List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indians—lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of sections 2002(a), 3006 and 7004(b) of the Solid Waste Disposal Act as amended 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: December 21, 2007.

Bharat Mathur,

Acting Regional Administrator, Region 5.

[FR Doc. E8–16 Filed 1–4–08; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 07–51; FCC 07–189]

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

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission's action concerns ''Multiple Dwelling Units'' such as apartment or condominium buildings and centrally managed residential real estate developments (collectively, ''MDUs''); cable operators that provide video service in MDUs; and agreements that grant them the exclusive right to provide video programming service in an MDU. The Commission finds that such agreements, in granting exclusivity, harm competition, the provision of programming to MDU residents, and broadband deployment. Thus, the Commission prohibits the enforcement of existing exclusivity clauses and the execution of new ones by cable operators (and a few others). This prohibition will materially advance the Communications Act's goals of enhancing competition, consumer choice in video service and programming, and broadband deployment.

DATES: Effective March 7, 2008.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, please contact John W. Berresford, (202) 418–1886, or Holly Saurer, (202) 418–7283, both of the Policy Division, Media Bureau.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's Report and Order in MB Docket No. 07–51, FCC 07–189, adopted October 31, 2007, and released November 13, 2007. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW., CY–A257, Washington, DC 20554. These documents will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Summary of the Report and Order

1. The Notice of Proposed Rulemaking (''*Notice*'') in this proceeding solicited comment on the need to regulate contracts containing clauses granting one multichannel video programming distributor (an ''MVPD'') exclusive access for the provision of video services (''exclusivity clauses'') to multiple dwelling units (''MDUs'') and other real estate developments. *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments,* Notice of Proposed Rulemaking, 22 FCC Rcd 5935 (2007). Approximately 30 percent of Americans live in MDUs, and their numbers are growing. In this *Report and Order,* we find that contractual agreements granting such exclusivity to cable operators harm competition and broadband deployment and that any benefits to consumers are outweighed by the harms of such clauses. Accordingly, we conclude that such clauses are proscribed by section 628 of the Communications Act of 1934, as amended. That section prohibits unfair methods of competition that have the purpose or effect of hindering significantly or preventing MVPDs from providing ''satellite cable'' and/or ''satellite broadcast'' programming to subscribers and consumers. Thus, in 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 deployment.

2. The record in this proceeding does not contain much information regarding the use of exclusivity clauses by providers of Direct Broadcast Satellite (''DBS'') or other MVPDs that are not cable operators subject to section 628 of the Act. In the interests of developing a fuller record, and in the interests of regulatory parity, we also issue a *Further Notice of Proposed Rulemaking* (''*Further Notice*'') concerning MVPDs not subject to section 628. In this *Further Notice,* we also seek comment on whether the Commission should prohibit exclusive marketing and bulk billing arrangements.

I. Background

3. This section reviews the history of this proceeding and makes several important findings of fact. Among these findings are that a large and growing number of Americans live in MDUs and that a significant number of those MDUs are subject to exclusivity clauses. The beneficiaries of most of those clauses are incumbent cable operators. Although Commission rules ensure that many residents of MDUs and other real estate developments may receive satellite-based video service, exclusivity clauses protect cable operators from competition in MDUs from new entrants into the MVPD business, chiefly incumbent local exchange carriers (''LECs'') and other wire-based MVPDs that bring satellite cable and satellite broadcast programming to their subscribers. We also find that the entry of incumbent LECs into the MVPD business has led incumbent cable operators to increase their use of exclusivity clauses in order to bar or deter the new entrants.

4. These practices are reached primarily by our authority under section 628. That section, in brief, makes it unlawful for cable operators to engage in certain unfair acts and methods of competition. Specifically, section 628(b) prohibits cable operators from engaging in unfair practices that have the purpose or effect of hindering significantly or preventing their competitors from providing satellite cable programming or satellite broadcast programming to subscribers or consumers. Such video programming is made for broadcast or cable systems and is delivered by satellite to MVPDs, who in turn deliver it to their subscribers. Section 628

concerns two kinds of programming in particular. One is ''satellite cable programming,'' which is video programming (not including satellite broadcast programming) that is transmitted by satellite to cable operators for retransmission to cable subscribers. See 47 U.S.C. 548(i)(1), 605(d)(1). The other is ''satellite broadcast programming,'' which is broadcast video programming that is retransmitted by satellite by an entity other than the broadcaster or an entity under the broadcaster's control. *See* 47 U.S.C. 548(i)(3). This programming comprises the substantial majority of programming carried by MVPDs. In section III below, we conclude that clauses that grant cable operators exclusive access to MDUs and other real estate developments fall within the scope of section 628(b), because those clauses effectively prohibit new entrants into the MVPD market from providing satellite-delivered programming to consumers who live in MDUs and other real estate developments.

5. The Commission last considered issues concerning exclusivity clauses in its 2003 Inside Wiring Order. At that time, the Commission decided that exclusivity clauses had both pro-competitive and anti-competitive effects, and that the record before the Commission made it unclear what their net effect was. The Commission therefore decided to take no action regarding exclusivity clauses at that time, but it did not close the door to action if new circumstances arose in which such clauses had new anti-competitive effects. The *Notice* of March 2007 re-opened the issue and prompted the submission of much new evidence. The *Notice* raised several questions concerning exclusivity clauses. These included the Commission's legal authority to regulate such clauses; the prevalence of such clauses; the possible increase in their number and scope at the instigation of incumbent cable operators with the impending entry of LECs into the MVPD marketplace; the benefits and harms to competition and consumers of exclusivity clauses; and the extent of any prohibition of such clauses, and other remedial action, that we should impose.

6. The *Notice* attracted filings from large and small cable operators and LECs, other providers of MVPD services (including so-called private cable operators or ''PCOs''), builders and managers of MDUs and other dwellings, elected officials, two state government entities and many local governments, academic institutions, consumer groups, labor unions, and subscribers to MVPD and other services. (PCOs are also known as Satellite Master Antenna Television providers or ''SMATVs.'' They are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban MDUs and commercial multiple tenant units such as hotels and office buildings. They are small compared to major incumbent cable operators and incumbent LECs.)

