ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 08-1016 & 08-1017

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *ET AL.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties

All parties, intervenors, and amici appearing in this Court and before the Commission are listed in the petitioners' briefs.

2. Ruling under review

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 FCC Rcd 20235 (2007), 73 Fed. Reg. 1080 (Jan. 7, 2008) (J.A.) (adopting 47 C.F.R. § 76.2000).

3. Related cases

This case has not previously been before this Court. We are not aware of any related case pending before this Court or any other court.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Others

* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

1992 Cable Act	Cable Television Consumer Protection and Competition Act of 1992
Br.	Brief
Commission (or FCC)	Federal Communications Commission
Communications Act	Communications Act of 1934
GAO	US General Accounting Office
J.A.	Joint Appendix
LEC	Local Exchange Carrier
LFA	Local Franchising Authorities
LMA	Local Marketing Agreement
MDU	Multiple Dwelling Units
MDU petitioners	National Multi Housing Council, National Apartment Association, and Manufactured Housing Institute
MVPD	Multichannel Video Programming Distributor
NCTA	National Cable & Telecommunications Association
RAA	Real Access Alliance

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BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

STATEMENT OF ISSUES

In these consolidated cases, the incumbent cable industry, through its trade association the National Cable & Telecommunications Association ("NCTA"), and various representatives of multi-unit real estate interests (the "MDU petitioners"), seek review of a Commission *Order*[1] intended to bring the benefits of cable competition to many of the roughly thirty percent of Americans who live in apartments, condominium buildings, and centrally managed real estate

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[1] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235 (2007), 73 Fed. Reg. 1080 (Jan. 7, 2008) ("*Order*") (J.A.) (adopting 47 C.F.R. § 76.2000).

developments (collectively referred to as multiple dwelling units, or "MDUs"). The *Order* prohibits cable operators from executing or enforcing contractual provisions that grant them the exclusive right to provide video service to MDU residents – provisions that effectively granted cable operators location-specific monopolies that shielded them from competition and denied residents the ability to choose another provider based on price, quality, and program offerings. *Order* ¶¶ 16-29 (J.A.).

The case presents two issues for the Court's review:

(1) Whether the Commission acted within its statutory authority in prohibiting cable operators from executing or enforcing exclusive access agreements with MDUs.

(2) Whether the Commission's action prohibiting cable operators from executing or enforcing exclusive access agreements was the product of reasoned decisionmaking.

STATEMENT OF JURISDICTION

The *Order* on review was released on November 13, 2007 and published in the *Federal Register* on January 7, 2008. Petitioners timely filed their petitions for review pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) and 2344.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are appended to petitioners' opening briefs.

COUNTERSTATEMENT

I. Background

The 1992 Cable Act. Concluding that "most cable television subscribers have no opportunity to select between competing cable systems," Congress in 1992 enacted a number of measures designed to curb cable operators' "undue market power" and to bring cable subscribers the benefits of competitive choice. Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), P.L. 102-385, § 2(a)(2), 47 U.S.C. § 521 nt. Among other things, Congress amended the Communications Act to provide that "a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award" additional franchises, 47 U.S.C. § 541(a)(1); and to require the Commission to adopt rules governing the disposition of wiring installed by the cable operator within the subscriber's premises when the subscriber switches cable operators or otherwise terminates service, *id.* § 544(i).

Most importantly for purposes of this case, Congress also enacted 47 U.S.C. § 548 (hereafter referred to as section 628, for its placement in the Communications Act). Designed "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in * * * areas not currently able to receive such programming, and to spur the development of communications technologies," section 628 makes it

> unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor 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.

47 U.S.C. § 548(a)-(b).

Local Franchise Reform. Full implementation of the Congressional goals reflected in the 1992 Cable Act's market-opening provisions offers the potential for significant competitive benefits for consumers, but a decade after enactment, little headway had been made in the development of meaningful cable competition. The U.S. General Accounting Office reported in late 2003 that cable subscribers in only "about 2 percent of markets hav[e] the opportunity to choose between two or more wire-based video operators."[2] Moreover, this pervasive lack of wireline cable competition was having a profound effect on consumer welfare. Data compiled by the Commission in its most recent pricing report showed that from 1995 through 2004, average prices for the types of cable service packages taken by the vast majority of consumers (basic-plus-expanded-basic) rose by over 90%. *Cable Prices Report* ¶¶ 2, 7, 10. In 2004, average price increases for such packages far outpaced inflation (5.2% to 3.0%). *Id.* ¶¶ 10, 18. In the relative handful of communities "where wireline competition is present," however, cable prices were "17 percent lower" than elsewhere. *Id.* ¶ 2.[3] Consumers without wireline cable competition have been denied this competitive benefit – at a staggering aggregate cost totaling potentially billions of dollars per year.[4]

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[2] U.S. General Accounting Office, GAO-04-08, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, at 9 (October 2003). Although satellite-based video services were available more broadly, the FCC has found that competition from direct broadcast satellite providers "does not appear to constrain cable prices." *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992*, 21 FCC Rcd 15087 (¶ 2) (2006) ("*Cable Prices Report*").

[3] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101 ¶ 50 & n.183 (2007) ("*Local Franchising Order*") (cataloguing evidence of the impact of competition on cable rates).

[4] *See* George S. Ford & Thomas Koutsky, Phoenix Center Policy Bulletin No. 13, "*In Delay There Is No Plenty": The Consumer Welfare Cost of Franchise Reform Delay*, at 1-4, 13 (2006) http://www.phoenix-center.org/Policy/Bulletin/PCPB13Final.pdf (estimating that, nationwide, the consumer welfare cost of one year's delay in introducing cable competition is $8.2 billion); Jerry Brito & Jerry Ellig, *Video Killed the Franchise Star: The Consumer Cost of Cable Franchising and Proposed Policy Alternatives*, 5 J. Telecomm. & High Tech. L. 199, 227-29 (2006) (estimating the annual cost of delaying nationwide cable competition to be $6.3 billion and listing results of other studies estimating annual costs ranging from $7.5 billion to $14 billion).

In March 2007, the Commission took a substantial step toward implementing Congress's competitive goals when it adopted the *Local Franchising Order*. The Commission found that, although wireline cable services had historically been offered on a monopoly basis, new competitive opportunities were emerging. *Local Franchising Order* ¶ 2. In particular, "traditional phone companies are primed to enter the cable market, while traditional cable companies are competing in the telephony market." *Ibid.* The Commission projected that, absent artificial entry barriers, both types of companies could offer customers "a 'triple play' of voice, high-speed Internet access, and video services over their respective networks, * * * benefit[ing] consumers by driving down prices and improving the quality of service offerings." *Ibid.*

The Commission determined, however, that the operation of the local franchising process in many cases was presenting an unreasonable regulatory obstacle to competitive entry. Finding that prolonged delays by local franchising authorities ("LFAs") in processing competitive franchise applications amounted in practice to unreasonable refusals to award franchises in violation of 47 U.S.C. § 541(a)(1), the Commission established time limits for LFAs to render decisions on such applications. *Local Franchising Order* ¶¶ 22-24, 66-67. The Commission also prohibited LFAs from imposing certain entry-impeding conditions – such as unreasonable build-out requirements – on the grant of competitive franchise applications. *Id* ¶¶ 82-93; *see generally id.* ¶¶ 82-124. The Sixth Circuit recently upheld the *Local Franchising Order* in its entirety against challenges by NCTA and various LFAs. *Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

MDU Exclusive Access Agreements. Approximately thirty percent of Americans today live in multiple dwelling units, and that percentage is growing. *Order* ¶ 8 (J.A.). Many incumbent cable operators have entered into agreements with MDU owners that grant the incumbent the exclusive right to provide video service to MDU residents, *Order* ¶ 10 (J.A.), creating, in effect, mini-exclusive franchises even in markets that are otherwise subject to cable competition. *See* MDU Br. 38 (acknowledging that "[i]n some ways, exclusive franchises are directly analogous to exclusive building access agreements"); *Order* ¶ 26 (J.A.) (comparing exclusive access agreements to "exclusive franchises of an earlier era").

The Commission first took note of this practice in a notice of proposed rulemaking issued in 1997 in which it sought comment on whether restrictions on such agreements were warranted.[5] In the corresponding order, issued in 2003, the Commission found the record before it inconclusive on the question of whether exclusive access agreements were pro-competitive or anti-competitive.[6] Accordingly, the Commission "decline[d] to intervene" with respect to such agreements at that time. *2003 Inside Wiring Order* ¶ 71.

