THE FCC’S PROHIBITION ON EXCLUSIVE SERVICE CONTRACTS AND ITS WEAK CONSTITUTIONAL GROUNDING

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I. INTRODUCTION

If an oil company wanted to open a refinery on a piece of property, it would want to be the only company allowed to extract oil from that land. It would hardly be beneficial to spend millions of dollars on satisfying the zoning requirements, obtaining favorable lease provisions from the property developer, installing the required infrastructure, and hiring thousands of employees, only to have another oil company establish the exact same operation on the same piece of property. So, to shield the business before making such a significant investment, the company likely would enter into an exclusive contract with the property developer. Done correctly, this exclusive arrangement would contractually ensure that it would be the sole oil refiner on the property. In return for such an auspicious lease provision, the property developer would likely have a legitimate justification for charging a higher monthly rent, which the company might consider well worthwhile.

However, what if the federal government decided that energy management was in the public interest? The government might attempt to invalidate the exclusive contract with the property developer retroactively. This action, in turn, would force the company to increase the price of oil per barrel so that it could still turn a profit, or at least recover its sunken investment. The government’s prohibition on exclusive arrangements between property developers and oil refiners, however, would likely implicate the company’s fundamental property rights as a leaseholder.

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From the perspective of property developers, an action by the government retroactively invalidating exclusive contracts would sever every land-owner’s mineral rights from their interest in the property. As a result, competitors could force property developers to install pump-jacks on their land that would enable competitors to extract oil from the property without having first contributed to the infrastructure. Thus, the exclusive contract ban would also interfere with the developer’s right to prevent others from trespassing on its land.

This analogy is similar to what actually occurred subsequent to a 2008 decision by the Federal Communications Commission (“FCC” or “Commission”). Since 2000, a debate has raged in the communications industry regarding whether the FCC should regulate the use of exclusive service contracts between multichannel video programming distributors (“MVPDs”) and owners of multiple dwelling units ("MDUs"), which include apartments, cooperatives, and condominiums. Because most MDUs in the United States are apartments, this Comment focuses on considerations of MDU apartment contracts. On Oc-

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1 In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Report and Order and Further Notice of Proposed Rulemaking, 22 F.C.C.R. 20,235, ¶ 36 (Oct. 31, 2007) [hereinafter Exclusive Service Report and Order] (“The lawfulness of exclusivity clauses has been under our active scrutiny for a decade . . . .”); see, e.g., In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Comments of Real Access Alliance, MB Docket No. 07-51, at 10–11 (July 2, 2007) [hereinafter Comments of Real Access] (accessible via FCC Electronic Comment Filing System) (“In this case, only one video provider is permitted to provide service to the building for a specified time period because the property 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. . . . 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.”); In re Telecommunications Services Inside Wiring and Customer Premises Equipment and 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 F.C.C.R. 1342, ¶ 59 (Jan. 21, 2003) [hereinafter 2003 Inside Wiring Order] (“[Exclusive agreements] generally refer to those contracts that specify that, for a designated term, only a particular MVPD and no other provider may offer video programming and related services to residents of an MDU.”).

2 Exclusive Service Report and Order, supra note 1, ¶ 1. For the purposes of the Exclusive Service Report and Order, MVPDs include multiple service operators (“MSOs”). See id. ¶¶ 1, 3–4, 8, 61. MSOs are companies that service multiple communities. HARRY NEWTON, NEWTON’S TELECOM DICTIONARY 616 (24th ed. 2008). The order, however, did not affect private cable operators (“PCOs”) or direct broadcast satellite (“DBS”) providers in its definition of MVPD. See Exclusive Service Report and Order, supra note 1, ¶ 61.

3 Exclusive Service Report and Order, supra note 1, ¶ 7. According to the Commission, thirty percent of the U.S. population reside in MDUs. Id. ¶ 1. By definition, MDUs include apartment buildings, and twenty-five percent of the U.S. population reside in apartments. Stephen Labaton, F.C.C. Set to End Sole Cable Deals for Apartments, N.Y. TIMES, Oct. 29, 2007, at A1. Thus, large apartment buildings comprise over eighty percent of MDUs.
tober 31, 2007, the Commission adopted the *Exclusive Service Report and Order* banning exclusive service contracts between MDUs and MVPDs. In accordance with the Communications Act of 1934 as amended ("1934 Act"), the *Exclusive Service Report and Order* aims to stimulate a more competitive marketplace for video services, so that Americans can benefit from additional choices and lower prices. Further, because most MVPDs are broadband providers, the *Order* aims to stimulate competition and lower prices for broadband services.

The *Exclusive Service Report and Order* included a Further Notice of Proposed Rulemaking ("FNPRM") seeking comment on whether the Commission should extend the exclusivity prohibition to Private Cable Operators ("PCOs") and Direct Broadcasting Satellite ("DBS") providers, which were not subject to the *Order*. In addition, the FNPRM sought comment on whether the Commission should similarly ban exclusive marketing contracts and bulk-billing arrangements between MVPDs and MDUs.

While the Commission’s goal of making services available to everyone—particularly the less wealthy and minority populations that live in MDUs—is well intentioned, the ban overlooks and violates fundamental principles of property law and several constitutional rights. Additionally, as a policy mat-

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7. See *Exclusive Service Report and Order*, supra note 1, ¶ 1 ("[I]n this Order we prohibit the enforcement of existing exclusivity clauses and the execution of new ones by cable operators and others subject to the relevant statutory provisions. This prohibition will materially advance the Act’s goals of enhancing competition and broadband employment.").
8. See id. ¶ 20 ("[B]roadband deployment and entry into the MVPD business are inextricably linked.").
9. Id. ¶ 1.
10. Id. ¶ 6.
11. Id. ¶ 61.
12. Id. ¶ 1.
13. Id. ¶¶ 63–65.
14. Id. ¶¶ 8, 11, 18 (explaining that minority groups are more likely to reside in MDUs, that the denial of new MVPDs from entering MDUs will disproportionately harm minorities and low income families, and that all should benefit from competition).
15. See U.S. CONST. amend. V ("No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").
16. See Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) ("[T]he owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others."); E. Enterprises v. Apfel, 524 U.S. 498,
ter, it is not optimal for achieving the Commission’s goals. From an MDU owner’s perspective, the *Exclusive Service Report and Order* violates “one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.” Further, because the *Order* deprives MDU owners of the economic benefit of their land and frustrates parties’ investment-backed expectations, it also constitutes a regulatory taking without just compensation.

The *Exclusive Service Report and Order* also interfered with private contracts and investment expectations of property owners and MVPDs. The *Order* prohibits enforcement of existing exclusive contracts between MDU owners and MVPDs. Such federal economic legislation cannot arbitrarily and irrationally alter private contract rights, or else it will violate the Due Process Clause of the Fifth Amendment. Further, because the Commission’s exclusive contract prohibition was arbitrary and irrational, it violated MDU owners’ and MVPDs’ constitutional right to due process.

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17 See G.M. Filisko, *FCC Ban Gets Bad Reception*, REAL ESTATE INVEST. ONLINE, May 1, 2008, http://reionline.com/mag/real_estate_fcc_ban_gets_0501/ (explaining that the ban “doesn’t govern the behavior of property owners; it governs cable operators, which can’t enforce their existing exclusive agreements and create new exclusive agreements. Property owners always have the right to tell any cable company it can’t come onto their property.” (quoting Leora Hochstein, Executive Director, Federal Regulatory Advocacy, Verizon)).

18 *Kaiser Aetna*, 444 U.S. at 176.

19 See *In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Comments of the National Multi Housing Council, The National Apartment Association, The Institute of Real Estate Management, The National Association of Real Estate Investment Trusts, and The Real Estate Roundtable, MB Docket No. 07-51, at 19 (Feb. 6, 2008) [hereinafter Comments of the National Multi Housing Council] (accessible via FCC Electronic Comment Filing System) (arguing the Commission’s authority does not extend to private property owners); see also *Exclusive Service Report and Order*, supra note 1, ¶ 60. Further, even if the Commission possessed the requisite authority to control the manner in which MDU owners use their land the exclusive contract prohibition would still constitute a governmental taking without just compensation and violate the constitutional protection of due process. See U.S. CONST. amend. V; see also infra Sections III.A, III.B.


21 *Exclusive Service Report and Order*, supra note 1, ¶ 1.

22 See U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”); *E. Enterprises*, 524 U.S. at 539 (Kennedy, J. concurring in the judgment and dissenting in part).
Additionally, the exclusivity ban undermines fundamental concepts of federalism. States have traditionally had the power to control private property owners. Therefore, in adopting the Exclusive Service Report and Order, the Commission overstepped its authority and encroached on the states’ police powers.

This Comment demonstrates that the FCC should not have banned exclusive service contracts between MVPDs and MDUs not only because the decision violated the Constitution, but also because its implementation represented flawed policy. Specifically, the Commission failed to take into consideration natural competitive forces that will dictate whether an MDU owner chooses a sufficient MVPD for its residents. As such, the Commission did not need to

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23 See, e.g., Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 83 (1946) ("The police power is one of the least limitable of governmental powers, [sic] and in its operation often cuts down property rights."); Union Carbide & Carbon Corp. v. White River Distrib., 275 S.W.2d 455, 457, 459–60 (Ark. 1955) (stating that the legislature has no right to take away property rights, unless it does so under the police power and for the purpose of protecting the public welfare); Shavers v. Duval County, 73 So.2d 684, 692 (Fla. 1954) ("The police power interferes with the free use and enjoyment of property but when reasonably exercised, there is no violation of the Constitution."); Lutz v. New Albany City Plan Comm'n, 101 N.E.2d 187, 191 (Ind. 1951) ("Contracts are subject to certain limitations which the state may lawfully impose in the exercise of its police power."); Ritholz v. City of Detroit, 13 N.W.2d 283, 283 (Mich. 1944) (requiring a nexus between the remedy and public purpose when the police power is exercised); State v. Sullivan, 71 N.W.2d 895, 901 (Minn. 1955) (discussing how the state may impose a restriction upon private businesses as long as it is not arbitrary or unreasonable); Turner v. Kansas City, 191 S.W.2d 612, 618 (Mo. 1945) ("Individual personal and property rights are subordinate to an appropriate exercise of the police power."); State v. Anderson, 566 N.E.2d 1224, 1225 (Ohio 1991) ("It is well-established that private property is held subject to the general police power of a state and may be regulated pursuant to that power."); Peoples Program for Endangered Species v. Sexton, 476 S.E.2d 477, 479 (S.C. 1996) ("[A] state in a bona fide exercise of its police power, may interfere with private property, and even order its destruction for the welfare and comfort of its citizens."); Richards v. City of Columbia, 88 S.E.2d 683, 687 (S.C. 1955) (stating that the police power may be exercised to enact statues and ordinances to "better the health, safety and welfare of the people"); Porter v. City of Paris, 201 S.W.2d 688, 689 (Tenn. 1947) (stating that state municipalities have been given wide discretion by state courts to exercise their police powers); Sowma v. Parker, 22 A.2d 513, 517 (Vt. 1941) (discussing the essential power of the legislature to regulate property by virtue of its authority under the Vermont State Constitution).

24 See, e.g., Queenside Hills Realty Co., 328 U.S. at 82–83.

regulate the contractual relationships between MDU owners and MVPDs in order to enhance competition.