7. For purposes of this *Report and Order,* we define the term ''MDU'' to include the kinds of dwellings that we have defined as being MDUs in past decisions implementing the Act. That is, MDUs include apartment, cooperative, and condominium buildings. For purposes of this *Report and Order,* we adopt this definition but expand it to include other centrally managed real estate developments. Thus, the term MDUs, for purposes of this *Report and Order,* also includes gated communities, mobile home parks, garden apartments, and other centrally managed residential real estate developments. All of these are collections of private individual households with residents remaining for lengthy, indefinite periods of time, each in a dwelling space that is distinctly separate but shares some common spaces requiring central management. For purposes of this proceeding, 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, and other group quarters characterized by institutional living, high transience and, in some cases, a high need for security. These latter institutions do not have most of the key defining attributes of MDUs that we have just described, including voluntary long-term residency and significant control by the resident over uses of the private dwelling space. These attributes give the resident a strong interest in making his or her own choice of a MVPD provider and thus warrant regulatory action to preserve the resident's ability to do so.

8. The record in this proceeding indicates that approximately 30 percent of Americans live in MDUs and that this percentage is growing. The percentage of minorities living in MDUs is larger than that of the general population. The majority of incumbent MVPDs serving MDUs pursuant to exclusivity clauses are incumbent providers of cable television service to the surrounding local community. A few of the incumbent MVPDs that have executed contracts with exclusivity clauses are PCOs or small providers of fiber-based communications services. Some incumbent LECs have requested exclusivity clauses from MDUs. There is no evidence in the record that providers of DBS service use exclusivity clauses.

9. Exclusivity clauses that run in favor of cable operators typically are a complete bar to entry into MDUs by fiber-deploying LECs such as Verizon, AT&T, and Qwest, as well as PCOs. These competitors in the MVPD marketplace receive much of their programming, both cable and broadcast, via satellite for retransmission directly to their subscribers. Although exclusivity clauses do not prevent MDU residents from installing receiving dishes and receiving DBS service where the Commission's ''Over the Air Reception Devices'' rules apply, they bar new wire-based competitors from MDUs.

10. The record herein reveals that exclusivity clauses are widespread in agreements between MVPDs and MDU owners, and that the overwhelming majority of them grant exclusive access to incumbent cable operators. Exclusivity clauses between MVPDs and MDU owners have the clear effect of barring new entry into MDUs by wire-based MVPDs. The evidence before us shows that this effect occurs on a large scale. Verizon provided examples of exclusivity clauses, most of them in favor of incumbent cable operators, that provoked requests to cease and desist the marketing of its FiOS cable service. Verizon has ''repeatedly encountered exclusive access arrangements which have prevented it from providing cable services to significant numbers of residents.'' Early in its offering of FiOS, Verizon encountered exclusivity clauses running in favor of incumbent cable operators, which barred it from serving more than 3,000 residential units in the Dallas, Texas, area and many other places, all totaling ''tens of thousands of units in five separate states.'' Other examples of exclusion, again mostly involving incumbent cable operators, are in the record from would-be MVPDs, a local government, and a MDU owner who agreed to exclusivity clauses in the past and now is prohibited from offering its residents new and improved communications services. AT&T states that ''efforts to lock-up MDUs have occurred in California, Texas, and virtually every market where AT&T has begun to enter the video service market''—efforts that are ''plainly intended to block competition and * * * not designed to address aesthetics or congestion in a MDU's common areas.'' The exclusivity clauses that AT&T has recently encountered typically last between five and 15 years, often with automatic renewal, or are

perpetual. Hargray CATV Inc., an affiliate of the incumbent LEC in Hilton Head, South Carolina, began to provide cable service there as a new entrant. It was forced to stop serving or marketing to 20,000 of the 25,000 homes in the community, however, due to exclusivity clauses entered into by real estate developers and the incumbent cable operator (originally Adelphia, whose systems later were acquired by Time Warner), decades ago in some cases.

11. Consumer groups are also concerned about exclusive agreements. As noted by several consumer groups, a disproportionately large number of communities of color live within MDUs. Consumer groups are concerned that these residents are unable to enjoy the benefits of competition in the video marketplace, and ask that the Commission act to ensure that all consumers can reap the benefits of competition.

12. The record indicates that the evidence before us understates the frequency of exclusivity clauses because many MDU owners are unwilling or legally unable to make public the contracts containing them. Also, many exclusivity clauses date from the time when cable operators had a *de facto* or *de jure* monopoly on wire-based MVPD service. In those market conditions, a MDU owner might have thought that agreeing to exclusivity was not giving the cable operator anything of significance. Some commenters state that a MDU owner can bargain for good service, low prices, and other concessions in exchange for exclusives. But the owner had no such bargaining power when the first cable operator was ''the only game in town.''

13. More recent developments were not part of the record the Commission compiled in the proceeding that culminated in the *2003 Inside Wiring Order.* Significantly, LECs and other wire-based providers have begun entering the video service business on a large scale. In this environment, exclusivity clauses executed by incumbent cable operators are causing an important loss of potential competition within MDUs and thereby depriving MDU residents of recognized benefits generated by competition in the form of price and service options. Exclusivity clauses may also be deterring new entry into the MVPD market in many areas because they put a significant number of new customers off limits to new entrants.

14. Moreover, AT&T, Lafayette Utilities in Louisiana, United States Telecom Association, and Verizon report that, with the imminent entry of LECs into the multichannel video marketplace, incumbent cable operators have increased the use of exclusivity clauses in their agreements with MDU owners. As one commenter noted, ''[i]ncumbent providers commonly engage in a flurry of activity to lock up MDUs and other real estate developments in exclusive arrangements as soon as it becomes clear that a new entrant will be coming to town.'' Sometimes these clauses are inserted in fine print, in ''legalese,'' and without adequate notice to the MDU owner.

15. In sum, the record demonstrates that exclusivity clauses bar entry into MDUs by new providers of multichannel video service. It also shows that, in reaction to the recent competitive challenge posed by LEC entry into the video marketplace, incumbent providers (chiefly incumbent cable operators) are increasingly using exclusivity clauses in new agreements with MDU owners to bar the entry of their new rivals and potential rivals. These developments constitute a substantial change to the record the Commission compiled in the period leading up to the *2003 Inside Wiring Order.*

II. Discussion

A. Harms and Benefits of Exclusivity Clauses

16. In this section, we first describe the harms and benefits of exclusivity clauses. We conclude that the harms significantly outweigh the benefits in ways they did not at the time of the Commission's 2003 *Inside Wiring Order.* Specifically, they bar new entry and competition for both MVPD services and the so-called ''triple play'' of voice, video, and broadband Internet access services. They also discourage the deployment of broadband facilities to American consumers. This, in turn, has the effect of significantly hindering or preventing new MVPDs from providing to MDU residents video programming services that are within the scope of section 628(b). Section 628(b) of the Act makes it unlawful for cable operators and their vertically integrated programmers to engage in certain practices that hinder or prevent MVPDs from providing ''satellite cable programming'' or ''satellite broadcast programming'' to subscribers. ''Satellite cable programming'' is video programming (not including satellite broadcast programming) that is transmitted by satellite to cable operators for retransmission to cable subscribers. ''Satellite broadcast programming'' is broadcast video programming that is retransmitted by satellite by an entity other than the broadcaster or an entity under the broadcaster's control. We therefore conclude that cable operators' use of exclusivity clauses in contracts for the provision of video services to MDUs constitutes an unfair method of competition or an unfair act or practice proscribed by section 628(b).

