to any perpetual contracts.

36. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 14th day of June, 2007, at Atlanta, Georgia.



Stephen J. Sadler

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EXHIBIT E

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of

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

Notice of Proposed Rule Making

MB Docket No. 07-51

**DECLARATION OF KENT MCDONALD IN SUPPORT OF
COMMENTS OF THE REAL ACCESS ALLIANCE**

I, Kent McDonald, declare as follows:

1. I submit this declaration in support of the Comments of the Real Access Alliance in response to the Commission's Notice of Proposed Rule Making in the above-captioned matter.

2. I currently serve as Director of Communications Services for Apartment Investment & Management Company (AIMCO), the largest apartment owner in the United States according to the National Multi Housing Council's most recent survey data. *See* "Top 50 Apartment Owners (Rankings)" reported on NMHC's website at:

<http://www.nmhc.org/Top50/SurveyDetail.cfm?SurveyID=13&Sort=Owners>.

3. I have served as Director of Communications Services since 2004. In this position, I am responsible for managing and coordinating the provision of communications services in AIMCO apartment buildings. This includes soliciting proposals from providers to provide these services to existing buildings, negotiating the terms of the service and related agreements, monitoring the performance of the agreements, and negotiating any renewals.

Background

4. AIMCO currently owns a total of 877 apartment properties (188,607 units) located in 48 states and the District of Columbia. About half of AIMCO's properties are covered by some form of exclusive agreement. Most of those agreements grant exclusive marketing rights and exclusive access to the building for the provision of video services.

5. In my experience, we have not witnessed any increase in requests for such agreements from cable operators in recent times. However, we have experienced an increased interest by telephone companies in entering into exclusive marketing agreements.

Ownership and Cost-Sharing

6. AIMCO does not construct new residential apartment buildings. We acquire and own existing buildings, and, in some cases, remodel or redevelop aging buildings. These buildings vary in age and in the quality of their communications infrastructure.

7. Unless we are planning to undertake a major building rehabilitation project, AIMCO prefers to have the service providers perform the construction of any upgrades to the communications infrastructure in our buildings. Retrofit projects usually take 30 to 45 days for the service provider to complete, and require repeated access to all units with on-site management present. Plans are submitted in advance for owner review as the owner, and we approve the layout, aesthetics, etc. The actual work is scheduled directly with the site management team.

8. Generally, we require these communications infrastructure upgrades to be at the cost of the provider. This is because we are not in the business of designing and installing wiring infrastructure, and because any costs we absorb must be passed through in tenant rents, which affects our ability to compete in the real estate market. Providers are usually willing only

to undertake these upgrades in return for exclusive access and/or marketing agreements with AIMCO. These agreements, which can range from one to ten years in length, compensate AIMCO for giving the provider the right to access our property, for providing space for their equipment, and, when applicable, for marketing their service. In most cases, upon expiration of the agreement, we gain ownership and rights to all inside wiring installed by the provider.

Benefits of exclusives

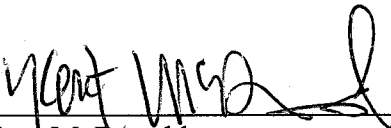
9. In addition to the cost-allocation benefits of the exclusive contracts, AIMCO believes these agreements offer a number of additional benefits. Customer service commitments are essential components of these agreements, because good customer service by all providers is a key quality of life component which AIMCO tenants expect. The apartment industry is a very competitive business with lower than average industry margins, and high resident turnover rates. We typically have annual tenant turnover rates of about 35 percent. In order to attract and retain residents, we believe it is very important to have high quality ancillary services, including video and telephone services, available in the buildings. Therefore, we negotiate customer service commitments that will benefit our residents. Because we are in effect able to aggregate the market power of customers in multiple buildings, and enter into exclusive agreements with providers, we are able to ensure that those customer service commitments are met and the residents are happy with their services because providers will not want to risk losing a valuable account due to poor service.

10. Furthermore, we put these contracts out for competitive bid when they expire, in order to assess that we are ensuring updated technology, service and competitive pricing at our communities.