II. The Proceeding On Review

Spurred in part by comments in the *Local Franchising* proceeding that analogized cable/MDU exclusive access agreements to the entry barriers posed by the local franchising process, the Commission, in early 2007, initiated a renewed examination of the use of exclusive contracts for video services in MDUs.[7] Following public comment, the Commission

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[5] *Telecommunications Services Inside Wiring, Customer Premises Equipment, Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, ¶¶ 259-66 (1997) ("*Inside Wiring Notice*").

[6] *Telecommunications Services Inside Wiring, Customer Premises Equipment, Cable Television Consumer Protection and Competition Act of 1992*, 18 FCC Rcd 1342 (¶¶ 59-77) (2003) ("*2003 Inside Wiring Order*"), *rev'd and remanded on other grounds, NCTA v. FCC*, 89 Fed.Appx. 743 (D.C. Cir. 2004) ("*Inside Wiring Order*").

[7] *See Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 5935 (¶¶ 4-5) (2007) ("*NPRM*") (J.A.).

unanimously adopted the *Order* on review, concluding that contracts granting cable operators exclusive access to MDUs "harm competition and broadband deployment and that any benefits to consumers are outweighed by the harms of such clauses." *Order* ¶ 1 (J.A.). The *Order* prohibited the enforcement of existing exclusivity clauses and the execution of new ones by all video providers that are subject to 47 U.S.C. § 548 (*i.e.*, traditional cable operators, as well as common carriers and open video systems). *Order* ¶¶ 31-32, 51 (J.A.).[8]

In so ruling, the Commission found that the new record developed in this proceeding was very different from the one preceding its 2003 *Inside Wiring* decision and thus required a different response. In particular, the new record demonstrated that exclusivity clauses had become "widespread in agreements between [multichannel video programming distributors ("MVPDs")] and MDU owners, and that the overwhelming majority of them grant exclusive access to incumbent cable operators." *Id.* ¶ 10 (J.A.); *see also id.* n.23 (J.A.) (discussing evidence on widespread use of exclusivity clauses, including survey showing that 90 percent of MDU residents in Raleigh and Charlotte, North Carolina were subject to them). Indeed, the record showed that "'[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.'" *Id.* ¶ 14 (J.A.) (quoting Lafayette Utilities System Comments at 9 (J.A.)).

The Commission further concluded that "[e]xclusivity clauses between MVPDs and MDU owners have the clear effect of barring new entry into MDUs by wire-based MVPDs," and

[8] The rule does not apply to other video providers not subject to section 628 (such as direct broadcast satellite ("DBS")) because the "record in this proceeding does not contain much information regarding the use of exclusivity clauses by [such providers]." *Order* ¶ 2 (J.A.); *see also id.* ¶¶ 61-66 (J.A.) (seeking further comment with respect to such providers).

that "this effect occurs on a large scale." *Id.* ¶ 10 (J.A.). Verizon, for example, had been barred by exclusive access agreements from "'tens of thousands of units in five states.'" *Ibid.* (quoting Verizon Comments at 11-12 (J.A.)). Another new entrant, Hargray CATV, was forced to stop serving or marketing to 80 percent of the homes in a Hilton Head, South Carolina community as a result of exclusivity agreements entered into years earlier by the incumbent and real estate developers. *Id.* ¶ 10 & nn. 33 & 34 (J.A.). Although the record contained numerous examples such as these, the Commission also stressed that "the evidence before us understates the frequency of exclusivity clauses because many MDU owners are unwilling or unable to make public the contracts containing them." *Id.* ¶ 12 (J.A.) (citing evidence that many exclusivity clauses are subject to confidentiality provisions).

The Commission also found that local telephone companies, such as Verizon and AT&T, and other wire-based providers are now attempting to enter the video service business on a large scale – a development that accelerated only after 2003 – and that "incumbent providers (chiefly cable operators) are increasingly using exclusivity clauses in new agreements with MDU owners to bar entry of their new rivals and potential rivals." *Id.* ¶ 15 (J.A.). The Commission found that these "developments constitute a substantial change to the record the Commission compiled in the period leading up to the *2003 Inside Wiring Order*." *Ibid.*

In examining the record before it, the Commission concluded that the harms of exclusivity clauses "significantly outweigh the benefits in ways they did not at the time of the Commission's *2003 Inside Wiring Order*." *Order* ¶ 16 (J.A.). For one thing, the Commission concluded 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." *Id.* ¶ 26 (J.A.). The Commission found that exclusivity clauses, which take away competitors' ability to offer one of the bundled (video, voice, and Internet access) services that comprise "triple play" offerings, "reduce competition in the provision of triple play services[,] result in inefficient use of communications facilities," and consequently slow broadband deployment. *Id.* ¶¶ 21, 26 (J.A.). More generally, the Commission concluded that such clauses "deny MDU residents the benefits of increased competition, including lower prices and the availability of more channels with more diverse content." *Id.* ¶ 26 (J.A.).

Given these findings about the market, the Commission concluded 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)," frustrating that provision's purposes "to increase 'competition and diversity' in the multichannel video marketplace" and to "'spur the development of communications technologies.'" *Order* ¶ 27 (J.A.) (quoting section 628(a)).[9] Exclusivity clauses, the Commission found, "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." *Ibid.*

The Commission concluded (*Order* ¶ 40 (J.A.)) that it had "ample authority" to prohibit exclusivity clauses under section 628(b), which makes it "unlawful for a cable operator * * * to

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[9] Section 628 addresses two types of stations that comprise "the substantial majority" of cable operators' line-up: "'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," and "'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." *Order* ¶ 4 & n.8 (J.A.).

engage in unfair methods of competition or unfair or deceptive 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." 47 U.S.C. § 548(b).[10] The Commission found that the plain language of that provision provided a "solid" substantive basis for a prohibition on exclusivity clauses. *Order* ¶ 41 (J.A.). Since exclusivity clauses, by their very nature, have "the effect of preventing a [rival] MVPD from providing satellite programming to consumers," the Commission found that a rule against such clauses fit comfortably within section 628(b)'s prohibition. *Id.* ¶ 43 (J.A.). Moreover, the Commission noted, section 628(c)(1) expressly commands the agency to promulgate rules specifying the conduct prohibited by section 628(b) "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." *Order* ¶ 41 (J.A.) (quoting 47 U.S.C. § 548(c)(1)).

Finally, the Commission rejected claims that it was required to grandfather existing contracts, thus putting off competition for years in MDUs already subject to long-term exclusivity provisions. *Order* ¶ 55 (J.A.). The Commission determined that, by expressly exempting (in section 628(h)) one narrow class of existing contracts not at issue here, Congress demonstrated its clear intent that rules issued pursuant to section 628 generally should have an immediate effect on existing contracts. *Id.* ¶ 55 (J.A.) (citing 47 U.S.C. § 548(h)). Doing so in this context was especially important, given that "many exclusivity clauses date from the time

[10] The Commission also found that it had ancillary authority to prohibit exclusivity clauses under titles I and III of the Communications Act. *Order* ¶¶ 52, 74 (J.A.) (citing 47 U.S.C. §§ 151, 152(a), 154(i), and 303(r)).

when cable operators had a *de facto* or *de jure* monopoly on wire-based MVPD service." *Id.* ¶ 12 (J.A.).

III. Subsequent Developments

On January 22, 2008, NCTA filed an emergency motion for stay of the portion of the *Order* that bars enforcement of exclusive access provisions in existing agreements. A panel of this Court denied that motion on February 28, 2008.

On March 21, 2008, the Commission issued a Report and Order in *Promotion of Competitive Networks in Local Telecommunications Markets*, 23 FCC Rcd 5385 (2008). Building upon a 2001 order that had adopted similar restrictions in the context of commercial multiple tenant environments ("MTEs"), the Commission prohibited telecommunications carriers from entering into contracts with residential MTE owners that grant carriers exclusive access for the provision of telecommunications services to MTE residents. *Id.* ¶ 1. The Commission also banned enforcement of such exclusivity provisions in existing contracts with residential MTEs. *Id.* ¶¶ 1-2 Noting the similar action taken in the *Order* with respect to cable/MDU exclusive access provisions, the Commission concluded that "[i]n an environment of increasingly competitive bundled service offerings, the importance of regulatory parity is particularly compelling in our determination to remove this impediment to fair competition." *Id.* ¶ 5. Because cable operators increasingly are significant competitors of telephone companies in the telecommunications market, they are major beneficiaries of this order.