17. *Harms Caused by Exclusivity Clauses.* By far the greatest harm that exclusivity clauses cause residents of MDUs is that they deny those residents another choice of MVPD service and thus deny them the benefits of increased competition. Congress and the Commission have repeatedly found, and few parties dispute here, that entry by LECs and other providers of wire-based video service into various segments of the multichannel video marketplace will produce major benefits for consumers. A significant increase in multichannel competition usually results in lower prices, more channels, and a greater diversity of information and entertainment from more sources. Notably, our most recent Cable Price Survey Reports show that the presence of a second wire-based MVPD competitor clearly holds prices down more effectively than is the case where DBS is the only alternative. The fact that an incumbent cable operator may face competitive pressures on its pricing in a franchise area surrounding or adjacent to a MDU does not mean that the residents of a MDU served by the same cable operator will reap the benefits of such competition, including the option to choose among competitive providers, some of which may provide a reduced-priced bundled package. This is particularly true when incumbent cable operators and MDU owners sign contracts before a competitive provider enters the market, a practice that the record in this proceeding indicates is quite common. Within the MDU, the incumbent, protected by its exclusivity clause from any competition it may face outside the MDU's boundaries, would have no incentive to hold down its prices within the MDU. The MDU's residents would also be denied the benefits of taking service from the new entrant, with potentially lower rates and better features than the incumbent's.

18. In addition, a new provider of MVPD services such as a LEC is likely to bring into a MDU some satellite-delivered cable programming that the incumbent beneficiary of the exclusivity clause does not. Absent the new entrant, the MDU's residents who favor that programming will be denied the programming of their choice. This denial will fall disproportionately on minorities and low-income families

(and on programmers specializing in programming oriented to those groups), and all residents will be denied increased competition in programming among MVPD providers. We agree with Consumers Union that we should ensure that the ''no segment of the population is denied the benefits of video competition.''

19. LEC entry is also likely to result in increased deployment of fiber to American homes at lower cost per residence, and a new competitor offering the ''triple play'' bundle of video, voice, and Internet access service. An exclusivity clause in a MDU's agreement with a MVPD denies all these benefits to the MDU's residents. Even if exclusivity clauses do not completely bar new entrants from the MVPD market everywhere, they foreclose new entrants from many millions of households, a significant part of the national marketplace. Such clauses could therefore deter new entrants from attempting to enter the market in many areas. More important, exclusivity clauses deny consumers in a part of the market the benefits that could flow to them, and exclusivity clauses confer few, if any, benefits on those consumers. These harms to consumers are greater than they were several years ago, when new entry by LECs had not begun on a large scale, the recent increase in fiber construction had not yet materialized, and the popularity of the triple play was unproven.

20. The effect of exclusivity clauses on broadband deployment and ''triple play'' services merits further discussion. We have stated that broadband deployment and entry into the MVPD business are ''inextricably linked.'' One basis for this observation is the recent emergence of LECs, cable operators, and some other providers offering consumers a ''triple play'' of voice, MVPD, and broadband Internet access services. The offering of, and competition in, the triple play brings to consumers not just advanced telecommunications capability, but also a simplicity and efficiency that is proving to be highly attractive in the marketplace.

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. Any new entrant that could offer all three parts of the triple play but for the existence of an exclusivity clause, which limits its offerings to voice and broadband Internet access, would find entry less attractive. The new entrant might not enter at all. Or, if the new entrant enters despite that handicap and provides MDU residents with only voice and Internet access services, leaving MVPD service to the beneficiary of an exclusivity clause, the new entrant's wire is inefficiently underutilized. Thus, exclusivity clauses reduce competition in the provision of triple play services and result in inefficient use of communications facilities.

22. Exclusivity clauses can cause other harms to MDU residents. A MDU owner may grant exclusivity to one MVPD based on the available choice of service providers at a given time, and in doing so bar entry into the MDU by a more desirable but later-arriving MVPD. Or, the 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. In addition, exclusivity clauses can insulate the incumbent MVPD from any need to improve its service; Manatee County, Florida, aptly describes incumbent beneficiaries of exclusivity clauses as ''sitting on these 'fiefdoms.' ''

23. Finally, the record indicates that exclusivity clauses are not always in the best interest of MDUs owners, either. 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. A MDU owner may not see a benefit in an exclusivity clause that bars entry by new providers that were not in the market when the clause was written.

24. *Benefits of Exclusivity Clauses.* When the Commission last considered issues concerning exclusivity clauses in its *2003 Inside Wiring Order*, it determined that exclusivity clauses had some pro-competitive effects. In some cases, exclusivity clauses, or at least those of a limited duration, may help a MVPD to obtain financing to wire an entire building for cable and other services and to recover its investment over the term of exclusivity. Similarly, some commenters claim that exclusivity clauses are especially necessary to attract investment in marginally attractive MDUs.

25. Some commenters argue in support of the use of exclusivity clauses that, with the decline of LECs' and cable operators' traditional duty to serve all homes in an area, an exclusivity clause may be necessary to attract a MVPD into a new real estate development. Other commenters state that a MDU owner, needing to attract buyers or tenants, may be counted on to represent them and will agree to an exclusivity clause only if it is in their interests. The rational owner, these commenters claim, will give exclusive access to the one of several bidding MVPDs that offers the best mix of low price, quality service, promised improvements and in some cases, specialized program offerings. An exclusivity clause, in this view, substitutes competition for the MDU for competition for individual residents, and the resulting benefits may be passed on to the residents. In the same vein, some commenters deny that exclusivity clauses allow MVPDs to become complacent and provide inferior service; these entities believe that the high turnover in MDUs requires building owners to maintain and constantly improve their service so that the building or development will attract new residents who will become its subscribers.