11. In this era of highly competitive and rapidly changing telecommunications services being offered to consumers through various corporate arrangements, we believe that both our tenants' interests and our own sound business practices are best served through the increased customer base and market negotiating strength provided through the status quo allowance for exclusive agreements for telecommunications services at our properties.

12. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 21st day of June, 2007, at Denver, Colorado.



Kent McDonald

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EXHIBIT F



BellSouth Telecommunications, Inc.
132 Commerce Way
Sanford, Florida 32771

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Gaines F. Spivey
Area Manager – Network Services

July 19, 2006

JPI Partners, LLC
Henry Williams Pye
Assistant Vice President
Resident Services and Technology
311 Marist Court
Durham, North Carolina 27713

RE: College Suites at Orpington

Dear Mr. Pye:

This letter is a follow-up to conversations you have had with Glenn Prunyi from our Engineering Group regarding BellSouth's service provisioning to the referenced project. Included in this letter is important information regarding BellSouth's requirements preparatory to our commencing work on this project. We thank you for considering BellSouth and look forward to working with your team.

Before BellSouth incurs costs to prepare the property for BellSouth service, we require an authorized representative of the developer or affiliated property owner to sign and return this letter. Once we receive the signed letter, BellSouth will commence planning and engineering activities when appropriate to serve the property. By signing this letter, you agree that:

- The developer or its affiliated property owner will grant to BellSouth, at no cost, easements for the placement of its cables and equipment within the property at mutually agreeable locations. To meet the estimated service dates of this project, easements must be granted and recorded by September 1, 2006.
- BellSouth will be provided with site plans and valid addresses for the project by September 1, 2006. The plans will include lot lines and measurements.
- To the extent required by applicable laws and rules, or as otherwise agreed upon, the developer or its affiliated property owner will provide support structures necessary for the installation of BellSouth's facilities (for example, conduits, trenches, pullboxes, equipment space, backboards, electrical power, as applicable.)
- BellSouth will not be restricted in any way from providing any service that it desires to offer at the property.
- The developer, any affiliated property owner or other affiliated party, and any homeowners or condominium association, have not entered into, and do not plan to enter into, an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement (i.e., charges for services provided to residents are collected through rent, fees, dues, or other similar mechanism), with another service provider for communications services, including any voice, data, or video service.

In addition, if (insert developer's name) or any affiliated party or homeowners or condominium association enters into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement (as defined above) with another service provider for communications services, including any voice, data, or video service, within 18 months of the date of first occupancy, (insert developer name) will be responsible to BellSouth for the then unrecovered costs associated with the engineering and installation of the initial facilities.

Please sign where indicated below and return the signed letter to me by August 4, 2006. By signing this letter, you agree that, if BellSouth proceeds with engineering and construction work and ultimately does not provide service to residents due to any of the conditions above not being met, or other conditions that limit BellSouth's ability to provide service, then you will reimburse BellSouth for the costs of such work. This cost recovery would be in addition to any other remedies available to BellSouth. You will promptly inform BellSouth if the conditions are not met or of any limiting conditions.

The person signing below must be a representative who is authorized to sign for your company and by signing below represents that he or she has that authority.

Thank you for choosing BellSouth. If you have any questions, please contact me at 407-327-0530

Sincerely,

BellSouth Telecommunications, Inc.

Gaines F. Spivey

Accepted and Agreed By:

JPI Partners, LLC

By: _____
Authorized Representative

Name: _____

Title: _____

Date: _____



July 20, 2006

Gaines F. Spivey
BellSouth Telecommunications, Inc.
Area Manager – Network Services
132 Commerce Way
Marlboro, Massachusetts 01752
Sanford, Florida 32771
(407) 327-0530

RE: Letter from Gaines F. Spivey (as Area Manager – Network Services, BellSouth Telecommunications, Inc.) dated July 19, 2006, relating to College Suites at Orpington

Dear Mr. Spivey:

While we plan to offer basic video and data services to our residents and include the cost of those services in their rent at the project referenced above, we do not believe either of these bulk offerings satisfy Sections 364.025(6)(b)(1-4), Florida Statutes, relating to relief from carrier of last resort obligations. 364.025(6)(a)(3), Fla. Stat., clearly defines “Communications Service” as “voice service or voice replacement service through the use of any technology.” We have not entered into any exclusive marketing, service, or bulk service agreements for voice service or voice replacement service with another service provider. In fact, we had agreed to execute a voice services marketing agreement with BellSouth, but BellSouth rescinded the offer when we declined to purchase bulk video and data services from their partner.