Part II of this Comment discusses the background of the *Exclusive Service Report and Order*, focusing on the Commission’s increased-competition rationale for issuing the order and explaining how exclusive contracts may in actuality stifle competition in the video services and broadband markets. Part III discusses how the *Exclusive Service Report and Order* disregards fundamental Constitutional protections. In particular, this section explains that the *Order* amounts to a taking because it eviscerates an MDU owner’s right to exclude others and deprives them of economic benefit in their land without due process or just compensation. Next, Part IV discusses the contradictory policy concerns contained in the Commission’s Exclusive Service Further Notice of Proposed Rulemaking. The Comment demonstrates that the Commission’s goal for universal service at affordable prices would be better served if it had not regulated exclusive agreements. Last, Part V discusses the alleged anti-competitive concerns raised in the FNPRM. Specifically, the section argues that the Commission must extend the *Order* to reach PCOs and DBS providers to even attempt to make increased competition viable. However, to encourage competition and therefore consumer benefit, the Commission must reject its proposed prohibition on exclusive marketing agreements and bulk-billing arrangements as well as rescind its *Order* prohibiting exclusive service contracts. Only with the adoption of these suggestions can the Commission foster a truly competitive marketplace and maximize consumer benefit.

II. BACKGROUND

The Commission adopted the *Exclusive Service Report and Order* only four years after finding exclusive contracts actually were beneficial to MDU residents. The Commission based its reasoning for adopting the *Exclusive Service Report and Order* on the idea that market forces will compel MDU owners in competitive real estate markets to take their tenants’ desires into account. . . . MDU owners must compete with rival owners to keep current residents and attract additional residents. In this context, an MDU owner that agrees to an exclusive contract in exchange for a monetary payment but does not somehow flow that payment through to its residents (e.g., a new swimming pool, a security system, or discounting the rent below the competitive level) is vulnerable to competition from similarly situated MDUs offering a more attractive mix of price and amenities to prospective tenants. If the MDU owner tries to simply keep the payment, new tenants will not be as attracted to the building and existing tenants will have an additional reason to relocate to another MDU (e.g., an otherwise similar residence where, to attract tenants, the owner has utilized its exclusive access to payment to reduce rent or improve amenities).[1]"

*with Exclusive Service Report and Order, supra note 1 (not addressing market forces).*
Report and Order on the alleged competitive harms of exclusive contracts between MVPDs and MDU owners.\(^2\) Paramount to the Commission was the belief that exclusive contracts lead to higher prices for consumers.\(^7\) Ultimately, however, whether the Commission’s belief that lower prices can be realized by invalidating exclusive contracts holds true, its action is unconstitutional. The Commission’s reasoning for adopting the Exclusive Service Report and Order is examined in detail below. Additionally, the authority on which the Commission relied to adopt the Order is examined, and the FNPRM issued in conjunction with the Order is discussed.\(^8\)

A. Purported Harms of Exclusive Contracts

The Exclusive Service Report and Order applies to all MDU properties, including apartments, condominiums, cooperatives, and other centrally managed real estate developments.\(^29\) The Commission found that approximately thirty percent of Americans live in MDUs and that the percentage is growing steadily.\(^30\) As a result, the Commission declared that incumbent MVPDs\(^31\) have in-

\(^2\) Exclusive Service Report and Order, supra note 1, ¶ 1.
\(^7\) See id. ¶ 17.

Then, on January 22, 2008, the NCTA, along with the National Multi-Housing Council ("MDU petitioners")—which represented the interests of various multi-unit real estate developments—sought review of the Exclusive Service Report and Order. As such, the NCTA and MDU petitioners filed an emergency motion for stay pending judicial review. Emergency Motion for Stay Pending Judicial Review, National Cable & Telecommunications Association, et al. v. FCC, No. 08-1016, No. 08-1017 (D.C. Cir. Jan. 22, 2008).

The motion, however, only dealt with the Commission’s ability and asserted cause for abrogating existing exclusive service contracts between MDUs and MVPDs. Id. at 5. Specifically, the NCTA and MDU petitioners argued that: (1) the Commission lacked statutory authority to prohibit exclusive service contracts; (2) even if the Commission did possess authority, this authorization did not extend to the abrogation of existing exclusive contracts; and (3) the Commission arbitrarily and capriciously abrogated existing exclusive agreements.

The NCTA’s motion to stay was rejected in a February 28, 2008 Order, by a divided panel of the United States Court of Appeals for the District of Columbia. Ted Hearn, Court Rejects NCTA’s MDU Stay, MULTICHANNEL NEWS, Mar. 7, 2008, http://www.multichannel.com/article/88306-CourtRejectsNCTA'sMDUStay.php. As such, the Exclusive Service Report and Order took effect, as expected, on March 7, 2008.

\(^29\) Exclusive Service Report and Order, supra note 1, ¶ 7.
\(^30\) Id. ¶ 1; see also In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Comments of AT&T Inc., MB Docket No. 07-51, at 7 (July 2, 2007) [hereinafter Comments of AT&T] (accessible via FCC Electronic Comment Filing System) ("The Census Bureau found that 32 percent of
creased their use of exclusive contracts with MDUs. While the exclusive contracts may have spurred the deployment of services, the Commission argues that the contracts actually reduced competition.

Throughout the *Exclusive Service Report and Order*, the Commission detailed how the harms of exclusive contracts purportedly outweighed the benefits. The Commission found that the greatest harm of exclusive contracts was consumers’ lack of choice regarding which MVPD was granted an exclusive contract by an MDU owner. Consequently, the Commission argued, consumers are denied the benefit of increased competition: lower prices. The Commission explained, “A significant increase in multichannel competition usually results in lower prices, more channels, and a greater diversity of information and entertainment from more sources.” As evidence, the Commission pointed

U.S. households are occupied by renters and that 24.6 million U.S. households are in buildings with more than one unit (citation omitted)).

An MVPD incumbent possesses market power because it serves multiple communities and is well established in the video service marketplace. *See Exclusive Service Report and Order*, supra note 1, ¶ 4.

See id. ¶ 3 (stating that the majority of exclusive agreements are granted to incumbent cable providers, who increased the use of exclusive agreements to prevent competition); *Comments of AT&T*, supra note 30, at 8 (“[T]hese agreements are between cable incumbents and building owners . . . [T]here is a consensus that exclusive access agreements . . . have become prevalent and are becoming more so and that such agreements can and have been used to frustrate cable competition just as new providers are attempting to enter . . . the market.”). But see, *In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, *Comments of Shenandoah Telecommunications Company*, MB Docket No. 07-51, at 3 (July 2, 2007) (hereinafter *Comments of Shenandoah*) (accessible via the FCC Electronic Comment Filing System) (“The notion that [exclusive service contracts] unfairly exclude new or emerging entities from providing competing video services to MDUs and developments is fundamentally flawed. That argument is belied by the fact that many video service providers that today serve MDUs and developments through [exclusive service contracts] are themselves small providers, and most have far fewer resources than some of the larger entities that have been heard to complain about [exclusive service contracts]. Indeed, little prevents these large entities from using [exclusive service contracts], where appropriate, to compete to serve MDUs and developments in precisely the same way that small providers do.”).

See *Exclusive Service Report and Order*, supra note 1, ¶¶ 17, 24.

*Id.* ¶¶ 16–23.

*Id.* ¶ 17.

*Id.*

*Id.*; see also *In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, *Comments of New Jersey Division of Rate Counsel*, MB Docket No. 07-51, at 8 (July 2, 2007) (accessible via FCC Electronic Comment Filing System) (“The prohibition on exclusive contracts in New Jersey encourages lower prices . . . and provides consumers with a greater number of alternatives.”).
to an instance where Verizon gained approval to offer video service in two Florida counties that were controlled by Comcast pursuant to exclusive contracts. After Verizon’s entry, Comcast announced that for the first time in a decade, it would not increase its rates. Similarly, within six months of Verizon gaining approval to offer video service in three incumbent controlled markets in Texas, consumers saved nearly $27 per month on the average cable bill. Considering these examples and other findings, the Commission found the entry of new MVPDs in incumbent-dominated markets instrumental to providing consumers with lower prices.

In addition, the Commission found that exclusive agreements not only bar new entry and curb competition between MVPDs, but they also deter entry of local exchange carriers (“LECs”) that seek to offer the “triple play” of voice, video, and broadband Internet services. For instance, prior to the Exclusive Service Report and Order it was impossible for an LEC to offer its triple play services in an MDU where an incumbent possessed exclusive service rights. Consequently, the Commission believed that the deployment of a bundled broadband service package was discouraged. Thus, to remedy this defect and promote the convenience of the triple play package, the Commission prohibited exclusive contracts.

The Commission also determined that exclusive agreements have other negative effects on MDU residents. In particular, the Commission explained that the indefinite time period of many exclusive contracts effectively bars entry of a later, more desirable MVPD. Additionally, an MDU owner likely will

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38 In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwellings and Other Real Estate Developments, Comments of Verizon on Exclusive Access Contracts, MB Docket No. 07-51, at 5–6 (July 2, 2007) [hereinafter Comments of Verizon] (accessible via FCC Electronic Comment Filing System).
39 Id. at 5–6.
40 Id. ¶ 17 (“A significant increase in multichannel competition usually results in lower prices, more channels, and a greater diversity of information and entertainment from more sources.”).
41 See Exclusive Service Report and Order, supra note 1, ¶ 15–22 (explaining that LECs have been prevented from promoting services to MDUs due to the use of exclusivity contracts employed by incumbent providers and that LECs entry is likely to increase the offering of the triple play). A “Triple Play” service package includes voice, video, and broadband Internet services. Id. ¶ 16.
42 Id. ¶ 15–20.
43 See id. ¶ 21 (“In a MDU where an incumbent has the exclusive right to provide MVPD service, no other provider can offer residents the triple play today on its own facilities.”).
44 See id.
45 See id. ¶ 26, 30.
46 Id. ¶ 22. But see Comments of Real Access, supra note 1, at 24. Real Access explained in its comment:
[ ]
47 Id. But see Comments of Real Access, supra note 1, at 24. Additionally, an MDU owner likely will
enter into a perpetual exclusive arrangement with only its best interests in mind, thereby binding subsequent owners and residents to the previously-bargained-for exclusive contract. Further, the Commission argued that exclusive contracts discourage exclusive service providers from improving and updating their services. As SureWest explained in its comments to the FCC, "once the exclusive contracts are in place, [incumbent] providers have little incentive to respond to non-existent competition with better services or lower rates."

Finally, the Commission indicated that exclusive contracts disfavor MDU owners. The Commission explained: "Technologically advanced buildings are important for attracting and retaining residents, and a lack of competition for providing new communications services can negatively affect a residential development." Thus, the Commission prohibited enforcement of exclusive contracts and the execution of new ones because they block entry to new MVPDs and their technologies, which may not have existed when the agree-

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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. 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.

Id. (citation omitted); 2003 Inside Wiring Order, supra note 1, ¶ 72 ("[T]he record does not demonstrate the existence of widespread perpetual contracts nor support the need for government interference at this time.").

48 See Exclusive Service Report and Order, supra note 1, ¶ 22 ("[T]he person who grants exclusivity to one MVPD may be the developer or builder of a MDU, who may grant exclusivity against the long-term interests of the residents and soon thereafter relinquish control of the MDU.").

49 See id.; see also Comments of Verizon, supra note 38, at 8 ("It is often a developer who strikes an agreement that will not impact that developer once the development is completed.").