SUMMARY OF ARGUMENT

In the *Order* on review, the Commission sought to bring the benefits of video competition to the thirty percent of Americans who today live in apartment buildings and other multiple dwelling units. It did so by barring cable operators from executing or enforcing exclusive access provisions that, in effect, grant them location-specific monopolies in the provision of video service to MDU residents. The Commission found ample authority for its action in the plain terms of section 628. Applying that authority, the Commission also reasonably considered and balanced the harms and putative benefits of exclusive access agreements. The petitioning cable and MDU interests provide no basis on which to set aside the Commission's action.

1. The plain terms of section 628(b) prohibit cable operators from engaging 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" the provision of most types of cable programming to "subscribers or consumers." 47 U.S.C. § 548(b). Section 628(c), moreover, directs the Commission to adopt regulations "to specify the particular conduct that is prohibited by subsection (b)." *Id.* § 548(c)(1). The Commission reasonably determined that this express delegation of authority empowered it to bar cable operators from executing or enforcing exclusive access agreements with MDU owners. Such provisions operate wholly to exclude new entrants from providing *all* cable programming, including the two major categories specifically identified in the statute, to the "consumers" living in MDUs subject to such agreements. *Order* ¶¶ 40-43 (J.A.).

In their attempt to avoid the plain import of the statutory text, petitioners resort to legislative history and what they perceive to be the structure of section 628. In doing so, they argue that Congress enacted that provision solely to reach restrictions on wholesale access to satellite programming between programming vendors and providers of multichannel video services; they claim, therefore, that the statute does not reach restrictions, such as exclusivity clauses, on the provision of retail cable service to consumers. The Commission rightly found, however, that while issues regarding wholesale program access may have been "the most pressing concern to Congress" at the time section 628 was enacted, petitioners' arguments ignore pertinent indicators of broader competitive purposes and, in any event, do not warrant a reading of the statute that is at odds with its plain terms. *Order* ¶ 49 (J.A.). In particular, petitioners' account fails in light of the fact that section 628 speaks of access to programming by "subscribers or consumers," not other cable companies, and in light of the statute's broad purpose to make satellite programming available to those unable to receive such programming, *see* 47 U.S.C. § 548(a). The Commission's reliance on the statutory text was entirely reasonable given that "it is ultimately the provision of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

Petitioners' other statutory arguments fare no better. They make only perfunctory challenges (each less than a page) to the FCC's reliance on ancillary authority – the basis on which the Commission successfully first undertook regulation of the cable industry before the enactment of the specific cable provisions of Title VI. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). And the MDU petitioners' claim that the *Order* unlawfully regulates the real estate industry collapses in the face of the Commission's express holding that the prohibition on the execution or enforcement of exclusivity clauses is directed only to cable operators and leaves MDU owners free to restrict building access as they please (consistent with state law). *Order* ¶¶ 1, 37 (J.A.). Any indirect impact the *Order* may have on MDU owners does not constitute unlawful regulation of the real estate industry. *See Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999).

2. Petitioners' APA claims also lack merit. Petitioners primarily argue that the decision to prohibit cable operators from executing or enforcing exclusive access agreements with MDU owners constitutes an arbitrary departure from the agency's decision, in the *2003 Inside Wiring Order*, not to intervene on that issue. As the Commission reasonably explained, however, its 2003 decision did not affirmatively endorse exclusivity clauses; it merely determined that the record then before it "made it unclear" what the net effect of such clauses was. *Order* ¶ 5 & n.10 (J.A.). By contrast, the evidence that was missing in 2003 was present in the record compiled in 2007, which showed that exclusive access agreements are now widely used by incumbent cable operators to lock up customers in advance of prospective LEC entry, thus limiting the development of video competition, including competition for "triple play" offerings of video, telephony and Internet access. *Id.*¶¶ 10, 13, 15, 16 (J.A.). It was reasonable to reevaluate the need for regulatory intervention in light of a different and more recent administrative record, and, in doing so, the Commission carefully predicated its decision upon a balancing of alleged benefits and harms caused by exclusivity agreements. *See*, *e.g,*, *id.* ¶¶ 26-29 (J.A.).

Contrary to NCTA's argument, the Commission's decision to prohibit enforcement of existing exclusive access clauses was neither directly retroactive in its effect, nor unreasonably retroactive in a secondary sense. Rules are directly retroactive only if they alter the past legal consequence of past actions. *Mobile Relay Associates v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006). The *Order* does not do so: it does not, for example, permit damages for past enforcement of exclusivity agreements. It prohibits only *future* enforcement of existing exclusive access agreements – a rule with only prospective effects.

Nor does the *Order* impose secondary retroactive effects that are unreasonable under APA standards. The Commission rightly found, as a policy matter, that leaving existing contracts in effect would allow the manifest competitive harms caused by such provisions to continue for years. *Order* ¶ 35 (J.A.). NCTA's overstated claims of detrimental reliance pale against such policy concerns. *See Order* ¶¶ 57-58 (J.A.) (explaining that the ban will likely have "minimal adverse economic impact on affected MVPDs" and that, in any event, cable operators have been on notice of the possibility of regulatory restrictions for years). NCTA also fails to account for Congress's clear intent to have section 628's prohibitions apply to existing contracts, except in certain narrow circumstances not present here, *see* 47 U.S. C. § 548(h) ("Exemptions for Prior Contracts").

Petitioners' remaining APA claims are insubstantial.

STANDARD OF REVIEW

Petitioners' challenge to the FCC's interpretation of the Communications Act is governed by *Chevron USA v. Natural Resources Defense Council,* 467 U.S. 837 (1984). Under *Chevron,* if "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the [Court] is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If the implementing agency's reading of an ambiguous statute is reasonable, *Chevron* requires this Court "to accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *National Cable & Telecommunications Association v. Brand X Internet Services,* 545 U.S. 967, 980 (2005). This deference applies not only to the Commission's implementation of ambiguous statutory terms regarding matters that clearly are within its delegated authority, but also to the agency's threshold "interpretation of the scope of its [regulatory] jurisdiction" under the governing statute. *Maine Public Utilities*

Commission v. FERC, 520 F.3d 464, 479 (D.C. Cir. 2008); *accord Transmission Agency of Northern California v. FERC*, 495 F.3d 663, 673 (D.C. Cir. 2007). *See also Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 844-45 (1986).

Petitioners also challenge the reasonableness of the FCC's *Order*. The Court must reject such a challenge unless the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This "[h]ighly deferential" standard of review "presumes the validity of agency action;" the Court "may reverse only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000) (internal quotations omitted); *see also Bell Atlantic Telephone Cos. v. FCC*, 1195, 1202-08 (D.C. Cir. 1996). Ultimately, the Court should affirm the Commission's decision if the agency examined the relevant data and articulated a "rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted).

ARGUMENT

I. The Commission Has Authority To Prohibit Cable Operators From Executing And Enforcing Exclusive Access Agreements With MDUs

Section 628(b) makes it "unlawful for a cable operator * * * to engage in unfair methods of competition or unfair or deceptive 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." Exclusive access agreements between cable operators and MDU owners clearly have the effect of preventing competing MVPDs from delivering satellite programming (the lion's share of cable channels) to consumers residing in affected MDUs. The plain language of section 628 thus authorized the Commission's decision to bar cable operators from executing or enforcing such agreements, and, despite their extensive efforts, petitioners fail to show that the provision does not mean what it says, much less that the Commission's reading is unreasonable. Even if the text of section 628 were not decisive here, however, the *Order* certainly was based upon a reasonable construction of that provision, *see Chevron*, 467 U.S. at 843-44. And as the Commission also found, the *Order* was a lawful exercise of the agency's ancillary authority. Finally, there is no merit to the MDU petitioners' contention that unfair practices by cable operators that have the effect of depriving customers of the opportunity to obtain cable programming from a competing provider are immunized from regulation if they are memorialized in contracts with real estate owners.