26. *Conclusion.* We conclude that exclusivity clauses cause significant harm to competition and consumers that the record did not reflect at the time of our 2003 *Inside Wiring Order*. We further find that although exclusivity clauses may in certain cases be beneficial, at least in the short term, to consumers, the harms of exclusivity clauses outweigh their benefits. The evidence described in the preceding paragraphs demonstrates that exclusivity clauses, especially when used in current market conditions by incumbent cable operators, are a barrier to new entry into the multichannel video marketplace and the provision of triple play offerings. Such exclusivity clauses inhibit competition in these markets and slow the deployment of broadband facilities. In doing so, exclusivity clauses deny MDU residents the benefits of increased competition, including lower prices and the availability of more channels with more diverse content, as well as access to alternative providers of broadband facilities and the triple play of communications services their facilities support. It is also noteworthy that there is no evidence in the record that MDU residents pay higher rates for MVPD services in states whose laws prohibit or limit exclusivity. These harms to consumers are traceable to the incumbent cable operators' practice, increased recently, of using exclusivity clauses, sometimes in fine print and without adequate notice to MDU owners, to forestall competition, particularly when new competitors are about to enter the market. We do not wish to deny MDU residents these benefits based on incumbents' alleged need to be shielded from additional competition, or to subject them to

something resembling the exclusive franchises of an earlier era.

27. Moreover, we find that cable operators' use of exclusivity clauses in contracts for the provision of video services to MDUs constitutes an unfair method of competition or an unfair act or practice proscribed by section 628(b). Section 628 is designed to increase ''competition and diversity'' in the multichannel video marketplace, increase the availability of satellite cable and satellite broadcast programming to persons in ''areas not currently able to receive such programming,'' and ''spur the development of communications technologies.'' That provision specifically prohibits cable operators from engaging in unfair methods of competition or unfair acts or practices that have the purpose or effect of hindering significantly or preventing any MVPD from providing satellite cable programming or satellite broadcast programming to consumers. We have found above that a significant percentage of consumers live in MDUs. We also found that, with the increasing entry of wire-based competitors, such as LECs, into the MVPD marketplace, incumbent cable operators have increased their use of exclusivity clauses with MDU owners, particularly when new competitors are on the verge of entering a particular market. The record shows that these exclusivity clauses have the purpose or effect of preventing other MVPDs from providing the kind of programming covered by section 628—satellite cable and/or broadcast programming—to certain consumers; indeed, that is the intended and inevitable effect of exclusivity clauses. Exclusivity clauses prevent new entrant MVPDs from competing with entrenched incumbent providers on the basis of service offerings, including programming, and on price. Foreclosing competition in the MDU market in this way is unfair because it deprives consumers residing in MDUs of the opportunity to choose a MVPD provider. Cable operators' execution of exclusivity clauses, which foreclose the competitive provision of MVPD service, the triple play, broadband deployment, and satellite-delivered programming to MDUs, thus constitutes an unfair method of competition in violation of section 628(b).

28. We reject arguments that exclusivity clauses mostly work to the benefit of MDU owners and residents. First, as explained above, the person signing an exclusivity clause for a MDU may be a builder or manager whose interests do not coincide with those of the MDU's residents, especially after a few years. Second, the cable operator may have induced the MDU owner to accept an exclusivity clause before any wire-based competitor was on the horizon, in which case there was no ''competition for the MDU'' at the time and no prospect of it in the future. Third, the exclusivity clause may be in ''legalese'' and in fine print and the MDU owner may be unaware of it. Fourth, the fact that a new entrant wants to serve the MDU undercuts any claim that only one wire-based provider can serve the building profitably—if new entry would be unprofitable, it is unlikely that the new entrant would want to enter. Fifth, there is no evidence in the record, other than generalities and anecdotes, that incumbent MVPD providers couple exclusivity clauses with significant new investments that they do not make elsewhere, such as in states whose laws prohibit exclusivity. Sixth, SureWest states that the triple play, which offers a provider revenue from three services, reduces any need for exclusivity that it may have had in the past, when MVPD revenue was the only way it could recover its investment. Finally, other agreements between incumbent MVPDs and MDU owners, perhaps providing for marketing exclusivity or bulk discounts, can provide benefits similar to those alleged for exclusivity clauses without causing the latter clauses' entry-foreclosing harms to consumers. Therefore, although ''competition for the MDU'' may have some theoretical advantages in some cases over competition for individual consumers, it may not describe reality in many cases. Even if it does, in general we find that the best results for consumers come from preserving their ability to play an active role in making an individual choice rather than allowing cable operators using exclusivity clauses to foreclose individual choice. In addition, as noted above, exclusivity clauses tend to insulate the incumbent from any need to improve its service. Thus, we conclude that exclusivity clauses generally do not benefit MDU residents.

29. The record contains claims that exclusivity clauses may lead to lower prices. Although we cannot rule out the possibility that those claims may be true in some cases, such assertions are outweighed by the numerous studies showing that a second wire-based MVPD lowers prices. We also reject arguments that ''exclusivity is not really a problem'' because many MDUs are not subject to exclusivity clauses and such clauses expire. A practice that harms a significant number of households in this country warrants remedial action even if it does not harm everyone.

B. Prohibition of Exclusivity Clauses

30. For the reasons set forth above, we prohibit cable operators and other entities that are subject to section 628 from enforcing existing exclusivity clauses and executing contracts containing new ones. These other entities are LECs and open video systems and are discussed in section III below.

31. Specifically, 60 days after publication of this *Report and Order* in the **Federal Register**, no cable operator or multichannel video programming distributor subject to section 628 of the Act shall enforce or execute any provision in a contract that grants it the exclusive right to provide any video programming service (alone or in combination with other services) to a MDU. Any such exclusivity clause shall be null and void.

32. We fashion the prohibition pursuant to section 628 for several reasons. First, that provision is a basis of our statutory authority to regulate exclusivity clauses. Second, incumbent cable operators, which are subject to section 628, are the beneficiaries of the vast majority of exclusivity clauses. As described above, incumbent cable operators are primarily responsible for the recent increase in newly executed exclusivity clauses. Also, the evidence in the record indicates that incumbent cable operators are using them to impede the entry of new competitors into the MVPD market in many areas. Incumbent cable operators are still by far the dominant force in the MVPD business, with a market share most recently measured at 67 percent and the ability to impose steadily rising prices. Our prohibition is limited to those MVPDs covered by section 628(b). It does not reach PCOs or DBS providers because we do not have an adequate record on which to decide whether such a prohibition is warranted for non-cable operators. Nevertheless, we are adopting a *Further Notice of Proposed Rulemaking* in order to develop such a record and, based on it, evaluate whether action is called for.

33. We put no time limit on the prohibition we adopt in the instant order and we do not exempt from it any kind of MDU or any geographic location. We do, however, limit our prohibition to those residential real estate developments that we define as MDUs as discussed above.