50 Exclusive Service Report and Order, supra note 1, ¶ 22.

51 In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Comments of SureWest, MB Docket No. 04-207, at 25 n.50 (July 2, 2007) (accessible via FCC Electronic Comment Filing System). But see In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments, Comments of OpenBand Multimedia, MB Docket No. 07-51, at 6 (July 2, 2007) [hereinafter Comments of OpenBand] (accessible via FCC Electronic Comment Filing System) (stating that exclusive service contracts actually force MVPDs to stay competitive or else MDU owners will opt to terminate or not renew the contract).

52 Exclusive Service Report and Order, supra note 1, ¶ 23.

53 Id. But see Comments of Shenandoah, supra note 32, at 15.

("Absent [Shenandoah’s exclusive service contract] to serve the building, the company would not have been able to accommodate the property owner’s request because the network equipment would have been too costly. [Shenandoah’s exclusive service contract] to serve the building therefore enabled the MDU owner to enhance the attractiveness of his property by improving the video service available to its residents.").
ment was initiated.\textsuperscript{54} While concurring with the thrust of the \textit{Exclusive Service Report and Order}, Commissioner Robert McDowell felt that the Commission operated on unsupported legal ground.\textsuperscript{55} Commissioner McDowell’s belief that the Commission was acting on unsupported legal ground arose because “after unanimously inviting cable companies and building owners to strike such deals in 2003, the FCC may now be abrogating those exact same agreements immediately rather than waiting for them to expire and without providing a grace period.”\textsuperscript{56} Additionally, Commissioner McDowell was disappointed that the Commission failed to take into consideration the possibility that the \textit{Order} constituted a regulatory taking without just compensation.\textsuperscript{57} He also expressed doubt that the record demonstrated a substantial shift in the competitive atmosphere of the video services market from only four years prior when the \textit{Order} chose not to regulate exclusive contracts.\textsuperscript{58} McDowell indicated that the Commission should have done “a better job of distinguishing these apparent contradictions.”\textsuperscript{59} Commissioner McDowell’s points were levied primarily at the legal and factual grounds on which the Commission based its decision. As demonstrated below, the Commission also improperly weighed the benefits of exclusive contracts relative to the perceived harms.

B. Benefits of Exclusive Contracts

The \textit{Exclusive Service Report and Order} represents a substantial shift in the Commission’s position on exclusive contracts between MVPDs and MDUs from a similar Commission Order issued only four years earlier.\textsuperscript{60} In the 2003 \textit{Inside Wiring Order}, the Commission conducted a proceeding to determine whether it should prohibit exclusive service agreements between MVPDs and MDUs.\textsuperscript{61} Ultimately, the Commission determined that there was no need to regulate the video services market with regard to exclusive contracts.\textsuperscript{62}

\textsuperscript{54} See \textit{Exclusive Service Report and Order}, supra note 1, \S 23.
\textsuperscript{55} See \textit{id.} at 20,289 (McDowell, Comm’r, concurring) (“I am concerned about the legal sustainability of the Order, should it be appealed.”).
\textsuperscript{56} \textit{id.}
\textsuperscript{57} Id. (“Arguments that our actions today may constitute a regulatory taking that requires compensation may have merit as well, and I wish the Commission’s appellate lawyers the best of luck in defending against such claims.”).
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} \textit{Compare} 2003 \textit{Inside Wiring Order}, supra note 1, \S 68 (finding no support for prohibiting exclusive contracts), with \textit{Exclusive Service Report and Order}, supra note 1, \S\S 26–27 (finding ample support to prohibit the enforcement of exclusive contracts).
\textsuperscript{61} See 2003 \textit{Inside Wiring Order}, supra note 1, \S\S 58–71.
\textsuperscript{62} \textit{id.} at 68–71.
The Commission’s decision in the 2003 Inside Wiring Order was based partially on comments arguing that exclusive contracts have pro-competitive effects in the video services market. In fact, the former Southwestern Bell Corp. (now AT&T) and the General Telephone and Electronics Corp. (now Verizon) both maintained that exclusive service contracts promoted competition. AT&T’s predecessor asserted that the Commission should not regulate in the area of exclusive contracts because such an arrangement “is a matter of private contract between the service provider and the property owner.” Similarly, Verizon’s predecessor argued that the Commission should avoid breaking precedent, which held that the Commission should not interfere with private contracts because it lacks the authority.

Furthermore, in the 2003 Inside Wiring Order the Commission found that exclusive contracts enabled new MVPDs to establish themselves and recoup expenditures for the deployment of service. The Commission noted that “exclusive contracts give property owners leverage, the opportunity to obtain better service options and rates, and the possibility of offering an alternative to the incumbent cable provider, which ultimately benefits residents.” Thus, only four years prior to the Exclusive Service Report and Order, the Commission determined that, on balance, exclusive contracts were beneficial.

In addition in the 2003 Inside Wiring Order, the Commission refused to impose a time limit on exclusive contracts. In essence, the Commissioners found that at the time the record indicated an influx of new MVPDs competing with incumbents. It explained that “the percentage of subscribers receiving their video programming from a franchised cable operator declined from 80% to 63.”

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63 See id. ¶¶ 63–64; Comments of Comcast, supra note 25, at 2–3.
66 See Comments of Comcast, supra note 25, at 3.
69 See 2003 Inside Wiring Order, supra note 1, ¶ 63.
70 Id. ¶ 64.
71 See 2003 Inside Wiring Order, supra note 1, ¶¶ 68–69, 71.
72 Id. ¶ 72 (“[T]he record does not demonstrate the existence of widespread perpetual contracts nor support the need for government interference at this time.”).
73 See id. ¶ 69.
76.5% between 2000 and 2002.” The Commission indicated that natural competitive forces dictate the viability of exclusive contracts and with a current increase in competition in the MVPD market, government regulation was not necessary in the video services marketplace at the time.

In short, in the 2003 Inside Wiring Order the Commission concluded that exclusive contracts may benefit MDU residents. Their use promoted the entry of new MVPDs by enabling video service providers to recover their costs and realize a return on investments. Further, exclusive agreements gave MDU owners the opportunity to negotiate for better service options and rates. Thus, the Commission determined that it should neither prohibit exclusive contracts, nor impose a cap on their duration.

In addition to outlining the purported benefits and detriments of exclusive service contracts, the Commission, in enacting the Exclusive Service Report and Order, also considered whether it had appropriate legal authority to regulate such contracts.

C. Stated Authority

The Commission cited several sources in the Exclusive Service Report and Order that afforded it the authority to prohibit the enforcement of exclusive contracts between MVPDs and owners of MDUs. Specifically, it asserted that section 628(b) of the 1934 Act granted the Commission the power to control the conduct of cable operators. In the alternative, the Commission reasoned that even in the absence of direct statutory power, it had ancillary jurisdiction under Titles I and III of the 1934 Act to prohibit incumbent cable operators from entering into exclusive contracts with MDUs.

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75 See 2003 Inside Wiring Order, supra note 1, ¶ 69.
76 Id. ¶ 71 (“We note that competition in the MDU market is improving, even with the existence of exclusive contracts.”).
77 See id. ¶¶ 64–65, 68–69, 71.
78 See id. ¶ 64.
79 Id.
80 Id. ¶ 77 (“[W]e are not banning or otherwise restricting perpetual contracts . . . .”)
82 Exclusive Service Report and Order, supra note 1, ¶¶ 40, 52–53; 47 U.S.C. §§ 151, 152(a), 164(i), 335. Ancillary jurisdiction allows the Commission to issue regulations in the absence of express statutory authority. See Am. Library Ass’n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005); Exclusive Service Report and Order, supra note 1, ¶ 52; see also Communications Act of 1934 § 4, 47 U.S.C. §154(i) (2000) (“The Commission may . . . make such rules and regulations . . . not inconsistent with this [Act], as may be necessary in the execu-
The Commission chiefly relied upon section 628(b) of the 1934 Act as its source of authority to prohibit cable operators from executing exclusivity agreements. Section 628(b) states

It shall be unlawful for a cable operator . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

Despite its failure to define what constitutes an “unfair method of competition or [an] unfair or deceptive” act or practice, the Commission argued that the plain language of section 628(b) established the foundation for the exclusive contract ban. It determined that exclusive contracts “‘lock up’ [an] MDU owner [and] is an unfair method of competition or unfair act or practice because it can be used to impede the entry of competitors into the market . . . .”

The Commission also addressed arguments suggesting that section 628(b) limits FCC authority to regulate anticompetitive practices that merely block MVPD access to programming. The Commission rejected these arguments,
finding that it not only had authority to prohibit anticompetitive practices that block MVPDs from *programming*, but also practices that block MVPD access to *consumers*. It explained, "Had Congress wanted Section 628(b) to proscribe only practices denying MVPDs access to programming it could easily have done so by focusing that provision explicitly on conduct that impairs MVPDs' access to programming." Therefore, once the Commission found that exclusive contracts block MVPD access to consumers, it reasoned that section 628(b) provided ample authority to eliminate their use between MVPDs and MDUs. In addition to relying on section 628(b), the Commission appealed to the broader purpose of the 1934 Act to find its statutory authority to prohibit exclusive service contracts.

To justify prohibiting exclusive contracts, the Commission relied on the stated purpose of the 1934 Act: "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." Thus, in order to further the goals of the 1934 Act, the Commission removed alleged barriers in the video services market by eliminating exclusive service contracts. As a result, the Commission not only retroactively banned exclusive service contracts, but also indicated that there may be further anticompetitive practices in the MDU video services marketplace that it has authority to remedy. The Commission sought comment on the additional practices by MVPDs that may have an anticompetitive effect in the *Exclusive Service Report and Order*’s FNPRM.

D. Further Alleged Anticompetitive Practices in the MDU Marketplace

The Commission strictly limited the scope of the *Exclusive Service Report and Order* and the prohibition on exclusive contracts to only reach Multiple Systems Operators ("MSOs"), which primarily include traditional video service carriers. By limiting the prohibition, the Commission left unaffected ex-

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2007) [hereinafter *Comments of NCTA*] (accessible via FCC Electronic Comment Filing System) ("[A]s everyone has always understood—this provision was squarely directed at practices that unfairly denied MVPDs access to *programming*. Section 628 is not a mini-Sherman Act that gives the FCC broad authority to restrict or proscribe any acts or practices that it may deem unfair, deceptive or anticompetitive.").

88 *Exclusive Service Report and Order*, supra note 1, ¶ 40.

89 Id. ¶ 44.

90 See id.

91 47 U.S.C. § 151 (2000); see also *Exclusive Service Report and Order*, supra note 1, ¶ 47.

92 See *Exclusive Service Report and Order*, supra note 1, ¶ 47.

93 See id. ¶ 61 ("[W]e note that the record in this proceeding predominantly addressed
clusive contracts between MDU owners and PCOs or DBS providers. In the FNPRM, the Commission sought comment on whether it has the appropriate authority and cause to extend the Exclusive Service Report and Order to PCOs and DBS providers.

The Commission also sought comment on whether it should ban exclusive marketing contracts. An exclusive marketing contract allows only the contracted MVPD to market their services to residents of an MDU. The Commission suggested that such agreements have been used to stifle competition in the video services marketplace. Specifically, the Commission noted that "[s]ome argue that in order for MDU residents to exercise freely their choice [of a specific video service provider], they must know about their MVPD options."

Finally, the Commission sought comment on whether it should prohibit bulk-billing arrangements. Provided that all tenants subscribe to a particular MVPD, bulk-billing agreements allow an MDU owner to negotiate on behalf of its tenants for reduced prices. Otherwise, MDU residents are required to pay retail prices for video services. Some commenters argued bulk-billing arrangements also restrict consumer access to MVPDs and are anticompetitive. The Commission stated, "As we understand them, bulk-billing arrangements may be exclusive contracts because MDU owners agree to these arrangements with only one MVPD, barring others from a similar arrangement.

exclusivity clauses involving cable operators.