A. Section 628 Provides Ample Authority To Regulate The Execution And Enforcement Of Exclusive Access Agreements By Cable Operators

Both NCTA and the MDU petitioners argue that section 628's text, structure, and legislative history demonstrate that Congress's intent was to regulate practices that affect the wholesale provision of programming to MVPDs, and not the retail provision of MVPD service to customers. NCTA Br. 15-28; MDU Br. 30-43. These claims are without merit.

(1) Text

Section 628(b) provides that:

> 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.

47 U.S.C. § 548(b). Subsection (c), in turn, authorizes the Commission to define what conduct is prohibited by subsection (b). 47 U.S.C. § 548(c). The purpose for which the Commission is to issue such regulations is "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." *Id.* § 548(c)(1).

NCTA attempts to create a rigid distinction between "programming" and "service." NCTA Br. 17-19; *see also* MDU Br. 32-33, 34-37. NCTA contends that section 628(b) could not reasonably be construed to reach unfair practices with respect to cable service, because, according to NCTA, in focusing only on "satellite cable programming" and "satellite broadcast programming," that provision "does not even reach all of the programming types that MVPD service provides." NCTA Br. 18. As the Commission concluded, however, the prohibition on exclusivity clauses "for the provision of video services to MDU owners is consistent with the [statute's] focus on satellite programming because most programming is delivered via satellite." *Order* ¶ 43 n. 132 (J.A.). And it is indisputable that an exclusive access provision will have the "effect" of preventing an MVPD "from providing satellite cable programming or satellite broadcast programming to subscribers or consumers" in the MDU covered by the agreement, 47 U.S.C. § 548(b), even if it also has the effect of preventing an MVPD from providing other, less common forms of programming. The Commission recognized this in its *Order*: "[S]uch 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." *Order* ¶ 43 (J.A.).

NCTA dismisses this plain and logical interpretation of the statute as a "specious syllogism," NCTA Br. 26, and claims that "Congress's intent was not to allow the Commission to regulate the myriad practices that might indirectly affect programming; its intent was to allow the Commission to regulate unfair practices *intended* to prevent competitors from obtaining programming," *id.* at 27 (emphasis added). This argument fails for several reasons. First, the plain text of the statute covers practices with "the purpose *or effect*" of hindering consumer access to programming. 47 U.S.C. § 548(b) (emphasis added). NCTA's formulation, which focuses exclusively on intent, reads "or effect" out of the statute. *Cf. USTA v. FCC*, 227 F.3d 450, 463 (D.C. Cir. 2000) (discussing presumption that all parts of a statute be given effect).[11]

Second, even if NCTA could amend section 628 to delete the phrase "or effect," NCTA would need a second amendment to change what kind of "intent" was necessary. Congress did not draft the statute to cover only "practices intended to prevent competitors from obtaining programming," NCTA Br. 27, but instead used a formulation covering those practices intended to hinder another MVPD "from providing satellite cable programming or satellite broadcast programming *to subscribers or consumers*," 47 U.S.C. § 548(b) (emphasis added). Had Congress wished to focus solely on wholesale access to programming, it would have not have included that language addressing the retail relationship between MVPD providers and consumers. Because the explicit "purpose" (as well as effect) of an exclusive agreement is to absolutely bar a competing MVPD from providing all "programming," including satellite cable

[11] To the extent NCTA were to concede that effects are in fact covered, but not "indirect[]" ones, NCTA Br. 27, such a fall-back position would not advance its case. Contrary to NCTA's suggestion, an exclusive access agreement has the *direct* effect of barring competitors from "providing" all cable programming to "consumers" in MDUs. 47 U.S.C. § 548(b). In any event, Congress could have, but did not, limit section 628(b) to those practices with the "*direct* effect" of hindering competitors from providing programming to consumers. In the absence of such a qualification, it was clearly reasonable for the Commission to conclude that there was a sufficient nexus between exclusive access agreements and the provision of "satellite cable programming or satellite broadcast programming" to consumers to qualify as an "effect" within the meaning of section 628(b).

programming and satellite broadcast programming, to "consumers" in MDUs, even an "intent" test would be satisfied here.

It is noteworthy, as well, that Congress focused in section 628(b) on the denial of programming to "consumers" in addition to "subscribers." The wholesale relationship between programming vendors and MVPDs clearly can have the purpose or effect of preventing MVPDs from providing certain satellite programming to their existing "subscribers." However, by referring as well to "consumers," Congress also focused on competitors' ability to provide programming to those (like MDU residents) who are not yet subscribers – a concern that has at most a tenuous connection to the vendor/MVPD relationship, but is directly implicated by restrictions (such as exclusive access agreements) that prevent MVPDs from competing to convert consumers into subscribers. Thus, while petitioners' reading of section 628(b) essentially reads one of its terms out of the statute, the Commission's reading, once again, properly gives meaning to all of the words in the provision. *USTA v. FCC*, 227 F.3d at 463.

Petitioners also contend that the text of subsection (c) confirms their argument that subsection (b) was aimed solely at agreements that hinder a MVPD's wholesale access to programming. NCTA Br. 18; MDU Br. 35. They argue, in particular, that because the specific matters on which the Commission is required to adopt rules under subsection (c) all relate to the relationship between cable operators and programming vendors, *see* 47 U.S.C. § 548(c)(2)(A)-(D), Congress could not have intended to reach practices that restrict the provision of retail programming to consumers. This claim, however, ignores the "obvious difference between a statutory *requirement* * * * and a statutory *authorization*." *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 491 (2004). The practices covered by the *required* rules set forth in subsection (c)(2) in no way exhaust the field of potential unfair "acts or practices" that "hinder significantly or * * * prevent" cable operators from providing programming to their customers in violation of section 628(b). Subsection (c)(2) is captioned: "*Minimum* contents of regulations." 47 U.S.C. § 548(c)(2) (emphasis added). Such language is consistent with the purpose of section 628 and, more generally, with a delegation of rulemaking authority to the agency: Congress prohibited a type of conduct, directed that certain practices would be considered such conduct, but also ordered the administrative agency with the practical and technical experience in the field to develop regulations identifying other practices that qualify as prohibited conduct.[12]

If the scope of the statute was limited to those practices specifically set out in subsection (c)(2), Commission action would be rendered superfluous; there would be no need for the FCC to define the conduct that constitutes a violation of section 628 if the statute itself established the universe of conduct that it covered. Thus, not only is there no merit to petitioners' suggestion that subsection (c)(2) operates as an implicit limitation on the scope of section 628(b); as the Commission found, subsection (c)(2) suggests just the opposite – that "Congress knew how to draft narrowly drawn provisions" and its determination not to do so in subsection (b) reinforces the broader construction that the Commission adopted. *Order* ¶ 44 (J.A.).

Petitioners' textual arguments also ignore the express purposes of section 628, as set out in section 628(a). That provision states that the "purpose of this section [628]" is, among other things, to "increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such

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[12] This express delegation of authority to the Commission to adopt rules defining the "acts or practices" prohibited by section 628(b) refutes the MDU petitioners' makeweight claim that the Commission lacks delegated authority to interpret that provision. *See* MDU Br. 30, 42-43.

programming," and to "spur the development of communications technologies." 47 U.S.C. § 548(a). That purpose, on its face, goes far beyond wholesale program access to embrace the promotion of cable service generally. If Congress intended section 628 as a tool to promote the availability of cable programming to customers "not currently able to receive such programming" at all, then it clearly was concerned about more than just the relationship between cable operators and programmers. Likewise, a statute one of whose purposes is to "spur the development of communications technologies" (such as broadband Internet access) cannot be limited to wholesale programming arrangements, which have nothing to do with that purpose.

Finally, even if NCTA were correct that Congress's intent in section 628 was to reach only access to programming and not access to service, that reading would not advance NCTA's claim that the Commission lacked authority to adopt the *Order*. In explaining the need for a prohibition on exclusive access agreements, the Commission stressed that "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." *Order* ¶ 18 (J.A.). The prohibition thus protects subscribers' and consumers' access to *particular* satellite-delivered programming, as well as providing a choice of competitive cable service writ large.