Respectfully, we find no basis in 364.025(6), Fla. Stat., for BellSouth’s requirement that we sign the letter referenced above as a precondition to BellSouth’s commencement of design or work for the project. If BellSouth believes there is some other basis in Florida law for requiring that we sign the letter, please explain that rationale. Otherwise, we cannot sign your letter or agree to reimburse BellSouth for any construction costs.

On the other hand, per standard practice and tariff, we will freely execute the requisite easement, supply plans for the community, and provide the necessary pathways. In fact, we have already met with the BellSouth Design Specialist for our community and agreed to provide the necessary crossings.

Please call me to discuss the above at your earliest convenience. We have begun construction and would like to proceed posthaste.

Thank you,

Henry Pye
Assistant Vice President
Resident Services and Technology
JPI Partners, LLC



July 20, 2006

CC:

Ian Davis – Munsch Hardt (via email)

Craig Scott – Munsch Hardt (via email)

Jim Arbury – National Apartment association/ Nation Multihousing Council (via email)

Amy Martin – BellSouth Community Technologies (via email)

BellSouth Telecommunications, Inc.
Museum Tower Building
150 West Flagler Street
Suite 1910
Miami, FL 33130

sharon.liebman@bellsouth.com

Sharon R. Liebman
Senior Attorney

305 347 5570
Fax 305 375 0209

August 3, 2006

VIA U.S. MAIL AND E-MAIL
HPye@JPI.com

Henry Pye
Assistant Vice President
Resident Services and Technology
JPI Partners, LLC
600 East Las Colinas Boulevard, Suite 1800
Irving, Texas 75039

Re: College Suites at Orpington

Dear Mr. Pye:

We received your July 20, 2006 letter to Gaines Spivey regarding the above development under construction by JPI. It is our understanding that the development will include 156 apartment units, each with 4 bedrooms (to be rented by the bedroom to college students) and that first residents are expected in/around March 2007.

Your letter advises that JPI plans to offer basic video and data services to residents and to include the cost of those services in their rent. JPI concludes that the referenced bulk offerings do not satisfy Section 364.025(6)(b)1-4, relating to relief from carrier of last resort obligations (or COLR).

As you know, in return for consideration to developers, developers are entering into agreements with alternate communications providers to serve developments with increasing frequency. The agreements may:

- restrict the ability of the carrier with COLR in the territory or the "LEC" to provide service to residents, due to exclusive arrangements with the alternate provider;
- significantly reduce or entirely eliminate the LEC's take rate for voice or other communications services from residents, due to "bulk" arrangements with the alternate provider or preferred arrangements that create an "unlevel playing field" for securing customers; and/or
- introduce another provider at the development that offers communications services, including voice services, or offers residents access to those services from another provider.

In enacting Section 364.025, Florida Statutes during the recent 2006 legislative session, the Florida Legislature recognized that COLR relief is appropriate under certain circumstances where the above agreements exist or where they or other factors affect the LEC's provision of service to a development. The COLR obligation was established at a time when the LEC was the sole source for communications service; the legislation recognizes that the availability of service from alternate providers due to arrangements made by developers erodes the need for a carrier of "last resort."

Your letter did not mention paragraph (6)(d) in the legislation. This paragraph allows a company like BellSouth to petition the Florida Public Service Commission for relief from COLR for "good cause shown based upon the facts and circumstances of provision of service to the multi-tenant business or residential property." The paragraph may be relevant for College Suites at Orpington.

Your letter also mentions the developer letter agreement that BellSouth asked JPI to sign. Given the agreements that JPI has entered into with an alternate provider, we understand that JPI will not sign the letter.

We will provide additional feedback after considering the information that you provided to us in your July 20 letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Sharon Liebman", written in a cursive style.