Id. The Commission sought comment on several issues regarding exclusive contracts and PCOs and DBS providers, such as whether these providers use exclusive contracts; whether MVPDs subject to the Order would partner with PCOs and DBS providers to avoid the Order; and what effect do exclusive contracts by these other MVPDs have on consumer choice, competition, and broadband deployment. Id.

Id.

Id. ¶ 63.

Id.

Id.

Id. ¶ 63, 65.

See id. ¶ 65; Comments of Comcast, supra note 25, at 19 ("A bulk rate agreement is an agreement whereby the MVPD agrees to provide its service to consumers in the MDU at a discounted rate, which is often paid to the MVPD by the MDU owner, who then includes video service as part of its lease benefits.").

See, e.g., In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Reply Comments of SureWest Communications, MB Docket No. 07-51, at 1–2 (Mar. 6, 2008) (accessible via FCC Electronic Comment Filing System) (noting "substantial evidence in the record ... that the use of Mandatory Bulk Billing Contracts is an unfair method of competition which impedes consumer choice of their preferred MVPD service provider, has the effect of being a barrier to entry for competitors, and thus impairs the deployment of advanced services.").

Exclusive Service Report and Order, supra note 1, ¶ 65.
exclusive service contracts.\textsuperscript{103} In summary, in its FNPRM, the Commission sought comment on various practices between MVPDs and MDU owners that may be anticompetitive and contrary to achieving its mandate of universal service at affordable prices for MDU residents.

Despite seeking comment and ruling on many aspects of the MDU debate, the Commission failed to consider fully the constitutional implications of the exclusive contract prohibition. The following Part addresses the constitutional ramifications of the \textit{Exclusive Service Report and Order} in detail and ultimately determines that the \textit{Order} is unconstitutional. To avoid prolonged and economically inefficient court proceedings, the Commission should immediately revise its \textit{Order} to comport with the Constitution.

\section*{III. THE EXCLUSIVITY BAN IS UNCONSTITUTIONAL}

The Commission violated the Constitution when it prohibited the enforcement of exclusive service contracts between MVPDs and MDUs. In particular, the \textit{Exclusive Service Report and Order} interferes with an MDU owner’s right to exclude others from its property and amounts to a physical occupation or invasion of property without the due process of law. As a result, the exclusivity ban constitutes a governmental taking without just compensation and violates the Fifth Amendment of the Constitution. Additionally, the \textit{Order} violates fundamental principles of federalism by disregarding states’ rights to regulate exclusive contracts between MDU owners and MVPDs. For these reasons, the exclusive contract prohibition is unconstitutional.

\subsection*{A. Exclusivity Ban Is an Unconstitutional Physical Invasion of Private Property}

The Commission, in its \textit{Exclusive Service Report and Order}, neglected fundamental property rights when it prohibited the enforcement of exclusive service agreements between MVPDs and MDUs. The Supreme Court previously has declared that "one of the most essential sticks in the bundle of rights that are commonly characterized as property [is] the right to exclude others."\textsuperscript{104} For the \textit{Order} to be effective, MDU tenants must be able to grant access to any MVPD of their choosing, which strips MDU owners of their right to exclude

\footnotesize{\begin{itemize}
  \item \textsuperscript{103} Id.
  \item \textsuperscript{104} Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); see also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982) ("[T]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others.").
\end{itemize}}
others. As such, the Commission’s interference with an MDU owner’s right to exclude other MVPDs from its property represents a direct infringement on constitutional rights deeply rooted in American jurisprudence—namely, the order violates the Fifth Amendment’s Due Process and Takings Clauses. 105

The foundation of these rights is the Takings Clause of the Fifth Amendment, which establishes that it is unconstitutional for the federal government to take private property for public use without providing the owner just compensation. 106 The Supreme Court has interpreted the Takings Clause several times with respect to the government contravening the right of a property owner to exclude, and has found consistently in favor of the property owner. 107

In Kaiser Aetna v. United States, the Supreme Court held that the federal government could not impose a regulation on private landowners that restricted the landowners’ ability to deny others access to their land without compensation. 108 At issue was a landowner’s private pond that had been converted by the property owner into a marina to gain access to a bay. 109 After learning of the conversion, the government sought to declare the marina a national navigational waterway 110 and grant the public access to the marina, effectively eliminating the private landowner’s right to exclude others from his property.

The Supreme Court held that the government’s attempt to give the public access to the marina violated the property owner’s fundamental right to exclude others from his private property. 111 Specifically, the Court reasoned that by converting the property into a public marina and eliminating the property owner’s ability to exclude, the government’s action was a taking under the Fifth Amendment. 112 Therefore, because the government’s action was a taking through the deprivation of the right to exclude, the Court required the government to pay just compensation. 113

The rationale behind Kaiser Aetna is applicable to the Commission’s Exclusive Service Report and Order. Just as the government’s action in Kaiser Aetna

105 See U.S. Const. amend. V (“No person shall be... deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.”).
106 See id.; see Palazzolo v. Rhode Island, 533 U.S. 606, 606-07 (2005) (“The Takings Clause of the Fifth Amendment... prohibits the government from taking private property for public use without just compensation.”).
107 See, e.g., Kaiser Aetna, 444 U.S. at 179-80 (noting the right to exclude is so fundamental the government cannot infringe without just compensation).
108 Id. at 179-80.
109 Id. at 165-66.
110 Id. Specifically, the United States sought the waterway be declared “navigational servitude of the Federal Government,” thereby requiring that the public be granted access to the area. Id. at 171-72.
111 Id. at 179-80.
112 See id. at 178-80.
113 Id. at 179-80; see Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).
violated the property owner’s right to exclude others, the *Exclusive Service Report and Order* essentially destroys an MDU owner’s ability to exclude other MVPDs.\(^\text{114}\) For the *Exclusive Service Report and Order* to be effective, MDU residents must be able to choose between a hypothetical number of MVPD competitors.\(^\text{115}\) In order to provide service to any MDU resident, all of the MVPD competitors must be able to deploy their services in the MDU,\(^\text{116}\) which requires a substantial amount of access to the MDU. Giving MDU residents the right to choose their MVPD ignores the ownership structure of MDUs: MDU residents hold leasehold interests in the building, while the owner of the MDU has an interest in the property as a whole.\(^\text{117}\) By eliminating an MDU owner’s right to exclude an MVPD, the government usurps an owner’s right without compensation and thereby violates the Constitution.

The MDU owner is the only party that should possess the fundamental right to exclude others. By permitting residents to dictate which MVPD can enter the MDU, the *Exclusive Service Report and Order* eviscerates the MDU owners’ constitutional right to exclude others from accessing their property.\(^\text{118}\) As the Real Access Alliance warned in its comments to the Commission prior to the adoption of the order,

> [r]egulation 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

\(^{114}\) See *Exclusive Service Report and Order*, supra note 1, at 20,289 (McDowell, Comm’r, concurring).

\(^{115}\) See *Exclusive Service Report and Order*, supra note 1, ¶ 26. The Commission claims that the exclusive contract prohibition does not implicate MDU owners’ ability to control their property. See id. ¶ 57 (“The rule merely prohibits clauses that serve as a bar to other MVPDs that seek to provide services to a MDU.”). However, this assertion is blatantly wrong—the *Order* explicitly restricts the way MDU owners use their land because it limits their ability to contract with video service providers. See id. ¶ 1.

Further, if the *Order* is to have any effect, MDU tenants must be able to grant access to the MVPD of their choosing. Otherwise, there is nothing to stop MDU owners from denying access to all MVPDs except the one with which it previously had an exclusive arrangement. As such, absent mandatory access, exclusive dealings will still exist, but without a formal exclusive service contract. Obviously, these back-door dealings would depart from the goals the Commission sought to accomplish when it enacted the *Exclusive Service Report and Order*. See id. ¶ 26 Thus, to be effective, MDU residents must be able to grant access to the MVPD of their liking, even if the MDU owner objects.

\(^{116}\) See Comments of Real Access, supra note 1, at 22–23.


\(^{118}\) Id.; see also *Kaiser Aetna*, 444 U.S. at 176.
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.\(^\text{119}\)

The Fifth Amendment requires that the government provide MDU owners with just compensation for any infringement the right of the MDU owner to exclude.\(^\text{120}\) The *Exclusive Service Report and Order*’s failure to provide any compensation violates the Fifth Amendment’s requirements.\(^\text{121}\)

Requiring MDU owners to grant access to any MVPD of any resident’s choosing not only impedes the owners’ fundamental right to exclude, but also constitutes physical occupation or invasion of a building. This also amounts to a governmental taking without just compensation.\(^\text{122}\)

In 1982, the Supreme Court held that the permanent, unwanted physical invasion of a building by the installation of cable used to provide video services was a taking that required just compensation under the Fifth Amendment in *Loretto v. Teleprompter Manhattan CATV Corp.*\(^\text{123}\) In *Loretto*, the appellant purchased an apartment building in which the previous owner allowed Teleprompter, a cable company, to install a cable to provide video services to the residents.\(^\text{124}\) The MDU owner filed suit against Teleprompter, alleging that the installation was a trespass and a taking without just compensation.\(^\text{125}\) The state court held that a minor but permanent, physical invasion of an owner’s property was authorized by New York Executive.\(^\text{126}\) Acting under this law, Teleprompter became a government actor. The U.S. Supreme Court overturned the state court and ruled in favor of the MDU owner.\(^\text{127}\)

The Court reasoned that such a physical invasion on private property effectively destroyed the right of the MDU owner to exclude others from that portion of her property.\(^\text{128}\) To justify its conclusion that a physical invasion constitutes a governmental taking, the Court cited *Kaiser Aetna*, which “reemphasiz[ed] that a physical invasion [of government forcing public access] is a gov-

\(^{119}\) See Comments of Real Access, supra note 1, at 22.

\(^{120}\) See U.S. Const. amend. V ("No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

\(^{121}\) TechLawJournal.com, supra note 117; see also, e.g., Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) ("The Takings Clause of the Fifth Amendment . . . prohibit[s] the government from taking private property for public use without just compensation.").


\(^{123}\) Id. at 441.

\(^{124}\) Id. at 421–22.

\(^{125}\) Id. at 424.

\(^{126}\) Id. at 424–25; see also N.Y. Exec. Law § 828(1) (Supp. 1972–81).

\(^{127}\) Loretto, 458 U.S. at 441–42.

\(^{128}\) See id. at 432–34.
ernment intrusion of an unusually serious character.” Loretto thus further clarified a physical invasion of property will amount to a taking for which the government must pay just compensation.

Applied to the Exclusive Service Report and Order, Loretto suggests that the exclusive contract prohibition amounts to a governmental taking. As in Loretto, the Order would force MDU owners to grant access to any MVPD, essentially requiring an MDU owner to allow multiple MVPDs to physically occupy the property. A trespass to private property is tantamount to a physical invasion, which constitutes a governmental taking of property for which MDU owners must be compensated.

Finally, the Supreme Court consistently has found that contract rights constitute property, and the FCC has undoubtedly interfered with pre-existing contract rights. By abrogating existing exclusive contracts, the Commission destroys the future benefits MDUs and MVPDs expect to gain from their agreement. Exclusive contracts “frontload[] investment costs in exchange for a guaranteed, long-term revenue stream” for service providers. Thus, the exclusive agreement prohibition “directly target[s] a vested property right and caus[es] harm with a retroactive effect.” As a result, absent just compensa-

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129 Id. at 433.