34. The rule we adopt in this proceeding is consistent with the longstanding Congressional prohibition of exclusive franchises for cable service and the statement in our most recent *Inside Wiring Order* that ''[n]ew entrants

to the video services and telephony markets should not be foreclosed from competing for consumers in multi-unit buildings.''

35. The rule we adopt in this proceeding prohibits both the enforcement of existing exclusivity clauses and the execution of new ones. Both have the same competition- and broadband-deterring effect that harms consumers. A rule that left exclusivity clauses in effect would allow the vast majority of the harms caused by such clauses to continue for years, and we believe that it is strongly in the public interest to prohibit such clauses from being enforced. Those harms would continue indefinitely in the cases of exclusivity clauses that last perpetually or contemplate automatic renewal upon the renewal of the incumbent cable operator's franchise.

36. Our prohibition of the enforcement of existing exclusivity clauses does not disturb legitimate expectations of investors in MDUs and the video service providers affected by this Order. The lawfulness of exclusivity clauses has been under our active scrutiny for a decade, making the parties to them aware that such clauses may be prohibited. Although we have not prohibited enforcement of them until now, we had previously recognized the reasons for doing so but had lacked an adequate record on which to base such a decision. We have prohibited the enforcement of exclusivity clauses for satellite-delivered programming before. For example, the Commission prohibits, with respect to distribution to persons in areas served by cable operators and other MVPDs covered by section 628(b), exclusivity clauses for satellite cable programming and satellite broadcast programming between a cable operator and a vendor of such programming in which a cable operator has an attributable interest, unless the Commission determines that such contracts are in the public interest. Also, in the context of commercial telecommunications services, the Commission has prohibited the execution of exclusive access arrangements in multiple tenant environments and has sought comment on whether to prohibit the enforcement of existing exclusive access provisions. We recognize that the Commission has yet to address the issue raised in the *Competitive Networks Further Notice of Proposed Rulemaking* regarding the enforceability of exclusivity clauses for telecommunications services in residential MDUs. In light of the competitive parity implications, we will resolve that issue within the next two months. Some states have given some or all MVPD providers rights of access to MDUs.

37. Moreover, incumbent cable operators will still be able to use their equipment in MDUs to provide service to residents who wish to continue to subscribe to their services. Finally, we note that the rule we adopt today does not require that any new entrant be given access to any MDU. A MDU owner still retains the rights it has under relevant state law to deny a particular provider the right to provide service to its property. We merely prohibit the enforcement of existing exclusivity clauses and the execution of new ones by cable operators. While this Order prohibits the enforcement of existing exclusivity clauses, it does not, on its own terms, purport to affect other provisions in contracts containing exclusivity clauses.

38. We reject proposals that we should exempt contracts with exclusivity clauses from this prohibition on a case-by-case basis or that we should allow exclusivity clauses for small cable operators, cable operators in rural areas, MVPDs that are found to lack ''market power,'' MVPDs other than incumbent cable operators, ''planned communities,'' and new real estate developments. We are reluctant to deny any large class of MDU residents the benefits of increased competition or to allow any cable operator to engage in future harmful conduct. Finally, we wish to avoid the burden that would be imposed by numerous individual adjudications about whether market power or some other undesirable condition exists in an individual MDU or community, or whether a particular entity in an allegedly unique situation is exempted from the prohibition. In addition, as discussed in section III below, restrictions adopted pursuant to section 628(b) apply automatically to certain categories of MVPDs pursuant to sections 602(7), 628(j), and 653(c)(1)(A).

39. Some commenters have suggested that we allow exclusivity clauses for a period of years or that we put a time limit on our prohibition of them, such as a specific term of years, the end of the current franchise of the incumbent cable operator, until ''effective competition'' is found to exist in an area, or until some other measure of competition is shown. We decline these suggestions. We are reluctant to grant any communications companies an artificial period of immunity from pro-competitive regulation during which the recovery of their investment is guaranteed; companies in communications markets regularly invest billions of dollars without any such guarantees. Chiefly, we wish to avoid the burden of individualized adjudications and measurements because we believe that they would burden us and the industry, and we believe that the limited benefits that such clauses confer are outweighed by their deleterious long-term effects on the provision of competitive services to consumers.

III. Legal Authority

40. Several sources afford the Commission ample authority to prohibit exclusivity clauses in contracts between cable operators and owners of MDUs. First, consistent with our tentative conclusion in the *Notice*, we conclude that we have authority under section 628(b) of the Act to adopt rules prohibiting cable operators from enforcing or executing contracts that give them the exclusive right to provide video programming services (alone or in combination with other services) to MDUs. Moreover, we conclude that pursuant to the Act the same prohibition will apply to common carriers or their affiliates that provide video programming directly to subscribers under section 628(j) of the Act and to operators of open video systems under section 653(c)(1). Finally, we conclude that, even in the absence of this explicit statutory authority, we have ancillary authority to prohibit incumbent cable operators from entering into contracts that are for the provision of video services to MDUs and that contain exclusivity clauses.

41. Turning first to cable operators, the plain language of the statute provides a solid legal foundation for the rule adopted today. Section 628(b) broadly states that:

> ''[i]t 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.''

42. Section 628(c)(1), in turn, directs the Commission, ''in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies,'' to promulgate rules specifying the conduct prohibited by section 628(b).

43. The plain language of section 628(b) encompasses the conduct at issue here. First, although we have never specifically defined what constitutes an ''unfair method of competition'' or

''unfair * * * act or practice'' beyond that conduct specifically proscribed in section 628(c)(2), we have recognized that there is additional conduct that could be proscribed under section 628(b). As discussed above, the use of an exclusivity clause by a cable operator to ''lock up'' a MDU owner 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 and foreclose competition based on the quality and price of competing service offerings. Moreover, as we have shown above, such a contract clearly has the effect of preventing a MVPD from providing satellite programming to consumers. Indeed, by its very nature, such an exclusivity clause prevents other MVPDs from providing service to the consumers who live in the MDU.

44. We reject Advance/Newhouse Communications's suggestion that this interpretation of section 628(b) suffers a logical flaw—why would Congress only focus on ''satellite'' programming if it sought to vest the Commission with the authority to ''curb unfair practices in the cable industry generally.'' First, we are not finding that section 628(b) vests the Commission with some unlimited authority to limit unfair practices in the cable industry. Rather, we are finding that the language of section 628(b) prohibits unfair methods of competition with the purpose or effect of hindering significantly or preventing MVPDs from providing satellite cable and broadcast programming to consumers. Moreover, we acknowledge that section 628 was primarily, but not exclusively, concerned about the vertical integration of cable operators and satellite programming vendors, and thus section 628 significantly focuses on those relationships. In addition, we note that our decision to prohibit exclusivity clauses for the provision of video services to MDU owners is consistent with the focus on satellite programming because most programming is delivered via satellite. Thus, we have explicit authority under section 628(b) to prohibit cable operators from entering into exclusivity clauses with MDU owners.