(2) Structure

As with its text, nothing in the structure and supporting provisions of section 628 or Title VI of the Communications Act suggests the rigid distinction NCTA posits between programming and service, or otherwise limits the scope of the section 628(b) prohibition to wholesale program access restrictions. *See* NCTA Br. 19-23; MDU Br. 35-37. Section 628 is titled: "Development of competition and diversity in video programming distribution." Subsection (a) makes clear that one of the purposes of the section is to "increas[e] competition and diversity in the multichannel video programming market" and to "spur the development of communications technologies." 47 U.S.C. § 548(a). Section 601 of the Communications Act explains that the broad purpose of the subchapter containing section 628 is to "promote competition in cable communications." 47 U.S.C. § 521(6). The *Order* accomplishes this goal by making opportunities for competition available in buildings and developments that would otherwise be restricted by contract to a single provider, and by redressing the competitive imbalance that comes from a long history of incumbents being able to "lock up" MDUs in long-term contracts and thus impose significant barriers to the development of competitive services.

Recasting some of their textual arguments as structural claims, petitioners note that section 628 contains numerous direct references to program access concerns without any similarly express references to access by cable operators to subscribers. *See* NCTA Br. 19-21 (citing section 628(c)(2)(B) – (D) (compelling rulemaking specifically directed to programming); section 628(e)(1) (specifying remedies regarding the sale of programming to aggrieved MVPDs); and section 628(h) (grandfathering certain existing contracts related specifically to exclusive distribution rights with respect to programming));[13] *see also* MDU Br. 35-37. As the Commission readily acknowledged, however, those specific provisions merely highlight that program access appeared to be "the most pressing concern to Congress" at the time of enactment. *Order* ¶ 49 (J.A.); *see also id.* ¶ 45 (J.A.). They do not demonstrate that the statute limits the Commission's authority to that subject, particularly given the plain language of section 628(b)

[13] While NCTA claims that section 628(h)'s limited grandfathering clause "reflects the narrowness of the authorization Congress intended to create in" section 628, NCTA Br. 21, section 628(h) clearly does not define the scope of the Commission's authority under section 628. Indeed, many contractual terms specifically proscribed by section 628(c) do not fall within the scope of section 628(h).

(which, as noted above, covers delivery of programming "to subscribers or consumers") and the broad competitive goals reflected in sections 628(a) and 601.

Finally, NCTA argues that because MDU access traditionally had been a province of the states, rather than the FCC, the Commission's ban on cable operator execution and enforcement of exclusive access agreements "runs afoul" of "'the strong presumption against federal preemption in matters traditionally regulated by the state.'" Br. 22-23 (quoting *Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 894 (D.C. Cir. 1996)). The Supreme Court, however, has held that courts must accord deference to an agency's interpretation of "the substantive (as opposed to pre-emptive) *meaning* of a statute," even where that interpretation may affect the scope of preemption. *Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 743-44 (1996). Since the Commission's interpretation does not address directly any preemption question, but only the substantive scope of section 628, its decision is entitled to *Chevron* deference, even assuming NCTA is correct that regulation of MDU access is a traditional state function.[14]

In sum, petitioners' structural arguments do not vitiate the Commission's reasonable statutory analysis or alter section 628(b)'s plain meaning.

(3) Legislative History

Because the rule adopted in the *Order* is clearly authorized by the plain language of section 628, resort to the legislative history is unnecessary in this case. The Supreme Court has stressed "time and again" that courts "must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v.*

[14] We note that petitioners cite no specific state or local law that is inconsistent with the Commission's *Order*, nor was one cited in the record.

Germain, 503 U.S. 249, 253-54 (1992)) (citations omitted); *accord USTA v. FBI*, 276 F.3d 620, 625 (D.C. Cir. 2002) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.")

Nevertheless, to the extent this Court finds it necessary to consider legislative history, nothing in the history of section 628 suggests that the Commission lacks authority to prohibit MVPDs from executing or enforcing exclusive access provisions where the agency has determined, in accordance with the plain terms of the statute, that such provisions "hinder significantly or * * * prevent any [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." 47 U.S.C. § 548(b). Indeed, as the Commission reasonably found, the legislative history, if anything, supports a broad reading of that provision aimed at "fostering competition among cable operators and enhancing consumer choice." *Order* ¶ 45 (J.A.). In particular, while the pertinent Conference Report stated that the focus of section 628 "'*includ*[*ed*]'" program access restrictions, the conferees went on to state their intent "'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.'" *Order* ¶ 45 (J.A.) (quoting H.R. Conf. Rep. 102-862 at 93 (Sept. 14, 1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1275 (emphasis supplied in *Order*)).[15]

[15] NCTA attempts to rebut the conferees' broad statement of intent by quoting a sentence fragment, purportedly from the preceding paragraph of the Conference Report, to the effect that section 628 "applies [to] *programming vendors*." NCTA Br. 24. We do not see any such phrase in that paragraph. In any event, it cannot be the case that section 628 applies only to "programming vendors" since, by its terms, it applies to "cable operator[s]" as well.

Moreover, the fact that the legislative history does not expressly address exclusive access provisions is not reason to find that they are not covered by a statute when the plain terms of the statute embrace them. *See Riegel v. Medtronic, Inc.*, 128 S.Ct. 999, 1009 (2008) ("The operation of a law enacted by Congress need not be seconded by a committee report on pain of judicial nullification."); *Port Auth. of New York & New Jersey v. Department of Transp.*, 479 F.3d 21, 31 (D.C. Cir. 2007) ("refus[ing] * * * invitation to pare [statute] down to only those portions explained in the Congressional Record"). This rule follows directly from the fact that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. at 79-80; *see also Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 298-99 (D.C. Cir. 2003) (holding that "statutes written in broad, sweeping language should be given broad, sweeping application," even where the legislative history "show[s] that Congress was most immediately concerned with" a narrower question).

NCTA's argument to the contrary relies on a section of a *1984* bill, H.R. No. 4103, 98th Cong., 2d Sess. § 633 (1984), that was never enacted. That section, according to NCTA, would have prohibited restrictions on MDU access, and NCTA claims that the fact that Congress did not adopt the bill suggests that section 628, adopted eight years later, cannot prohibit exclusive access provisions *See* NCTA Br. 25-26 (citing *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 168 n.16 (1993)). This argument is baseless.

As an initial matter, section 633 of the 1984 legislation did not address MVPD conduct with regard to exclusive access contracts with MDU owners. Rather, that failed provision would have gone far beyond the *Order* at issue here and prohibited MDU *owners* from preventing the installation of a cable system when a resident requested the installation.[16] The *Order* on review, by contrast, is concerned with practices by cable operators, and does not address the power of MDU owners to restrict service. *Order* ¶ 37 (J.A.) ("We merely prohibit the enforcement of existing exclusivity clauses and the execution of new ones *by cable operators*.") (emphasis added). Thus, contrary to NCTA's argument, the *Order* does not implement the policy that Congress rejected in 1984, but instead adheres to any intent that may be implied from its action – an intent to preserve the MDU owner's freedom to exclude: "[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." *Order* ¶ 37 (J.A.).

Moreover, Congress's decision not to enact the cited provision in 1984 would have no logical bearing on the Commission's authority to adopt the *Order* even if that provision had addressed the same subject matter as the *Order*. The primary source of authority for the *Order*, section 628, was enacted in 1992 and delegates to the FCC the broad authority to prohibit conduct by cable operators that the Commission determines to constitute "unfair methods of competition or unfair or deceptive acts or practices" that hinder the distribution of satellite cable and broadcast programming by MVPDs. The fact that, in 1984, Congress was not prepared directly to outlaw exclusivity provisions (according to NCTA) does mean that it could not, in legislation adopted eight years later, delegate to the FCC the authority to outlaw such provisions

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[16] *See* H.R. 4103, § 633(a) ("The owner of any multiple-unit residential or commercial building or manufactured home park may not prevent or interfere with the construction or installation of facilities necessary for a cable system * * * if cable service or other communications service has been requested by a lessee or owner * * * of a unit in such building or park."); *id.* § 633(c) ("Any owner of such a multiple-unit building or park may not demand or accept payment from any cable operator in exchange for permitting construction or installation of facilities necessary for a cable system on or within the premises in excess of any amount which constitutes just compensation.").

where the agency finds such provisions to be "unfair methods of competition or unfair or deceptive acts or practices." *See Order* ¶ 47 & n.151 (J.A.).