130 Compare Exclusive Service Report and Order, supra note 1, ¶ 26 (stating that the residents should be allowed to pick their MVPD provider), with Loretto, 458 U.S. at 438–40 (suggesting that forcing a landlord to accept a tenant’s cable choice is a permanent invasion and thus a taking).

131 Cf. Loretto, 458 U.S. at 438-39 (holding that a cable installation is a physical occupation and thus requires compensation).

132 See, e.g., Lynch v. United States, 292 U.S. 571, 579 (1934) (“Valid contacts are property, whether the obligor be a private individual, a municipality, a state, or the United States.”); see also U.S. Trust Co. v. New Jersey, 4331 U.S. 1, 19 n.16 (1977) (“Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.”); United States v. N. Pac. Ry., 256 U.S. 51, 64 (1921) (“[Con- tractual rights] are within the protection of the due process of law clause of the constitution.”); United States v. Cent. Pac. R.R., 118 U.S. 235, 240 (1886) (finding that a breach of contract by the government was “an invasion of the constitutional rights of the appellee”); Ballstaedt v. Amoco Oil Co., 509 F. Supp. 1095, 1097 (N.D. Iowa 1981) (“The fifth amendment . . . protects against the taking of private property for public use without just compensation, and it is undeniable that contract rights are property and thus constitutionally protected.”).

133 See Comments of Comcast, supra note 25, at 33 (“Cable operators and other MVPDS, large and small, have invested significant sums of money in reliance upon, and provided due consideration for, the contractual rights that the Commission has previously approved but is now considering abrogating.”).

134 In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Comments of Time Warner Cable, MB Docket No. 07-51, at 12 (July 2, 2007) [hereinafter Comments of Time Warner] (accessible via FCC Electronic Comment Filing System).

135 Id. at 13.
tion, the Commission’s Exclusive Service Report and Order constitutes an infringement upon a basic property right and is, thus, unconstitutional.

In addition to violating MDU owners’ fundamental right to exclude others from their property, the Exclusive Service Report and Order also constitutes a regulatory taking for which the government must also provide just compensation.136

B. Exclusivity Ban Constitutes a Regulatory Taking

The Supreme Court has determined that regulatory takings occur when the government issues a regulation that restricts a property owner’s use of the property.137 Despite rejecting the bright line rule that any deprivation of economic benefit in property is tantamount to a regulatory taking, the Tahoe-Sierra Court emphasized that “if [a] regulation goes too far it will be recognized as a taking.”138 A finding of a regulatory taking is determined ad hoc and involves an examination of the type of governmental regulation, its economic impact, and how drastically the regulation frustrates the property owner’s reasonable investment-backed expectations.139 Because the exclusive contract ban has deprived MDU owners of the economic benefit of their property and frustrated their investment-backed expectations,140 the Exclusive Service Report and Order goes too far and constitutes a regulatory taking.

Ostensibly, the negative impact on the investment expectations of building owners and service providers justified the Commission’s previous refusal to

136 See, e.g., Comments of Comcast, supra note 25, at 34 (“Taking the steps contemplated in the [Order] may implicate MVPD and MDU owners’ property rights and could give rise to an unconstitutional Fifth Amendment regulatory taking. The Supreme Court’s ruling in Tahoe-Sierra is consistent with [this] view that the actions contemplated in the Notice present Fifth Amendment issues.”).


139 See, e.g., Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); see also Comments of Comcast, supra note 25, at 34 (explaining that a long line of Supreme Court cases indicate that regulatory takings focus on “the nature of the governmental action, the severity of its economic impact, and the degree of interference with the property owner’s reasonable investment-backed expectations.”).

140 See, e.g., Comments of NCTA, supra note 87, at 11 (asserting that abrogation of exclusive service contracts drastically interferes with the investment-backed expectations of MDU owners and MVPDs); In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Comments of Charter Communications Inc., MB Docket No. 07-51, at 2–4 (July 2, 2007) (accessible via FCC Electronic Comment Filing System) (contending that the exclusive contract prohibition will have a negative impact on the investment-backed expectations of MDU owners).
regulate MDUs. In certain situations, MDU owners and MVPDs have determined that an exclusive service arrangement is the most mutually advantageous: "[S]uch agreements can enhance the value of the property, and its attractiveness to potential tenants, by encouraging lower prices, increased quality of service, and new and improved products and services, while they allow the MVPD some time to recoup the value of their investments." For example, OpenBand explained:

It is simply not possible to convince owners, directors, investors or lenders to finance the construction of such capital-intensive networks in such limited markets unless the networks will be able to serve a significant portion of the households in the developments for periods long enough to recover their projected investment and operating costs.

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141 See, e.g., In re Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission’s Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Review of Sections 68.104, and 68.213 of the Commission’s Rules Concerning Connection of Simple Inside Wiring to the Telephone Network, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 F.C.C.R. 22,983, ¶ 36 (Oct. 12, 2000) [hereinafter Competitive Networks Order] (explaining that “the modification of existing exclusive contracts . . . would have a significant effect on the investment interests of those building owners and carriers that have entered into such contracts.”); see also In re Telecommunications Services 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 F.C.C.R. 1342, ¶ 63 (Jan. 21, 2003) ("[E]xclusive contracts enable alternative providers to recoup the investment required to enter MDUs and thus to become or remain viable."); Comments of Comcast, supra note 25, at 34 (“It is presumably for this reason that the Commission has heretofore exercised restraint in interfering with private contracts.”).

142 See Comments of Real Access, supra note 1, at 12–14 (explaining that, in many situations, the MDU owner and the MVPD have determined exclusive contracts to be the most beneficial for all parties involved); Comments of Shenandoah, supra note 32, at 15 (explaining because exclusive service contracts ultimately provide lower prices for MDU residents, such contracts enhance the attractiveness of the building).

143 In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Reply Comments of Comcast, MB Docket No. 07-51, at 3 (Aug. 1, 2007) (accessible via FCC Electronic Comment Filing System); see also Comments of Real Access, supra note 1, at 3 (arguing exclusive contracts lower prices and enhance the attractiveness of the building to potential residents).

144 Comments of OpenBand, supra note 51, at 4; see also Comments of Real Access, supra note 1, at 16 (“Without such [exclusive] 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.”); Comments of Shenandoah, supra note 32, at 8–10 (explaining that exclusive contracts allow an MVPD to gain a foothold on the video services market while it recovers its investments); In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Comments of Lennar Corporation, MB Docket No. 07-51, at 2 (June 14,
Further, commenters argued that exclusive contracts actually provide MVPDs a greater incentive to upgrade services and install new facilities, particularly for properties that house less affluent tenants.\(^4\)

Moreover, the FCC focuses only on the short-term economic impact of exclusive contracts, ignoring any of the long-term economic benefits. MDU owners will see a decrease in the availability of funds to contribute towards their infrastructure without the ability to generate revenue from exclusive service contracts.\(^6\) Without exclusive arrangements, MVPDs may need to increase prices or forgo infrastructure improvements to ensure that they will earn some return on investment.\(^7\) An increase in prices or a decrease in service quality for MDU residents could result in a direct loss of lease renewals and an ultimate loss in revenue for the MDU owner.\(^6\) These outcomes deprive MDU owners of economic benefit and frustrate the MDU owners’ investment-backed expectations.\(^9\) Therefore, the Exclusive Service Report and Order constitutes a regulatory taking.

However, this argument does have a weakness. The prohibition on exclusive contracts has not deprived MDU owners of all economic productivity and beneficial use of their land. MDU owners will still receive the bulk of their profit from monthly lease revenue paid by tenants, not from royalties received

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\(^4\) See e.g. Comments of Real Access, supra note 1, at i ("[P]ermitting such agreements gives service providers greater incentive to upgrade facilities or install facilities in new buildings, especially in smaller properties and properties with less affluent residents."); In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Comments of Community Associations Institute, MB Docket No. 07-51, at i (July 2, 2007) (accessible via FCC Electronic Comment Filing System) ("Without exclusivity, video programming providers are often unwilling to assume the cost of meeting an association’s needs.").

\(^6\) See 2003 Inside Wiring Order, supra note 1, ¶ 63; Comments of Time Warner, supra note 134, at 3 ("In some cases, an exclusive contract’s guaranteed, long-term revenue stream encourages an MVPD to make the infrastructure investments required to provide service to an MDU.").

\(^7\) See, e.g., Comments of the National Multi Housing Council, supra note 19, at 7–8 (stating that some providers will not upgrade because it would not be cost effective).

\(^9\) See Comments of Comcast, supra note 25, at 33.
through exclusive service agreements. Alternatively, if MDU owners can effectively argue that the prohibition on exclusive agreements will cause them to lose lease renewals and new residents, then a regulatory taking may successfully be argued. Nonetheless, the case can also be made for a determination that the Order deprives MDU owners of due process under law.

C. Exclusivity Ban and the Deprivation of Due Process

Aside from violating the Takings Clause of the Fifth Amendment, the Exclusive Service Report and Order violates the Due Process Clause of the Fifth Amendment. Due process rights include procedural due process and substantive due process. Substantive due process protects fundamental rights. In effect, the Exclusive Service Report and Order fails to provide adequate substantive due process by retroactively abridging pre-existing contracts without providing sufficient notice to the property owner.

The Supreme Court has indicated that "[r]etroactivity is generally disfavored in the law . . . because it can deprive citizens of legitimate expectations and upset settled transactions." With regard to finding a due process violation for the retroactive abrogation of private contracts, the Supreme Court established that "[w]hen the contract is a private one, and when the impairing statute is a federal one . . . [t]he party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and establish that the legislature has acted in an arbitrary and irrational way."

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150 See e.g. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) (explaining that a regulation must render the land valueless in order for it to amount to a regulatory taking). Compare Comments of WorldNet, supra note 145, at 5 (explaining that because exclusive service contracts allow land developers to obtain lower video service prices, their use puts land developers in stronger negotiating positions with potential residents; thus, exclusive contracts assist MDU owners in attracting residents for new leases), with Comments of Real Access, supra note 1, at 7 (explaining that MDU owners make the bulk of their profits off of leases with residents and that if residents are unhappy with the amenities an MDU offers, the residents will move out).

151 See Lucas, 505 U.S. at 1030.

152 See Comments of Comcast, supra note 25, at 33.


154 See id. at 404–05.

155 Cf. id. ("When federal economic legislation restricts private contractual rights a court must determine whether the federal legislation in fact is altering substantive contractual rights in more than a minimal fashion, just as it would if the court was examining the alteration of contractual rights by state legislation under the contracts clause.").


This fundamental right to due process for deprivation of property was explained in Pennsylvania Coal Co. v. Mahon. In Pennsylvania Coal, the Court held that government regulation cannot deprive a property owner the use of his land without the due process of law. If a regulation does deprive a property owner the use of his land without due process, the government's action will constitute a taking without just compensation.

In Pennsylvania Coal, Mahon and Pennsylvania Coal negotiated an agreement in which Mahon obtained surface rights to a piece of property and Pennsylvania Coal gained the mining rights to the land underneath. In 1921, the state of Pennsylvania passed the Kohler Act, which retroactively extinguished Pennsylvania Coal's right to mine the land underneath Mahon's property and absolved both parties of their contractual obligations. The state asserted that it was justified in the taking under its police power because similar agreements had led to the collapse of surface land after the subterranean land had been mined. Pennsylvania Coal challenged the regulation, claiming it constituted a deprivation of its property without the due process of law and, as a result, constituted a taking that required just compensation under the Fifth Amendment.