45. We note that the New Jersey Division of Rate Counsel raises a number of issues, including the argument that the Commission's regulation of exclusivity clauses for MDUs violates the Tenth Amendment of the U.S. Constitution, that hinge on its view that the Commission lacks any authority to adopt the prohibition on exclusivity clauses described herein. We need not address these tangential issues because, as explained herein, we find that we have specific statutory authority to adopt the prohibition.

46. Contrary to commenters' suggestions, the Commission's authority under section 628(b) is not restricted to unfair methods of competition or unfair or deceptive practices that deny MVPDs access to programming. Section 628(b) is not so narrowly drawn. Anticompetitive practices can hinder or prevent MVPDs from providing programming to consumers either by blocking their access to programming or by blocking their access to consumers, and there is nothing in section 628(b) that suggests that the Commission's authority is limited to the former. Although NCTA argues that the language ''from providing satellite cable programming or satellite broadcast programming to subscribers or consumers'' indicates that section 628(b) was ''squarely directed at practices that unfairly denied MVPDs access to *programming*,'' the better reading is the one based on the clear and complete terms of the provision: any practices that unfairly deny MVPDs the ability to provide such programming to consumers are prohibited. 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. Congress knew how to draft narrowly drawn provisions of that kind as evidenced by another subsection, section 628(c)(2), which proscribes specific conduct hindering MVPDs' access to programming. Thus, we believe that our interpretation of section 628(b) gives meaning to the broad, plain language of the statutory provision.

47. We recognize, as commenters point out, that much of section 628's legislative history focuses on MVPDs' access to programming. However, the legislative history indicates that a primary concern underlying section 628 was fostering competition among cable operators and enhancing consumer choice. For example, the Conference Report on section 628 reflects a concern that is broader than MVPDs' access to programming:

> ''[T]he conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, *including* restricting the availability of programming and charging discriminatory prices to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies providing facilities based competition to cable and extending programming to areas not served by cable.''

48. Our adoption of a rule prohibiting exclusivity clauses addresses the Congressional concerns underlying section 628(b). The rule will prohibit the continuation and proliferation of an anticompetitive cable practice that has erected a barrier to the provision of competitive video services. It also will promote the development of new technologies that will provide facilities-based competition to existing cable operators, and thus serves the purposes set forth in section 628(a) (as well as other provisions of law, such as section 706 of the Telecommunications Act of 1996). As Verizon points out, fiber optic services and interactive video are new facilities-based technologies that competitors seek to deploy. Exclusivity clauses prevent competitive MVPDs from providing satellite cable and broadcast programming to consumers by means of such new technologies. SureWest similarly argues that, because the deployment of broadband networks and the provision of video service are intrinsically linked, exclusivity clauses that prevent it from providing video services compromise its ability to deploy other advanced telecommunications services, by inhibiting its ability to market a package of services that consumers demand and reducing the revenues it needs to support investment in new and innovative services.

49. More broadly, prohibiting exclusivity clauses for the provision of video services will further the purposes of the 1992 Cable Act and the 1934 Act. As several commenters point out, the 1992 Cable Act sought to promote competition and consumer choice in cable communications. In addition, the purpose of the Communications Act of 1934, as amended, is ''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.'' Moreover, section 706 of the Telecommunications Act of 1996 directs the Commission to ''encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans * * * ''. Removing barriers to allow access to a broad segment of consumers in the multichannel video programming distribution market by prohibiting exclusivity clauses for the provision of video services will further these statutory purposes. As Verizon notes, once a MDU owner is ''locked'' into an exclusivity clause, ''residents are prevented from choosing alternative services that they might prefer—on the

basis of price, quality, and innovative and technologically advanced service offerings.'' Thus, contrary to some commenters' arguments, our interpretation of section 628(b) to prohibit exclusivity clauses for the provision of video services is not only consistent with the plain language of that statutory provision and confirmed by that provision's legislative history, but also furthers the broader purposes of the Act. We also find that Congress's failure *in 1984* to include a provision that would have mandated access to MDUs for cable service has no bearing on our interpretation of the subsequent legislation that became the 1992 Cable Act, particularly since there is no evidence that Congress's failure to act in 1984 is at all related to the action it did take in adopting section 628(b) in 1992.

50. We disagree with those commenters who argue that the regulatory requirements outlined in section 628(c) circumscribe the Commission's authority to prohibit exclusivity clauses for the provision of video services. For example, Real Access Alliance (''RAA'') states that the specific provisions of sections 628(c)(2)(A), (B), (C), and (D) establish the full scope of the Commission's authority under section 628. However, nothing in these provisions indicates that they were intended to establish the outer limits of the Commission's authority under section 628(b). In fact, the very title of section 628(c)(2), ''Minimum Contents of Regulations,'' strongly suggests that the rules the Commission was required to implement had to cover the conduct described in sections 628(c)(2) at the *least*, but that the Commission's authority under section 628(b) was broader. The term ''minimum'' indicates that more could be covered since it is defined as ''the least quantity assignable, admissible, or possible.'' (Webster's *New Collegiate Dictionary* (1977).) This interpretation is confirmed by section 628(c)(1), which grants the Commission wide latitude to ''specify particular conduct that is prohibited by [section 628(b)].'' Other commenters' suggestions along the same lines are unconvincing for the same reasons.

51. As pointed out by several commenters, the Commission's implementation of this provision to date has focused on ensuring MVPD access to the programming they need to provide a viable and competitive multichannel alternative to consumers, *i.e.*, on the regulations adopted pursuant to section 628(c)(2). In the decision initially implementing section 628, the Commission described the provision as ''intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems, by prescribing regulations that govern the access by competing multichannel systems to cable programming services.'' Nevertheless, the Commission stated:

> ''Neither the record of this proceeding nor the legislative history offer much insight into the types of practices that might constitute a violation of the statute with respect to the unspecified ''unfair practices'' prohibited by section 628(b) beyond those more specifically referenced in section 628(c). The objectives of the provision, however, are clearly to provide a mechanism for addressing those types of conduct, primarily associated with horizontal and vertical concentration within the cable and satellite cable programming field, that inhibit the development of multichannel video distribution competition. * * * [A]lthough the types of conduct more specifically referenced in the statute * * * appear to be the primary areas of congressional concern, section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming.''