To the extent that the terms of rejected legislation are relevant, there is a far more pertinent example. The House of Representatives when debating the 1992 Act considered a provision that would have "prohibit[ed] any video programming vendor [owned or controlled by] a multichannel video system operator * * * from refusing to deal with any [MVPD] with respect to the *provision of video programming*." 138 Cong. Rec. H6545-01, H6550 (July 23, 1992) (emphasis added). But the House rejected that provision, with its exclusive focus on wholesale program access, and Congress adopted instead the more expansive language of section 628(b) on which the Commission reasonably relied. *See Order* ¶ 44 n.136 (J.A.). The rejection of that proposed provision is considerably clearer evidence of Congressional intent than an amendment addressing a different issue considered eight years earlier.

B. The Commission's Ancillary Authority Lawfully Provided An Independent Basis For The *Order*.

The FCC also lawfully relied upon its ancillary authority, under Titles I and III of the Communications Act, as an independent basis upon which to sustain the *Order*. *Order* ¶¶ 52, 74 (J.A.) (citing 47 U.S.C. §§ 151, 152(a), 154(i), 303(r)) (J.A.). The Commission noted that "[c]ourts 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 * * * [(1)] cover interstate or foreign communications by wire or radio * * * [and (2) are] reasonably ancillary to the Commission's statutory responsibilities." *Order* ¶ 52 (J.A.) (citing *United States v. Southwestern Cable Co.*, 392 U.S. at 178; *Rural Telephone Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988); *GTE Service Corp. v. FCC*, 474 F.2d

724, 741 (2d Cir. 1973)). Indeed, the Commission observed, the FCC's initial decision to regulate cable service was successfully predicated upon such authority. *Order* ¶ 52 n.167 (J.A.) (describing holding of *Southwestern Cable Co.*, 392 U.S. 157).

Applying the first part of the test for ancillary jurisdiction, the Commission concluded that "[t]he multichannel video services provided by cable operators are interstate in nature and are covered by the Act's definitions of 'radio communication' and 'wire communication,'" thus falling "within the scope of our subject matter jurisdiction granted in Title I." *Order* ¶ 53 (J.A.) (quoting 47 U.S.C. §§ 153(33) & (52)).[17] The Commission also determined that prohibiting cable operators from executing or enforcing exclusive access provisions was "reasonably ancillary" to the agency's statutory responsibilities. *Order* ¶ 54 (J.A.). Such a prohibition would curb "an anticompetitive cable practice that has erected a barrier to the provision of competitive video services" and would "promote the development of new technologies that will provide facilities-based competition to existing cable operators," thus "serv[ing] the purposes set forth in Section 628(a)." *Ibid.* And by promoting competition and curbing an anticompetitive practice, the prohibition would further "the broad goals of the 1992 Cable Act and the 1934 Act generally." *Ibid.*

The petitioners present only perfunctory challenges – each less than one page in length (NCTA Br. 27-28; MDU Br. 43-44) – to the Commission's analysis. NCTA argues that the Commission's ancillary authority does not provide "roving" power "to regulate all aspects of competition," and it suggests that such authority applies only if the statute already contains

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[17] Indeed, the Commission noted, such services also fall within the definition of "cable service" made subject to the Act in 47 U.S.C. § 152(a). *Order* ¶ 53 & n.172 (J.A.). *See also id.* (citing 47 U.S.C. §§ 522(5) & (6) (defining "cable operator" and "cable service")).

"specific mandates" governing the subject matter of the regulation. Br. 27-28. But the Commission has not asserted any broad "roving" power over all aspects of competition; rather, it has narrowly focused on a particular practice – involving exclusive access agreements – that has the "purpose or effect" of "hinder[ing]" the provision of cable programming to consumers. 47 U.S.C. § 548(b). And ancillary authority, by its nature, is only needed "absent explicit reference in the statute." *GTE Service Corp.*, 474 F.2d at 731. Thus, even if NCTA were correct that "no specific [statutory] mandates" underpin the *Order*, that unadorned claim provides no basis to question the Commission's action.

The MDU petitioners, moreover, simply object that ancillary authority does not extend to "the use of real property." Br. 43. But, as discussed in Argument I. C., below, the *Order* does not regulate the real estate industry. It prohibits cable operators from engaging in a specific practice that poses an absolute bar to the *transmission* of competitive cable service in MDUs and thus falls comfortably within the Commission's subject matter jurisdiction over cable service, as well as communication by wire or radio. In sum, petitioners' brief and perfunctory arguments provide no basis to question the Commission's analysis of its authority. *See National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 185 (D.C. Cir. 1993) (if petitioners seek judicial review of Commission findings, they "must argue the point in [their] brief[s] with enough detail to show why [their] claims merit[] an answer") (citing *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)).

C. The *Order* Does Not Regulate The Activities Of MDU Owners

The MDU petitioners contend, finally, that the *Order* is *ultra vires* because it allegedly regulates the activities of MDU owners. Although recognizing that the *Order* states that it is regulating a "practice" of the cable industry, the MDU petitioners contend that the practical result of the *Order* is to regulate the real estate industry. That is so, they claim, because building access agreements are bilateral, negotiated contracts that grant access to property, and the ban on MVPDs' ability to execute or enforce such contracts necessarily will affect the value MDUs can receive for use of their property. MDU Br. 21, 26.

This claim is wholly without merit. Section 628 vests the Commission with ample authority to reach MVPDs' actions with respect to exclusive access agreements. By its terms, section 628 reaches all "unfair or deceptive acts or practices" of a cable operator that have the effect of "hinder[ing] significantly" or "prevent[ing]" the delivery of satellite programming to subscribers or consumers. 47 U.S.C. § 548(b). The section makes no exception for acts and practices, such as entering into an agreement with a third party who is not a cable operator.

Moreover, the *Order* is not targeted at and does not regulate the activity of MDU owners. The *Order* quite clearly addresses itself solely to acts by cable operators: "[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." *Order* ¶ 1 (J.A.) (emphasis added). Indeed, the FCC carefully drafted the *Order* to *avoid* impinging upon any rights that MDU owners may have. The FCC specifically explained that the *Order* does *not* direct an MDU owner to permit competitive cable operators to offer service within its MDU if the MDU owner does not wish to do so: "[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." *Order* ¶ 37 (J.A.).

The fact that the prohibition against execution or enforcement of exclusive access provisions by cable operators may indirectly affect the value MDU owners may receive for granting access to their properties hardly constitutes "regulation" of the MDU owners. This

Court's decision in *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 is illustrative. In that case, the FCC had prohibited U.S. telecommunications carriers from paying their foreign counterparts more than certain benchmark rates for terminating international long-distance calls. 166 F.3d at 1226. Foreign carriers challenged the Commission's action, claiming that the Commission was, in effect, regulating foreign carriers and services without authority. The Court rejected that challenge. "To be sure," the Court noted, "the practical effect of the Order will be to reduce settlement rates charged by foreign carriers." *Id.* at 1230. "But the Commission does not exceed its authority simply because a regulatory action has extraterritorial consequences" that affect carriers and services beyond its jurisdiction. *Ibid.* The Court stressed that "no canon of administrative law requires us to view the regulatory scope of agency actions in terms of their practical or even foreseeable effects." *Ibid.*[18] Like the regulation in *Cable & Wireless*, the ban on regulated cable operators' execution or enforcement of exclusive access agreements that hinder the competitive provision of satellite cable and broadcast programming to consumers is not rendered *ultra vires* by its indirect effects on unregulated entities.

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[18] *See also FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 794 (1978) (rejecting argument that FCC could not restrict newspaper/broadcast cross-ownership because it had no authority over newspaper industry); *Ambassador, Inc. v. U.S.*, 325 U.S. 317, 323-24 (1945) (upholding tariff regulation for hotel telephone rates that prohibited hotel from charging patrons fees beyond the telephone company's tariffed rate, explaining that while "the regulation will necessarily affect * * * third party relationships," that result "is not invalid per se").