The U.S. Supreme Court agreed with Pennsylvania Coal. The Court explained that "some values [in property] are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone." The Court determined that the Kohler Act exceeded the scope of police powers and deprived Pennsylvania Coal the use of its property. Therefore, as established in Pennsylvania Coal, a government-imposed regulation that retroactively restricts a property owner's use of its land violates the due process clause. In such cases, the government's action amounts to a taking without just compensation.

Justice Kennedy's concurrence in part in Eastern Enterprises v. Apfel further explained this principle as it relates to the federal government. Eastern Enterprises arose out of a challenge to the Coal Act compelling companies in

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159 Id. at 415.
160 Id. at 412.
161 Id. at 412-13.
162 Id. at 412-14; see cases, supra note 23 (providing an overview of interpretations of the police power).
164 Id. at 414-16.
165 Id. at 413.
166 See id. at 414-15.
the coal industry to provide health benefits to retired workers. Eastern, which previously had been in the coal business, had since converted into a gas company and barge operator. However, the Coal Act treated Eastern as if it were still in the coal industry and therefore forced the company to provide its retirees with healthcare benefits. In response, Eastern sued the Coal Commission, which was responsible for enforcing the act, alleging the act violated its right to substantive due process and constituted a taking under the Fifth Amendment.

While the plurality invalidated the Coal Act on the ground that it was an unconstitutional taking, it refused to rule on whether the law also violated Eastern's right to substantive due process. However, Justice Kennedy did not shy away from Eastern's due process claim; he concluded that the Coal Act "must be invalidated as contrary to essential due process principles." Specifically, Kennedy stated, "[I]n creating liability [today] for events which occurred 35 years ago the Coal Act has a retroactive effect of unprecedented scope." This suggests that legislation may be invalidated when it amounts to an egregious and arbitrary retroactive application of the law.

Justice Kennedy's reasoning in Eastern Enterprises can be applied directly to the Commission's retroactive abrogation of exclusive service contracts. Just as the Coal Act "exceeded the limits imposed by due process," the Exclusive Service Report and Order violates the Due Process Clause because it arbitrarily, irrationally, and retroactively disturbs pre-existing exclusive arrangements between MDU owners and MVPDs.

The Commission's exclusive contract ban is arbitrary and irrational because it seeks to prohibit exclusive contracts, even though cable operators hold 7.5% less of the MVPD market than they did four years ago when the Commission determined that competition was flourishing. In fact, the Commission attempted to address the argument that the exclusive contract ban was arbitrary, stating, "MDU contracts have been under active scrutiny for over a decade." Under this rationale, parties to exclusive contracts cannot contend that their investment-backed expectations have been frustrated because they should have anticipated the inevitable birth of prohibition. However, this line of reasoning

168 Id. at 514–15.
169 Id. at 516.
170 See id. at 514, 517.
171 See id. at 517.
172 Id. at 538.
173 Id. at 539 (Kennedy, J., concurring in the judgment and dissenting in part).
174 Id. at 549.
175 Id.
176 See discussion, supra Parts II.A–B.
177 Exclusive Service Report and Order, supra note 1, ¶ 58.
COMMLAW CONSPECTUS

is flawed: parties to exclusive contracts rightfully expected exclusive dealings to survive because their validity was upheld only four years earlier when cable operators maintained an even greater market share. The Commission’s weak rebuttal only emphasizes the arbitrary and egregious nature of the Commission’s decision.

In summary, when federal economic legislation is enacted arbitrarily, irrationally, and retroactively, it amounts to a Fifth Amendment Due Process Clause violation. Here the Commission acted arbitrarily and irrationally because the Exclusive Service Report and Order contradicted the Commission’s prior reasoning upon which contract holders had depended. Challenges against current contracts in violation of the Order would likely remain valid because the Order unconstitutionally violated the Due Process Clause. Moreover, not only does the Exclusive Service Report and Order offend due process, but it also generally offends notions of federalism in the United States.

D. The Exclusivity Ban Undermines Fundamental Concepts of Federalism

Instead of enacting the exclusive contract ban, the Commission should have deferred to current state law regarding exclusive agreements. Numerous states have already enacted statutes that in some way require MDU owners to grant building access to any MVPD provider that the tenants request. These

178 See In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Reply Comments of The Fiber-to-the-Home Council, MB Docket No. 07-51, at 2–3 (Mar. 7, 2008) (accessible via FCC Electronic Comment Filing System) (“Each of these state regulatory schemes already provide protection to the association for service contracts entered into with developers before the turnover of control of the association to the unit owners . . . .”).

comprehensive state regulatory schemes provide an adequate framework for enhancing competition in the video services marketplace. Thus, the Commission, in adopting the *Exclusive Service Report and Order*, encroached on the states’ power to regulate private property owners.

The *Exclusive Service Report and Order* has essentially stripped MDU owners of the power to grant and deny access to their property. However, the Commission does not have the authority to take such action. That authority, consistent with traditional property rights, lies with the states. In fact, “[n]o rule in constitutional law is better settled than the principle that all property is held subject to the right of the state reasonably to regulate its use under the police power . . .” Therefore, the Order has intruded on the states’ police powers and violated fundamental principles of federalism.

This does not mean that the federal government could never regulate an MDU owner; rather, it may only supersede state law when acting pursuant to an enumerated power. The Commission, however, cited no enumerated power when it prohibited exclusive service contracts between MDUs and MVPDs. Without reference to an enumerated Constitutional provision, the Commission’s *Exclusive Service Report and Order* improperly infringes upon the states’ police power to regulate private property owners and undermines deeply rooted concepts of federalism. Aside from the constitutional violations the *Exclusive Service Report and Order* committed, the exclusive contract provision also represents flawed policy.

IV. EXCLUSIVE CONTRACT POLICY CONSIDERATIONS

The *Exclusive Service Report and Order* rests on a determination that the regulation was necessary to ensure competition in the video services market. However, the Commission failed to consider adequately the natural competi-

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180 *See supra* note 115, and accompanying text.
181 *See cases supra* note 23.
184 *See*, e.g., *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138 (1948) (holding that the Federal Government was permitted to adopt the Housing and Rents Act of 1947—which stabilized rental prices near the end of World War II—because it was acting pursuant to its enumerated War Power). *But see New York*, 505 U.S. at 156–57 (“Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government’s role.”).
185 *Exclusive Service Report, supra* note 1, ¶ 1.
tive forces that drive the video services market. For example, if one MDU has entered into an exclusive contract with a cable incumbent and a similarly-located MDU allows tenants to choose an MVPD, competitive forces will determine if the correct choice was made. That is, if the MDU owner's decision to enter into an exclusive contract with an MVPD was not what tenants demand, tenants may leave the MDU for the better housing option. Therefore, a regulation of the contractual relationships between MDU owners and MVPDs discourages customer choice and unnecessarily burdens competition.

The Exclusive Service Report and Order signifies a drastic shift in ideology from only four years earlier, when the Commission recognized that exclusive contracts actually benefited and enhanced competition in the video services market. The 2003 Inside Wiring Order considered comments that argued exclusive contracts enable alternative and new MVPDs to procure financing, recoup their costs, expand operations, and enter in and compete for the MDU market. They give property owners leverage, the opportunity to obtain better service options and rates, and the possibility of offering an alternative to the incumbent cable provider, which ultimately benefits residents.

Moreover, the Commission decided to leave exclusive service agreements intact at a time when cable operators controlled 76.5% of the MVPD market; now cable operators merely hold 69% of the video market. The Commission's exclusive contract prohibition is even less justifiable now than it would have been four years ago when it determined that MVPD competition was thriving. Such a patent contradiction in the Commission's policy perspective toward exclusive contracts invites the suggestion that the Commission was merely catering to the new-video-service, large players: Verizon and AT&T. This paradox is only exacerbated by the fact that Verizon (then GTE) and AT&T (then SBC) lobbied for exclusive service contracts only a decade earlier. Hence, the Commission's sudden shift towards a regulated MDU video services market is suspect and may have other negative effects.

The contradictory policy discourages long-term investment because the ul-

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186 See discussion, supra Part II.A.
187 See discussion, supra Parts II.A–B.
188 2003 Inside Wiring Order, supra note 1, ¶ 64 (citations omitted).
189 Comments of Time Warner, supra note 1, ¶ 6–7; see Comments of NCTA, supra note 87, at 9–10; Comments of Comcast, supra note 25, at 3–4. NCTA specifically states Competition in the video marketplace has become more intense; consumers—including those living in MDUs—have even more choice; and MVPDs face greater pressures to provide consumers better value and improved services. DBS providers are now the second and third largest MVPDs in the country, and the telcos, most notably AT&T and Verizon, are finally exploiting the freedom they have had for over a decade to enter the video business.

Id.
190 Comments of Comcast, supra note 25, at 3.
timate outcome of the investment is highly unpredictable. Additionally, the uninhibited entry into the MDU market of Verizon and AT&T—companies established in the MVPD market without FCC regulation\(^9\)—may prevent smaller, independent cable operators from even attempting to compete. Corporate giants like Verizon, AT&T, Comcast, and Time Warner all have the economic resources to install the required infrastructure throughout an MDU, while less financially secure cable operators must have some guaranteed return on their investment before taking such a significant financial risk.\(^9\) Thus, the prohibition of exclusive service contracts may unduly burden small, independent cable operators. Furthermore, the lack of exclusive contracts may also serve as a significant barrier to entry in an industry with already high fixed costs. The uncertain status of the law cannot allow small companies to estimate reasonably the rate of return when establishing an agreement and therefore completely discourages small investment.

In addition, the exclusive contract ban is detrimental to the Commission’s overarching goal of universal service at affordable prices for MDU residents.\(^9\) The bottom line is that MDU owners are able to extract superior deals from MVPDs through the use of exclusive service contracts.\(^9\) Without such arrangements, MDU residents are forced to pay retail for video services, which may be unaffordable.\(^9\) Although the Commission claims the long-term nature of exclusive service contracts make them anticompetitive,\(^9\) the competition of MVPDs to provide services to MDUs more than outweighs the insignificant

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\(^9\) See id. at 3–4, 4 n.7 (“In fact, Verizon’s video business appears to be growing so fast that it is now the 11th largest cable operator and the 13th largest MVPD in the country, with over 500,000 subscribers . . . . Notably, Verizon has achieved this growth without any of the regulatory help that it claims to need in this proceeding.” (citation omitted)).

\(^9\) See Comments of Shenandoah, supra note 32, at 12; see also Comments of Open-Band, supra note 51, at 3–4; Comments of Lennar Corp., supra note 144.

\(^9\) See Communications Act of 1934 § 1, 47 U.S.C. § 151 (2000) (“[S]o as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire . . . at reasonable charges . . . .”); Exclusive Service Report and Order, supra note 1, ¶¶ 18, 47.


\(^9\) See, e.g., Comments of Real Access, supra note 1, at 16–17; see also Comments of Comcast, supra note 25, at 19.