Viewing the implementation history as a whole, the Commission's early focus on program access is not surprising. It was shaped both by the specific provisions of section 628(c)(2)—since these regulations were statutorily required and thus appeared to be of the most pressing concern to Congress—and the policy goal in the 1992 Cable Act of '''rely[ing] on the marketplace, to the maximum extent feasible' in promoting the availability of programming to the public.'' But the Commission's prior attention to these requirements in no way precludes its exercise of clear statutory authority to regulate unfair practices, beyond program access, which have the purpose or effect of hindering significantly or preventing the provision of certain programming to subscribers or consumers. The Commission has imposed no such artificial limitation on the scope of its authority, and section 628(b) does not require it.

52. The Commission has authority to delineate by rule conduct prohibited under section 628(b) in order to promote the public interest through increased competition and diversity in the MVPD market and continued development of communications technologies. We have explained how a rule prohibiting exclusivity clauses for the provision of video services promotes the public interest here because it will likely increase competition in the MVPD market and promote continued development of communications technologies. Thus, we find that we may by rule prohibit cable operators from executing exclusivity clauses for the provision of video services to MDUs.

53. This prohibition necessarily also applies to common carriers and open video systems. Although section 628(b) extends only to cable operators, section 628(j) explicitly states that ''[a]ny provision that applies to a cable operator under this section shall apply to a common carrier or its affiliate that provides video programming by any means directly to subscribers.'' In addition, section 653(c)(1)(A) provides that ''[a]ny provision that applies to a cable operator under (A) section[ ] * * * 628 * * * of this title shall apply * * * to any operator of an open video system.'' Thus, pursuant to sections 628(j) and 653(c)(1)(A), our prohibition on exclusivity clauses for the provision of video services applies to both any common carrier or its affiliate and also to OVS operators to the extent that these entities provide video programming to subscribers or consumers.

54. Although we believe that we have specific statutory authority to adopt this prohibition, as described above, we note that our ancillary authority, under titles I and III of the 1934 Act, also provides a sufficient basis to prohibit cable operators from enforcing or executing exclusivity clauses for the provision of video service to MDUs. Courts have long recognized that, even in the absence of explicit statutory authority, the Commission has authority to promulgate regulations to effectuate the goals and provisions of the Act if the regulations are ''reasonably ancillary to the effective performance of the Commission's various responsibilities'' under the Act. The Supreme Court has established a two-part ancillary jurisdiction test: (1) The regulation must cover interstate or foreign communication by wire or radio; and (2) the regulation must be reasonably ancillary to the Commission's statutory responsibilities. The prohibition we adopt here applies to ''interstate and foreign communication by wire or radio,'' advances the purposes of both the 1992 Cable Act and section 706 of the 1996 Telecommunications Act, and serves the public interest.

55. Title I confers on the Commission regulatory jurisdiction over all interstate radio and wire communication. The multichannel video services provided by cable operators are interstate in nature and are covered by the Act's definitions of ''radio communications'' and ''wire communication.'' In addition, these services fall within the definition

of ''cable service.'' Thus, cable services are within the scope of our subject matter jurisdiction granted in Title I.

56. In addition, we find that applying the prohibition against exclusivity clauses for the provision of video services to cable operators is reasonably ancillary to our statutory responsibilities under the Act. As we have explained, prohibiting exclusivity clauses for the provision of video services to MDUs will prohibit an anticompetitive cable practice that has erected a barrier to the provision of competitive video services. It also will promote the development of new technologies that will provide facilities-based competition to existing cable operators, and thus serves the purposes set forth in section 628(a). In addition, for the same reasons explained above, applying this prohibition to cable operators will ensure the furtherance of the broad goals of the 1992 Cable Act and the 1934 Act generally.

57. Because several commenters raise concerns about the treatment of exclusivity clauses in existing MDU contracts, we take particular care to observe that the law affords us wide authority to prohibit the enforcement of such clauses where, as here, the public interest so requires. Indeed, as the Commission has previously stated, ''Congress intended that rules promulgated pursuant to implement section 628 should be applied prospectively to existing contracts, except as specifically provided for in section 628(h).'' In addition, the Fifth Amendment's Takings Clause presents no obstacle to prohibiting the enforcement of existing exclusivity clauses. To begin with, such a step obviously does not involve the permanent condemnation of physical property and thus does not constitute a *per se* taking.

58. Nor does the proposed rule represent a regulatory taking. The Supreme Court has outlined the framework for evaluating regulatory takings claims as follows: ''In all of these cases, we have eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. To aid in this determination, however, we have identified three factors which have particular significance: (1) The economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.'' None of these factors counsels in favor of finding a regulatory taking here.

59. First, prohibiting the enforcement of exclusivity clauses will have minimal adverse economic impact on affected MVPDs. Nothing in the rule precludes MVPDs from utilizing the wires they own to provide services to MDUs or requires them to jettison capitalized investments. Neither does it prohibit the enforcement of other types of agreements between MDUs or MVPDs, such as exclusive marketing agreements. The rule merely prohibits clauses that serve as a bar to other MVPDs that seek to provide services to a MDU. The record in this proceeding demonstrates that in some cases, exclusivity clauses in existing MDU contracts impose adverse *and* absolute impacts upon would-be competitors who are otherwise ready and able to provide customers the benefits of increased competition.

60. Second, the rule does not improperly interfere with investment-backed expectations. As previously stated, exclusivity clauses in MDU contracts have been under active scrutiny for over a decade, and the Commission has prohibited the enforcement of such clauses in similar contexts. States have also taken action to prohibit such clauses. Moreover, to the extent that MVPDs have used exclusivity clauses to ''lock up'' MDUs in anticipation of competitive entry or to obstruct competition, as described above, any underlying investment-backed expectations are not sufficiently longstanding or pro-competitive in nature to warrant immunity from regulation.

61. Finally, with respect to the character of governmental action, the rule's prohibition of the enforcement of exclusivity clauses in existing MDU contracts substantially advances the legitimate governmental interest in protecting consumers of programming from ''unfair methods of competition or unfair acts or practices''—an interest Congress explicitly has recognized and protected by statute, *see* 47 U.S.C. 628(b), and commanded the Commission to vindicate by adopting appropriate regulations, *see id.* section 628(c)(1). The rule we adopt today is based upon the Commission's detailed analysis of the harms and benefits of exclusive MDU contracts, discussed above in section II, and is carefully calibrated to promote this interest. In short, the rule at issue here does not invoke Justice Holmes' observation that ''if regulation goes too far it will be recognized as a taking.''