II. The Commission's *Order* Is The Product of Reasoned Decisionmaking

A. The Commission's Decision To Prohibit Cable Operators From Executing Or Enforcing Exclusive Access Provisions Was Reasonable And Supported By The Administrative Record

Citing a lack of record evidence in 2003, the Commission declined to prohibit exclusive access provisions at that time. *See 2003 Inside Wiring Order* ¶¶ 4, 68, 69, 71. Nowhere in the *2003 Inside Wiring Order*, however, did the Commission endorse or advocate the use of exclusive access provisions. Nevertheless, from that 2003 decision, NCTA argues that the *Order* on review is arbitrary and capricious despite the passage of four years and the introduction of evidence missing in 2003. There is nothing arbitrary in the Commission's decision to reevaluate an earlier position. This Court has counseled that an "agency must always stand ready 'to hear new argument' and 'to reexamine the basic propositions' undergirding [a] policy." *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993) (quotation marks omitted) (citing *McLouth Steel Products Corp. v. Thomas,* 838 F.2d 1317, 1321 (D.C. Cir.1988)); *FCC v. WNCN Listeners Guild,* 450 U.S. 582, 603 (1981). "A change in policy is not arbitrary or capricious merely because it alters the current state of affairs. The Commission is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest, if it gives a reasoned explanation for the revision." *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997) (citations omitted).

NCTA's claim that the FCC's *Order* (issued in 2007) was an unjustified reversal of its findings in 2003 is unfounded. As an initial matter, NCTA vastly overstates the FCC's conclusions in the *2003 Inside Wiring Order.* The FCC did not conclude that the existence of competition definitively precluded the need for regulation, but instead merely declined to forbid exclusive access provisions based on an inconclusive record. *See 2003 Inside Wiring Order* ¶ 60 ("we find that the record is inconclusive * * * "); *id.* ¶ 68 ("we do not find a sufficient basis in this record to ban or cap the term of exclusive contracts"); *id* ¶ 69 ("The record does not indicate the extent to which exclusive contracts have been utilized, and, more importantly, does not demonstrate that such contracts have thwarted alternative providers' entrance into the MDU market, so as to warrant imposition of limits on such contracts."); *id* ¶ 71 ("In sum, we find that the record does not support a prohibition on exclusive contracts for video services in MDUs, nor a time limit, in the nature of a cap, for such contracts."); *id* ¶ 72 ("Nonetheless, the record does not demonstrate the existence of widespread perpetual contracts nor support the need for government interference at this time.").

The evidence that was missing from the 2003 record was present in the one compiled in 2007. Where in 2003 the record was inconclusive as to "the extent to which exclusive contracts have been utilized," and did "not demonstrate that such contracts have thwarted * * * entrance into the MDU market,"[19] in 2007, a substantial record from a broad cross-section of commenters indicated that exclusive access provisions are now widely used by incumbent cable operators, increasingly in response to prospective entry by LECs into the video marketplace, and that such provisions are operating to restrict access to potential customers and to limit the development of competition. *Order* ¶¶ 10, 13, 15 (J.A.). Large LECs, such as AT&T, informed the Commission that incumbent cable operators had "recently sought to increase their use of exclusive access contracts, especially in response to the threat of entry by wireline video entrants," and that "efforts to lock-up MDUs have occurred in California, Texas, and virtually

[19] *2003 Inside Wiring Order* ¶ 69; *see Order* ¶ 5 n.10 (J.A.).

every market where AT&T has begun to enter the video service market." AT&T Comments at 9, 10 (J.A.). *See also* Verizon Comments at 1-2 (J.A.) (noting that many exclusivity provisions "have been entered into recently – indicating that incumbent providers are resorting to exclusive access arrangements as a means of 'locking up' [MDUs] immediately prior to the entry of a new competitor"). The City of Lafayette, Louisiana concurred that "[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." Lafayette Utilities System Comments at 9 (J.A.).[20] And SureWest Communications, a smaller provider, told the Commission that "at least *28 percent* of [the MDUs it passes] * * * are locked into [some form of] exclusive service contracts" and that "the total of 'locked-up' MDU units passed could be as high as 59 percent." SureWest Comments at 3 (J.A.).[21] In light of these and other additions to the record in 2007, the Commission was justified in prohibiting MVPDs from employing exclusive access provisions, and the Commission gave a reasoned explanation for its policy change based on record evidence that the MVPD market had changed since 2003. *See Order* ¶¶ 5, 13, 15 (J.A.); *see generally id.* ¶¶ 16-39 (J.A.).

NCTA seeks to present the four years between the *2003 Inside Wiring Order* and the *Order* on review as too short a period of time to justify what it considers to be the Commission's

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[20] While NCTA claims that cable operators "obviously have no greater notice than MDU owners as to when and where a new MVPD plans to enter a particular geographic area," NCTA Br. 35, it is not difficult to believe that an incumbent cable operator, which has a preexisting relationship with an LFA, would have greater access to information about the plans of prospective new entrants and would be following more closely developments in the local MVPD market than would MDU owners.

[21] *See also* Letter from Jeffrey Gee, counsel for SureWest, to FCC Secretary (May 16, 2007) (J.A.); Letter from Leona Hockstein, Verizon, to FCC Secretary (MB Docket No. 05-311, but cited at NPRM ¶ 5 n.19 (J.A.)), at 3 (July 6, 2006) (J.A.).

reversal of course. NCTA Br. 29-41. But four years is a significant period of time, and the four years between 2003 and 2007 were an especially important time in the rapidly evolving video industry. Since 2003, a number of "LECs and other wire-based providers have begun entering the video service business on a large scale." *Order* ¶ 13 (J.A.). Moreover, the number of consumers taking advantage of high speed broadband services and correspondingly the prevalence of bundling of services – the so-called "triple play" package of voice, video, and data – increased dramatically between 2003 and 2007, making it more critical than ever that new video entrants providing the "triple play" be on a level playing field in their ability to offer these services. *Id.* ¶¶ 20-21, 26 (J.A.). The record also contained evidence from a number of participants in the rulemaking showing that between 2003 and 2007 and "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." *Id.* ¶ 15 (J.A.). *See* AT&T Comments at 9-10 (J.A.); Verizon Comments at 1-2 (J.A.); Lafayette Utilities Comments at 9 (J.A.).

(1) The Commission's Conclusions In The *2003 Inside Wiring Order* Pose No Conflict With The Commission's Decision In The *Order* To Prohibit Exclusive Access Agreements On A New Record

NCTA argues that, central to the Commission's decision not to regulate exclusive access agreements in 2003, was its finding that the record "does not demonstrate that [exclusive MDU] contracts have thwarted alternative providers' entrance into the MDU market." NCTA Br. 30. NCTA contends that the very metric that the Commission found dispositive in 2003 – the percentage of subscribers receiving service from franchised cable operators – had continued to decline from 76.5% in 2002 to only 67% by the end of 2006. *Id.* at 31.

As an initial matter, although cable operators' overall market share declined somewhat since 2003, incumbent cable operators in 2007 were "still by far the dominant force in the MVPD business * * * and [had] the ability to impose steadily rising prices." *Order* ¶ 32 (J.A.). More importantly, however, NCTA overstates the conclusions in the *2003 Inside Wiring Order*. In 2003, the FCC noted only that a decline in cable operators' market share *may* signify that new entrants were not barred from competing in the MVPD market. *2003 Inside Wiring Order* ¶ 69. That conclusion from 2003 poses no necessary conflict with the Commission's finding in the *Order* that even as new players seek to enter the video marketplace, competitive choice may not reach all consumers, including, of course, consumers in MDUs subject to exclusive access provisions. *Order* ¶ 17 (J.A.) ("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.").[22] In this regard, the Commission explained that changed competitive circumstances in the video marketplace (including the entry of wireline

[22] Hargray CATV, Inc., for example, presented striking evidence of this conclusion. Its entry into the video market in Hilton Head Island, South Carolina did little for the overwhelming number of residents of that franchise area because of the simple fact that more than approximately 80% of the franchise area resided within private communities locked up in decades-old exclusive access agreements currently owned by Time Warner. Indeed, a number of these agreements were allegedly perpetual in duration. *See Order* ¶ 10 & nn. 33-34 (J.A.) (citing Letter from David Armistead, Hargray CATV Inc., to FCC Secretary, at 1-5 (October 12, 2007) ("Hargray October 12 Letter") (J.A.); Letter from Brian Pitts, counsel for Palmetto Dunes Property Owners Ass'n, to FCC Secretary, at 1-2 (October 19, 2007) (J.A.); Letter from David Armistead to FCC Secretary (October 24, 2007) (J.A.)).

telephone companies and other providers on a large scale and the development of triple play offerings), had led "incumbent cable operators [to] increase[] the use of exclusivity clauses," causing "an important loss of potential competition within MDUs." *Order* ¶¶ 13-15 (J.A.). The result was a bifurcated market, subject to increasing competition from some providers outside MDUs but declining competition within. Moreover, the Commission found, even in areas (outside MDUs) where competition had increased, the fact that many MDU customers had been locked up may have dampened competition from levels that otherwise would have developed. *See Order* ¶ 13 (J.A.) (finding that "[e]xclusivity clauses may * * * 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"). This reasonable analysis, on a new record, poses no arbitrary conflict with the discussion of market share in the *2003 Inside Wiring Order*.