\(^9\) See Exclusive Service Report and Order, supra note 1, ¶ 35. The Commission has criticized exclusive service contracts for being perpetual in length and rarely changed. See id., ¶ 46. As a result, the Commission argued, such exclusive dealings leave video service providers without incentive to update their operations. Id. ¶ 22. This argument, while seemingly meritorious, does not justify a complete prohibition of exclusive contracts between MDUs and MVPDs. If the Commission was really concerned about long-lasting exclusive arrangements, it merely should have imposed a cap on their duration. This would have resolved conflict from both sides of the argument—advocates of exclusive contracts would have been pleased because they would retain a guaranteed return on investments, at least for a set period of time, and opponents of exclusive contracts could no longer claim that they are “locked-out” of a service area.
anticompetitive effect. Therefore, everybody wins with exclusive contracts: MDU owners receive better deals for their tenants, which means that they are more likely to sign and keep tenants; MVPDs may profit by providing their services; and MDU residents are able to receive video services at competitive lower prices.

In short, the Commission’s regulatory intervention of the MDU video services market was unnecessary because competition was already flourishing. The Commission opted not to intervene only four years earlier—a time when the cable companies’ share of the MVPD market was actually greater than it was when the Commission adopted the Exclusive Service Report and Order. Further, without the existence of exclusive contracts, cable operators are no longer able to provide video services at discounted rates, which negatively affects MDU owners, MVPDs, and, most importantly, MDU residents. As such, the Commission’s goals would have been better served had it maintained the status quo, allowing natural competitive forces to dictate arrangements between MVPDs and MDU owners. For similar reasons, the Commission should not adopt the rules it proposed in the Order’s FNPRM.

V. THE FURTHER NOTICE OF PROPOSED RULEMAKING

The Commission prohibited exclusive service contracts between MDUs and MVPDs because it believed such agreements stifled competition, which resulted in higher prices for MDU residents. Similarly, it sought comment on other alleged anticompetitive practices that exist in the video services marketplace. In particular, the Commission sought comment on whether it should: (1) extend the ban to PCOs and DBS providers; (2) prohibit exclusive marketing contracts; and (3) ban bulk-billing arrangements. This part addresses these alleged anticompetitive concerns raised by the Commission in its FNPRM.

This Comment provides recommendations for these questions. Specifically, if kept, the exclusive contract ban must be extended to PCOs and DBS providers to achieve “regulatory parity” and level the playing field for all video service providers. The Commission should remove the exception in the Order for dormitories and academic campuses. Additionally, the proposed prohibition of exclusive marketing agreements should be rejected because of the constitutional ramifications that the ban would raise. Finally, the benefits of bulk-billing arrangements outweigh the anticompetitive costs and their use helps the

E.g., Comments of Comcast, supra note 25, ¶¶ 2–3.
198 See Exclusive Service Report and Order, supra note 1, ¶¶ 1, 17, 22–23.
199 Id. ¶¶ 61–65.
200 Id.
201 Cf. id. ¶¶ 8–9, 32, 61.
Commission achieve its overarching goal of universal video service at affordable prices. Ultimately, if courts uphold the Order, the Commission must extend the exclusive contract prohibition to other types of video service providers and refrain from further regulation of MVPD activity in MDUs.

A. The Exclusivity Ban Improperly Discriminates Against Multiple Service Operators

Throughout the Exclusive Service Report and Order, the Commission refused to extend the exclusive contract ban to PCOs and DBS providers. While Multiple Service Operators ("MSOs") are subject to FCC authority under section 628 of the 1934 Act, the Commission concluded that PCOs and DBS providers could not be regulated under this section. Therefore, it sought comment on the effects of exclusivity agreements used by PCOs and DBS providers.

Reconciling why only MSOs are constrained under the Exclusive Service Report and Order while PCOs and DBS providers are not is difficult. The Commission unfairly prohibits incumbent cable operators from entering into new exclusive agreements and from enforcing existing exclusive agreements, but not their PCO and DBS competitors. Generally, the Commission’s objective is to establish rules that allow competitors to operate on a level playing field. However, discriminating against MSOs only perpetuates an uneven playing field, as PCOs and DBS providers are given an unjustifiable competitive advantage over MSOs. Therefore, this "one-sided regulation" disre-
gards the Commission’s policies of promoting competition in a way that does “not favor one technology or industry over another” and attaining “regulatory parity by applying a consistent regulatory framework across platforms.”

The chief problem with only constraining the MSOs’ ability to enter into exclusive contracts with MDU owners is that the result diminishes competition for MDU residents. To achieve the goal of increased MVPD competition for MDU residents, the Commission improperly focused on the MVPD’s market power when it limited the exclusive contract ban to MSOs. As Comcast noted in its comments:

If the goal is to maximize the choice of video service providers that [are] available to each individual household in an MDU, rather than just shifting market share, there is no more reason to allow AT&T or Verizon to have an exclusive contract than to allow Comcast to have one.

From the perspective of the MDU resident, any MVPD—whether an MSO, PCO, or DBS provider—possesses market power when it has an exclusive arrangement with an MDU owner. Comcast further argued, “It does not matter whether the company providing the exclusive service is established or new to the marketplace—the consumer still only has one choice.” Thus, by prohibiting MSOs from entering into exclusive service contracts, but not their competitors, the Commission actually has provided MDU owners with fewer service options: MDUs can still seek out exclusive contracts, but now only with PCOs and DBS operators.

Importantly, decreasing competition is counterproductive to the Commission’s objective of enhancing competition in the video services marketplace. Time Warner Cable argued, “If the Commission determines that exclusivity is

when the Commission declined to regulate exclusive contracts[,] . . . the video market has become even more competitive, with cable’s share of subscribers dropping from 76.5 percent to 69 percent of all MVPD households.” (citations omitted)).

208 Id. at 5.
210 See, e.g., Comments of Comcast, supra note 25, at 11–12; Comments of Time Warner, supra note 134, at 6.
211 See Comments of Comcast, supra note 25, at 11–12.
212 Id.
213 Id. at 12.
214 Id.
215 Id. at 11–12.
anticompetitive, the only principled response would be to prohibit or restrict such contracts for all video providers.\footnote{217} This exact rationale was adopted in the Commission’s \textit{Competitive Networks Order} when it banned exclusive contracts for competitive and incumbent telecommunications providers.\footnote{218} The Commission concluded that “applying an exclusive contract prohibition only to the incumbent LEC could distort competitive outcomes and ill serve end user interests.”\footnote{219} The Commission should not depart from this precedent for the video services market.

Compared to the competitive state of the video services marketplace only four years ago when the Commission declined to regulate exclusive agreements because the cable providers’ market share had dropped from 80\% to 76.5\%,\footnote{220} the MVPD market has become even more robust. Cable operators’ share of subscribers in the video market has dropped further from 76.5\% to 69.4\% of all households that subscribe to an MVPD service.\footnote{221} Thus, the Commission’s regulation is even less justifiable now than it was in 2003,\footnote{222} because today, the \textit{Order} affects less than 70\% of the MVPD market.\footnote{223}

Furthermore, the Commission, as a matter of fairness, should not have carved out exemptions for academic campuses and dormitories from the definition of MDUs. In the \textit{Exclusive Service Report and Order}, the Commission explained that “MDUs do not include time share units, academic campuses and dormitories, military bases, hotels, rooming houses, jails, prisons, halfway houses, hospitals, nursing and other assisted living places . . . .”\footnote{224} Therefore, university-owned housing, among many other types of multiple tenant housing buildings, may still use exclusive service agreements with MSOs and negotiate better for tenants.

The academic campuses and dormitories exemption is troublesome, because universities are allowed the opportunity to extract superior deals for on-campus students, but off-campus student housing developers are not. For example, an

\footnotesize{\begin{itemize}
\item \textit{Comments of Time Warner, supra note 134, at 6.}
\item \textit{Competitive Networks Order, supra note 141, ¶ 30; see also Comments of Time Warner, supra note 134, at 6.}
\item \textit{Competitive Networks Order, supra note 141, ¶ 30.}
\item See 2003 \textit{Inside Wiring Order, supra note 1, ¶ 69.}
\item \textit{Comments of Time Warner, supra note 134, at 6–7; see also In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, \textit{Twelfth Annual Report}, 21 F.C.C.R. 2503, ¶ 5 (“[A]lmost all consumers have the choice between over-the-air broadcast television, a cable service, and at least two DBS providers.”).}
\item See \textit{Comments of Time Warner, supra note 134, at 7.}
\item See \textit{Comments of NCTA, supra note 87, at 9–10 (“Today, incumbent cable operators serve only 67\% of all multichannel video customers, and the Commission has recognized that the video marketplace is characterized by vigorous competition among cable operators, two national DBS providers—and, now, the incumbent LECs as well.”).}
\item \textit{Exclusive Service Report and Order, supra note 1, ¶ 7.}
\end{itemize}}
off-campus MDU owner whose building is next to a university-owned dormitory is unable to negotiate for the same contract terms as the university with whom the housing the developer competes. Such an exemption contravenes the Commission's policy of regulatory parity because it treats similarly situated developers differently. Therefore, if the Commission continues to support the exclusive service contract prohibition, it should no longer exempt university housing from complying with the rules. Further, there are other anti-competitive concerns set forth in the Exclusive Service Report and Order’s FNPRM that the Commission should refrain from regulating.

B. The Commission Should Not Ban Exclusive Marketing Agreements

In the Exclusive Service Report and Order the Commission sought comment on whether it should ban exclusive marketing agreements between MDUs and MVPDs. Under an exclusive marketing agreement, an MDU owner “markets the video provider’s product offerings to prospective residents on an exclusive basis in exchange for certain benefits, which can include cash compensation as well as other specifically-negotiated commitments.” Such exclusive marketing agreements do not bear on which MVPDs can actually provide services to the building. Instead, they merely prevent an MDU owner from providing informational literature about another MVPD’s services.

Moreover, one of the greatest barriers of entry for a new MVPD is the cost of installing an adequate infrastructure within the MDU to support the

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225 See Comments of Time Warner, supra note 134, at 5; see also 2007 Inside Wiring Order, supra note 206, at 10,680 (Statement of Martin, Chmn.).

226 Exclusive Service Report and Order, supra note 1, at §§ 63–64.

227 Comments of National Multi Housing Council, supra note 19, at 5.

228 See In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Comments of the National Association of Home Builders, MB Docket No. 07-51, at 12 (Feb. 6, 2008) [hereinafter Comments of the National Association of Home Builders] (accessible via FCC Electronic Comment Filing System) (“By their nature, exclusive marketing agreements preserve consumer choice because they do not require any resident of an MDU to purchase or not purchase any multi-channel video service offered by either the MVPD holding exclusive marketing rights or any of its competitors.”).

229 See id. at 14 (“Exclusive marketing agreements do not preclude an MVPD not a party to such an arrangement from effectively communicating with any resident of an MDU subject to such an agreement.”). Because exclusive marketing agreements do not physically or economically inhibit an MDU resident from choosing a different MVPD, section 628 of the Act is not implicated. See Comments of National Multi Housing Council, supra note 19, at 20; In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Comments of Camden Property Trust, MB Docket No. 07-51, at 9 (Feb. 6, 2008) [hereinafter Comments of Camden Trust] (accessible via FCC Electronic Comment Filing System).
MVPD's services. From a video service provider's standpoint, an agreement for exclusive marketing provides a "low-cost way to reach customers and increase probable sales . . . " As a result, exclusive marketing agreements incentivize MVPDs to incur the cost of deploying infrastructure within the MDU.

From an MDU owner's perspective, exclusive marketing agreements allow MDU owners to recoup expenses incurred caused by the installation of inside wiring by the MVPD. Therefore, marketing agreements are beneficial on multiple fronts: they provide incentive for property owners to install new or improve upon existing wiring, as well as encourage MVPD's to contribute to the infrastructure.