Sharon Liebman



August 3, 2006

Sharon R. Liebman
Senior Attorney
BellSouth Telecommunications, Inc.
Museum Tower Building
150 West Flagler Street
Suite 1910
Miami Florida 33130
(305) 347-5570

RE: Letter from Gaines F. Spivey (as Area Manager – Network Services, BellSouth Telecommunications, Inc.) dated July 19, 2006, and Letter from Sharon R. Liebman (Senior Attorney, BellSouth Telecommunications, Inc) dated August 3, 2006 relating to College Suites at Orpington

Dear Ms. Liebman:

I appreciate your reply. We have not and will not sign any exclusive contract for voice service or voice replacement services, which are the only “communications services” involved in Section 364.025(6)(b). Unfortunately, we cannot execute Mr. Spivey’s letter which we believe manifestly misinterprets Florida statute.

If BellSouth continues to be unwilling to provide the needed communications services and facilities, it will be particularly difficult, time consuming, and costly to obtain POTS lines that qualify for life safety--phone lines required for occupancy by Florida statute.

Thank you,

Henry Pye
Assistant Vice President
Resident Services and Technology
JPI Partners, LLC

CC:

Ian Davis – Munsch Hardt (via email)
Scott Craig – Munsch Hardt (via email)
Jim Arbury – National Apartment Association/ Nation Multi Housing Council (via email)
Matthew Ames - Miller & Van Eaton (via email)
Gerry Lederer - Miller & Van Eaton (via email)
Mark Stanfield – BOMA (via email)
Jack L. Goodrich – BOMA (via email)



August 3, 2006

Amy Martin – BellSouth Community Technologies (via email)

EXHIBIT G



FTTP MDU - BUILDING ENTRANCE GRANT AGREEMENT TO SERVICE A BUILDING

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the undersigned Grantor (s) F C Drake Associates L C hereby grants unto VERIZON PENNSYLVANIA INC. (Verizon), having an address at 900 Race St. Phila., PA 19107 its successors and assigns, the permanent right, privilege and authority to have the right of access over and under said land to construct, reconstruct, relocate, replace, operate, repair, maintain and at its discretion remove the following facilities:

Fiber-To-The-Premises (FTTP) network facilities for the provision of communications services including but not limited to: fiber cables, drops, jumpers, splice enclosures, distribution hubs, distribution terminals, optical network terminals, conduits and innerducts and associated communications equipment and facilities.

This is a no cost upgrade and the new equipment will be placed in the phone room free of charge. The relocation clause is for future moves, if you need the room for storage, etc. and request that we relocate to another part of the building, then and only then, would we would look to the owners for the relocation costs. Also, we will remove all of the old equipment that is not working and leave only the existing working network that is currently providing service to the building.

upon the property which the undersigned owns or in which the undersigned has an interest, located at _____ known as _____ in the Borough/City/Township of Philadelphia, County of Philadelphia, in the Commonwealth of Pennsylvania.

Upon the request of the Grantor, Verizon agrees to relocate its facilities at the above location to another portion of Grantor's premises, provided that (i) the proposed new area is reasonably adequate for Verizon's purposes and is mutually satisfactory to both parties, and (ii) Grantor shall pay all costs of such relocation and obtain all necessary permits and approvals therefor.

It is understood that the work shall be performed in a workmanlike manner and that any damage to the premises caused thereby shall be corrected by Verizon and that while constructing, reconstructing, relocating, replacing, operating, repairing, maintaining and removing its facilities Verizon shall save harmless and indemnify the Grantor from injury to its property, its employees or the public which may occur at any time through the negligence of Verizon.

This Agreement is binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

IN WITNESS WHEREOF, I/we have hereunto set my/our hand(s) and

X seal(s) the _____ day of _____ A.D. 2007

X at _____
(Post Office Address)

WITNESS OR ATTEST:

PROPERTY OWNER:

X _____
signature
Y _____
printed name
X _____
title/company

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF _____) ss.:

X On the ____ day of _____ in the year 2007 before me, the undersigned, a Notary Public for the
Commonwealth of Pennsylvania, personally appeared _____,
(Name)

_____ of the _____,
(Title) (Corporation / Partnership)

personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose
name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the
same in his/her/their capacity, and that by his/her/their signature(s) on the instrument, the individual(s), or
the person upon behalf of which the individual(s) acted, executed the instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

X _____

Notary Public