62. Because the prohibition that we adopt today applies only to cable operators, common carriers or their affiliates that provide video programming directly to subscribers, and operators of open video systems, and does not require MDU owners to provide access to all MVPDs, we do not address comments raising concerns about the Commission's authority to mandate such access. However, we reject arguments suggesting that the Commission has no authority to regulate such entities' contractual conduct because of the tangential effect of such regulation on MDU owners. As explained above, sections 628(b), 628(j), and our ancillary jurisdiction provide ample bases for regulating these specific MVPDs. Moreover, sections 4(i), 201(b), and 303(r) supply the Commission with strong authority to enforce the full scope of the Cable Act prohibition at issue.

IV. Further Notice of Proposed Rulemaking

63. The *Report and Order* found that further inquiry and analysis was needed before the Commission would decide how, if at all, to regulate building exclusivity clauses that give exclusivity to DBS service providers and PCOs. The Commission also refrained, in the *Report and Order,* from regulating exclusive marketing arrangements (which allow one MVPD into a MDU or real estate development but constrain the ability of competitive MVPDs to market their services directly to MDU residents) and bulk billing arrangements (which may be exclusive but do not prohibit MDU residents from selecting a competitive MVPD provider). The Commission commenced a further rulemaking to inquire into these as-yet unresolved matters, and states that it would conclude this rulemaking and release an order within six months of publication of this *Order.*

V. Procedural Matters

A. Regulatory Flexibility Analysis

64. Pursuant to the Regulatory Flexibility Act of 1980, as amended, the Commission has prepared a Final Regulatory Flexibility Analysis (''FRFA'') of the possible significant economic impact on small entities of the policies and rules addressed in this document. The FRFA is set forth in Appendix B to the *Report and Order.*

B. Paperwork Reduction Act Analysis

65. The *Report and Order* does not contain new or modified information collection requirements subject to the paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified ''information collection

burdens for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

C. Congressional Review Act

66. The Commission has sent a copy of the *Report and Order,* including the FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. In addition, the Commission has sent a copy of the *Report and Order,* including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

D. Additional Information

67. For additional information on this proceeding, please contact John W. Berresford, (202) 418–1886, or Holly Saurer, (202) 418–7283, both of the Policy Division, Media Bureau.

VI. Ordering Clauses

68. Accordingly, *it is ordered* that, pursuant to the authority contained in sections 1, 2(a), 4(i) 157 nt., 303(r), 335, 601(6), 628(b,c), and 653(c)(1) of the Communications Act of 1934, as amended; 47 U.S.C. 151, 152(a), 154(i), 157 nt., 303(r), 335, 521(6), 548(b,c), and 573(c)(1), this *Report and Order is adopted.*

69. *It is further ordered* that, pursuant to the authority contained in sections 1, 2(a), 4(i) 157 nt., 303(r), 335, 601(6), 628(b,c), and 653(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152(a), 154(i), 157 nt., 303(r), 335, 521(6), 548(b,c), and 573(c)(1), 47 CFR part 76.2000 of the Commission's rules *is amended,* as set forth below. It is our intention in adopting these rule changes that, if any provision of the rules is held invalid by any court of competent jurisdiction, the remaining provisions shall remain in effect to the fullest extent permitted by law.

70. *It is further ordered* that the following documents shall be made part of the record in this proceeding: (a) Letter from Leora Hochstein, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Commission Secretary, MB Docket No. 05–311 (Aug. 9, 2006); (b) Letter from Ms. Hochstein to Ms. Dortch, MB Docket No. 05–311 (July 6, 2006); (c) Comments of SureWest Communications in MM Docket No. 06–189; (d) Comments of Manatee County, Florida, in MB Docket No. 05–311; and (e) the Comments of Cablevision and Comcast in MB Docket No. 07–29.

71. *It is further ordered* that the rule contained herein *shall become effective* 60 days after publication of this *report and order* in the **Federal Register**.

List of Subjects in 47 CFR Part 76

Cable television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 76 as follows:

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

■ 2. Add subpart X to part 76 to read as follows:

Subpart X—Access to MDUs

§ 76.2000 Exclusive access to multiple dwelling units generally.

(a) *Prohibition.* No cable operator or other provider of MVPD service subject to 47 U.S.C. 548 shall enforce or execute any provision in a contract that grants to it the exclusive right to provide any video programming service (alone or in combination with other services) to a MDU. All such exclusivity clauses are null and void.

(b) *Definition.* For purposes of this rule, MDU shall include a multiple dwelling unit building (such as an apartment building, condominium building or cooperative) and any other centrally managed residential real estate development (such as a gated community, mobile home park, or garden apartment); provided however, that MDU shall not include time share units, academic campuses and dormitories, military bases, hotels, rooming houses, prisons, jails, halfway houses, hospitals, nursing homes or other assisted living facilities.

[FR Doc. E7–25349 Filed 1–4–08; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Part 172

[Docket No. PHMSA–2006–28711 (HM–145N)]

RIN 2137–AE24

Hazardous Materials: Revisions to the List of Hazardous Substances and Reportable Quantities

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Final rule.

SUMMARY: PHMSA amends the Hazardous Materials Regulations (HMR) by revising the list of hazardous substances and reportable quantities (RQs) and by correcting editorial errors to the list of hazardous substances and RQs. Superfund (*i.e.*, CERCLA) requires PHMSA to list and regulate all hazardous substances designated by the Environmental Protection Agency (EPA). This final rule enables shippers and carriers to identify the affected hazardous substances, comply with all applicable regulatory requirements, and make the required notifications if the release of a hazardous substance occurs.

DATES: *Effective Date:* March 31, 2008.

Voluntary Compliance Date: PHMSA is authorizing voluntary compliance beginning February 29, 2008.

FOR FURTHER INFORMATION CONTACT: Dirk Der Kinderen (202) 366–8553, Office of Hazardous Materials Standards, PHMSA, 1200 New Jersey Avenue, SE., East Building, Washington, DC 20590–0001. Questions about hazardous substance designations or reportable quantities should be directed to EPA at the Superfund, EPCRA, RMP and Oil Information hotline at (800) 424–9346 or, in Washington, DC, local area (703) 412–9810.

SUPPLEMENTARY INFORMATION:

I. Background

Section 306(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA; 42 U.S.C. 9601–9675), as amended by section 202 of the Superfund Amendments and Reauthorization Act of 1986 (SARA; 42 U.S.C 11011 *et seq.*), requires the Secretary of Transportation to regulate hazardous substances listed or designated under Section 101(14) of CERCLA, 42 U.S.C. 9601(14), as hazardous materials under the Federal hazardous materials transportation law (49 U.S.C. 5101–5128). PHMSA carries