Furthermore, a restriction on marketing agreements may violate the Free Speech Clause of the First Amendment. The Supreme Court has established that the First Amendment protects non-misleading commercial speech. In order to regulate non-misleading commercial speech the government must satisfy a three-pronged test: "First, the government must assert a substantial interest in support of its regulation; second, the government must demonstrate that the restriction on commercial speech directly and materially advances that interest; and third, the regulation must be 'narrowly drawn.' A ban on exclusive marketing agreements likely is not supported by a substantial government interest in the regulation.

Presumably, when challenged on this issue, the Commission will argue that increased competition in the video services market is a substantial governmental interest. However, the record does not suggest that exclusive marketing agreements deter competition in the video services marketplace. In fact, commenters indicated that such agreements are actually advantageous not only for the contracting parties, but also for MDU residents. For instance, the Na-

230 See, e.g., Comments of the National Multi Housing Council, supra note 19, at 7 ("[I]t is well established in the multifamily communications industry that the most critical factor influencing decisions to serve an MDU property is the cost of installing or upgrading existing infrastructure.").
231 Comments of the National Association of Home Builders, supra note 228, at 25.
232 See Comments of National Multi Housing Council, supra note 19, at 6.
233 See id. ("[Exclusive marketing agreements] offer extremely important financial benefits to property owners, which facilitate the installation and enhancement of infrastructure, independent of any benefit afforded to cable providers."); see also Comments of the National Association of Home Builders, supra note 228, at 25.
234 See U.S. CONST. amend. I; Comments of Camden Trust, supra note 229, at 10.
236 Id. at 624.
237 See, e.g., Comments of the National Association of Home Builders, supra note 228, at 25 ("An exclusive marketing agreement represents an investment by both sides—the MDU and the MVPD—that benefits not only the contracting parties, but also the MDU residents, who are really third party beneficiaries of the exclusive marketing contract."); Comments of
tional Association of Home Builders explained

The MDU is pragmatically able to ensure available MVPD service (since no MVPD would pay for marketing rights for a service it did not intend to provide), as well as some compensation; the MVPD gets a low-cost way to reach customers and increase probable sales, and the residents get the MVPD to serve the MDU (which it might not have done otherwise) and additional information about alternatives that are available.\textsuperscript{238}

Further, other avenues remain available for competitive MVPDs to communicate their message to MDU residents. For instance, MVPDs are still able to advertise through television, radio, newspapers, the Internet, and other publications.\textsuperscript{239} In addition, there is nothing to stop an MVPD interested in advertising in a particular MDU from standing outside the building on a public sidewalk and handing out leaflets as the tenants enter the MDU. Absent a clear indication that exclusive marketing agreements stifle MVPD competition, the Commission likely cannot establish a substantial interest in favor of the prohibition. Therefore, a ban on exclusive marketing agreements likely would violate the First Amendment right to free speech.

C. The Commission Should Not Ban Bulk-Billing Arrangements

The Exclusive Service Report and Order was intended, in part, to make video services available to everyone, particularly the less wealthy and minority populations.\textsuperscript{240} If the Commission opts to ban bulk-billing arrangements, however, it will likely have a negative impact on the universal availability of services because the prohibition will lead to uncertainty as to whether the MVPD can recoup its investment in deploying service to the MDU. This problem already exists with the prohibition on the enforcement of exclusive contracts; a ban on bulk-billing arrangements will only increase the uncertainty. As a result, MVPDs may be unable to offer video services at reduced rates.\textsuperscript{241} If bulk-billing agreements are prohibited and residents are forced to pay retail, lower

\textsuperscript{238} \textit{Comments of the National Association of Home Builders, supra} note 228, at 25.
\textsuperscript{239} \textit{Comments of Camden Trust, supra} note 229, at 11.
\textsuperscript{240} See Exclusive Service Report and Order, supra note 1, ¶¶ 8, 17.
\textsuperscript{241} See \textit{Comments of Camden Trust, supra} note 229, at 14 (explaining that in 2007 its bulk rates were 22\% lower than retail rates offered by competing MVPDs).
income residents may not be able to afford video services— one of the goals that the Commission sought to accomplish through the Exclusive Service Report and Order.\footnote{See Exclusive Service Report and Order, supra note 1, ¶ 26.}

In the prototypical bulk-billing arrangement, the MDU owner pays an MVPD a flat service fee for the entire building.\footnote{See, e.g., In re Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Declaration of Henry Pye in Support of Comments of the Real Estate Association, MB Docket No. 07-51, ¶¶ 15–16 (accessible via FCC Electronic Comment Filing System).} This ensures the MVPD that it will recover its costs from the installation of wiring and equipment.\footnote{Comments of Shenandoah, supra note 32, at 22 (“Bulk billing allows PCOs the ability and flexibility to offer bulk discounts while securing for themselves an opportunity to earn a reasonable return on investment in MDUs that would be far more costly to serve in the absence of such arrangements.”) (citations omitted)); see also Comments of National Multi Housing Council, supra note 19, at 7 (“In many cases, Verizon will not agree to deliver its advanced services if the existing infrastructure does not support such services. This is because of the cost of installing new infrastructure.”).} In exchange for some certainty as to the return on the investment, the MVPD provides the owner with a significant discount for its services.\footnote{Comments of National Multi Housing Council, supra note 19, at 22; Comments of Camden Trust, supra note 229, at 14.} For instance, “[t]he amount of the discount is typically very large: as much as 40–60% over the price charged single family residents in the same geographical area.”\footnote{Comments of National Multi Housing Council, supra note 19, at 25.}

MDU residents likely consider the attractiveness of bulk-billing arrangements when choosing in which MDU to reside. For instance, if two apartment buildings offer equal amenities, price, location, and quality, but one offers video services at a discounted rate under a bulk deal, the potential dweller will likely choose the MDU offering the bulk arrangement.\footnote{Communications Act of 1934 § 628, 47 U.S.C. § 548(b) (2000).} Finally, if the Commission decides to ban bulk agreements, it will do so without authority. The Commission finds its authority in section 628 of the 1934 Act, which empowers the Commission to shield consumers from “unfair methods of competition or unfair or deceptive acts or practices . . . .”\footnote{Comments of National Multi Housing Council, supra note 19, at 23 (“The Commission should not patronize apartment residents by presuming that they do not consciously choose to rent apartments in buildings that have bulk deals.”).} However, prior to the Order, “[c]ompetitors [could] still obtain the right to serve a building and residents [would] still have the ability to choose service from the competing provider.”\footnote{Comments of National Multi Housing Council, supra note 19, at 25.} Therefore, bulk agreements cannot be characterized as...
“unfair methods of competition,”\textsuperscript{250} and section 628 gives the Commission no explicit authority to prohibit MDU owners from entering into bulk arrangements with MVPDs.

Moreover, the 1934 Act specifically contemplates the use of bulk-billing arrangements under section 623(d).\textsuperscript{251} Initially, section 623(d) "severely limited the ability of cable operators to offer bulk rate discounts in apartment buildings and other MDUs."\textsuperscript{252} However, section 301(b)(2) of the Telecommunications Act of 1996 sought to remedy this by adding language to section 623(d) clarifying that the section does not apply to MDUs.\textsuperscript{253} Therefore, in codifying the bulk-billing exemption, Congress explicitly approved of bulk arrangements and sought to increase their use.

The benefits of bulk-billing arrangements significantly outweigh any potential harm listed in the Commission’s \textit{Exclusive Service Report and Order}. Not only are bulk agreements specifically endorsed in section 623(d) of the 1934 Act, but they also provide lower prices for MDU residents, particularly for those residents in affordable housing. Therefore, the Commission should not restrict the use of bulk-billing arrangements.

Ultimately, the Commission should adopt its proposal to extend the exclusive contract prohibition to PCOs and DBS providers; however, it should reject its other proposals to prohibit exclusive marketing agreements and bulk-billing arrangements. While the former proposal is necessary to foster competition and achieve regulatory parity, the latter proposals detract from the Commission’s overarching goals of increased MVPD competition and universal video service at affordable prices. As such, in order for a truly competitive MVPD marketplace to exist, the \textit{Order} should include PCOs and DBS providers and continue to allow exclusive marketing agreements and bulk-billing arrangements.

VI. CONCLUSION

The Commission had good intentions in adopting the \textit{Exclusive Service Report and Order}. It sought to foster competition in the video services market so

\textsuperscript{250} 47 U.S.C. § 548(b).
\textsuperscript{251} See 47 U.S.C. § 543(d).
\textsuperscript{252} Comments of National Multi Housing Council, \textit{supra} note 19, at 26.
\textsuperscript{253} Telecommunications Act of 1996, § 301(b)(2), Pub. Law No. 104-104, 110 Stat. 56, 115 (1996). In pertinent part:
This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition . . . . Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit.
that MDU residents could benefit from more choice and lower pricing.  
However, the *Exclusive Service Report and Order* stands in direct violation of fundamental Constitutional guarantees and represents flawed policy. Specifically, MDU owners have been stripped of the right to exclude others from accessing their private property and are forced to allow intrusion upon their property. By rejecting the MDU owners’ fundamental right to exclude others, the *Exclusive Service Report and Order* is susceptible to attack on the grounds that it amounts to a governmental taking without just compensation and the due process of law.

In addition, the Commission acted arbitrarily and irrationally when it retroactively abrogated existing exclusive service arrangements. MDU owners and MVPDs should not have anticipated such a drastic departure in ideology regarding the benefits of exclusive contracts from only four years earlier. Thus, the *Order* violates the Due Process Clause of the Fifth Amendment, rendering action against pre-existing exclusive service agreement unenforceable.

The *Order* also departs from deeply rooted concepts of federalism. Pursuant to the states’ police powers, it is the states that possess the ability to control the manner in which private property owners use their land. By effectively granting mandatory access to the MVPD of the residents’ choosing, the Commission has overstepped its authority and encroached on state police powers. Therefore, the *Order* is contrary to fundamental federalism principles.

While the Commission’s rationale behind the exclusive contract prohibition was misplaced and unconstitutional, with regards to the FNPRM, it still has the opportunity to adopt sound policies. First, the Commission must—if it continues to endorse the exclusive contract ban—extend the *Exclusive Service Report and Order* to PCOs and DBS providers so that it can achieve regulatory parity. Next, because it would violate the Free Speech Clause of the First Amendment and overstep the Commission’s authority, the Commission should refrain from prohibiting exclusive marketing agreements. Finally, the Commission should not ban bulk-billing arrangements because they allow MDU owners to receive discounted video service rates and promote the Commission’s goal of universal service at affordable prices.

254 *Exclusive Service Report and Order*, supra note 1, ¶ 17; see also *supra* Part II.A.
255 See also *supra* Part III.A.
256 See also *supra* Part III.A–C.
257 See also *supra* Part III.D.
258 See also *supra* Part III.D.
259 See also *supra* Part III.D.
261 See also *supra* Part V.B.
262 See also *supra* Part V.C.
Ultimately, the Commission must immediately act on the aforementioned proposals to ensure economic security among MDU owners, MVPDs and, most importantly, MDU residents. In addition, the Exclusive Service Report and Order can and should be challenged as unconstitutional. As such, to avert the prolonged period of uncertainty associated with a constitutional challenge, the Commission should immediately reconsider the Order. Only when the prohibition against exclusive contracts between MVPDs and MDU owners is repealed will a truly competitive video services marketplace exist and MDU residents receive video services at affordable prices.