NCTA also contends that the Commission's finding in the *Order* that MDU owners are sometimes unwilling or unable to represent the best interests of their residents is an unsupported reversal from the agency's prior findings in the *2003 Inside Wiring Order*. NCTA Br. 38-39. But, once again, NCTA overstates the FCC's findings in 2003. Based on the record then before it, the FCC stated only that it believed that "market forces will, in most cases, provide incentives for MDU owners to recognize tenants' interests in selecting a provider." *2003 Inside Wiring Order* ¶ 15. The new record before the agency in 2007, however, showed that many of the exclusive access provisions at issue were entered into prior to the development of new video distribution technologies and wireline alternatives. The interests of MDU owners then and now are considerably different. *See Order* ¶¶ 22-23 (J.A.). In fact, the new record showed that many exclusive access provisions are decades old. *See* Hargray October 12 Letter at Exh. 2 (copies of license agreements including exclusive access provisions dating from 1976, 1978, and

1988) (J.A.). And the record indicated that exclusive access agreements are often entered between property developers and cable companies and then assigned to the later owners of the MDUs. *Id.* (copies of license agreements entered into between developers and cable operator).[23] It was reasonable for the FCC, on the 2007 record, to determine that the interests of long-gone developers and later residents can be considerably different. *See Order* ¶¶ 22-23, 28 (J.A.).

NCTA also contends that the Commission's reliance in the *Order* on developing competition for "triple play" services as a reason to prohibit exclusive access provisions was inconsistent with the agency's finding in the *2003 Inside Wiring Order* that triple-play service was already available at that time and that the competition created by "new entrants * * * offering bundled video, telephony, and data services" was a reason not to regulate. NCTA Br. 39. There is no conflict. While in 2003 the FCC noted that new entrants had "begun to compete with incumbent providers" through bundled offerings, *2003 Inside Wiring Order* ¶ 69, in general, "LEC involvement into the video market" at that time remained "lackluster."[24] By 2007, however, efforts to enter the market with triple play offerings had increased dramatically, and the FCC found evidence that exclusivity clauses had become a barrier to such efforts. *See Order* ¶ 26 (J.A.).

The FCC explained in the *Order* that new competitive entry by telephone companies was likely to result in increased deployment of competitive triple play bundles, including broadband services, and (as a consequence) that exclusivity clauses threatened greater competitive harm to

[23] *See also* Verizon Comments at 8 (J.A.); Manatee County Comments (MB Docket No. 05-311, but cited at *NPRM* ¶ 5 n.16 (J.A.)) at 12 (J.A.); Letter from Paul Feldman, counsel for SureWest, to FCC Secretary, Attachment at 1 (October 11, 2007) (J.A.).

[24] *Annual Assessment of the State of Competition in the Market for the Delivery of Video Programming*, Tenth Annual Report, 19 FCC Rcd 1606 (¶ 16) (2004).

consumers in the changing MVPD marketplace. *See Order* ¶ 19 (J.A.). That conclusion was consistent with the Commission's determination, in the *Local Franchising Order* (¶ 62) a year earlier, that "a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated." Exclusive access contracts, however, de-link video service and broadband networks for one competitor by prohibiting that competitor, but not the incumbent operator, from offering both. *Order* ¶ 21 (J.A.).[25] The Commission's analysis of how consumers are harmed by exclusivity provisions when they result in less competitive triple play offerings is exactly the type of cost-benefit analysis "most appropriately entrusted to the [FCC's] expertise." *Charter Communications, Inc. v. FCC*, 460 F.3d 31, 42 (D.C. Cir. 2006).

(2) The Commission Gave Due Consideration To The Alleged Benefits Of Exclusive Access Agreements

The MDU petitioners contend that the FCC ignored the putative benefits of exclusive access agreements for MVPDs, MDU owners, and residents. MDU Br. 44-51. That claim is baseless. The Commission directly addressed the alleged benefits of exclusive access agreements – considering a number of factors promoted by more than a dozen different commenters and a number of comments, reply comments, and ex parte presentations from the

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[25] NCTA asserts that eliminating exclusive access agreements will not make triple play services more competitive, because the Commission's inside wiring rules would allow a successful MVPD competitor to gain control of the incumbent's wire to the customer. NCTA Br. 40. "The result," NCTA says, "will be that the competitor MVPD will be able to block the original MVPD from providing voice or Internet service over the wire, and consumers will be deprived of choice for those services." *Ibid.* The scenario NCTA posits, however, does not dampen triple play competition. Even if the MDU resident must choose one provider or the other for all three triple play services, the resident still has a choice for the first time. Exclusive access agreements deny residents that choice.

Real Access Alliance (the "RAA").[26] *See, e.g.*, *Order* ¶ 24 n.72 (J.A.) (citing RAA Comments); *id.* ¶ 24 n.73 (J.A.) (citing Letter from Matthew C. Ames, Esq., Miller & Van Eaton, P.L.L.C., counsel for RAA); *id.* ¶ 25 n.74 (J.A.) (citing RAA Comments); *id.* ¶ 25 n.76 (J.A.) (citing RAA Comments); *id.* ¶ 25 n.78 (J.A.) (citing RAA Comments).

In so doing, the Commission specifically considered RAA's argument that exclusivity provisions are necessary to allow certain buildings to attract investment from cable providers. *See Order* ¶ 24 (J.A.) ("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."); *id.* ("Similarly, some commenters claim that exclusivity clauses are especially necessary to attract investment in marginally attractive MDUs."); *id.* ¶ 25 (J.A.) ("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."). While the Commission did not reference RAA's use of the phrase "cost allocation," it is clear from the *Order* that the agency considered the utility of allowing cable operators to include exclusivity provisions in the mix of contract terms that they could offer to MDU owners, and also considered the alleged benefits that exclusivity agreements could offer for "marginal" buildings looking to attract capital investment from cable providers. *Order* ¶¶ 24-25, 28-29 (J.A.). Ultimately, the Commission rejected these arguments on the merits – finding (among other things) that there was no persuasive evidence that MDU-related cable

[26] The RAA was closely aligned with the MDU petitioners before the Commission (counsel for the petitioners was counsel to the RAA below), and it is the RAA's comments that petitioners claim the Commission ignored. *See* MDU Br. 45-51.

investment was lower than elsewhere in the significant number of states that have laws already prohibiting exclusive access provisions, *Order* ¶ 28 (J.A.),[27] and determining that, on this record, the potential benefits of permitting exclusivity arrangements are outweighed by their considerable negative effects, *id.* ¶¶ 26-29 (J.A.). That is all that is required; the agency is under no obligation individually to cite each set of comments, or to reference the particular language employed by specific commenters.[28]

There also is no merit to the MDU petitioners' claim (Br. 49-51) that the agency unlawfully ignored record evidence submitted by the RAA that MDU owners can and do protect the best interests of their residents. In fact, the Commission considered the position, reflected in RAA's comments, that exclusive contracts were often part of a negotiated process between MDU owners and cable operators. *See Order* ¶ 12 (J.A.) ("Some commenters state that a MDU owner can bargain for good service, low prices, and other concessions in exchange for exclusives.") (citing as examples, Comments by the American Cable Association and Comcast); *see also id.* ¶ 26 (J.A.) ("Indeed, Charter claims that exclusivity clauses appear not because of cable operators' market power, but because of MDU owners' power over cable operators needing access to their MDUs.").[29] However, the Commission also considered the evidence

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[27] By NCTA's own account (Br. 3 n.5), there are 18 such states.

[28] *See City of Portland v. EPA*, 507 F.3d 706, 714 (D.C. Cir. 2007) ("[T]he agency's response to public comments need only enable us to see what major issues of policy were ventilated * * * and why the agency reacted to them as it did.") (internal quotations omitted); *United States Satellite Broadcasting Co. v. FCC*, 740 F.2d 1177, 1188 (D.C. Cir. 1984) ("In notice and comment rulemaking, an agency need not respond to every comment so long as it responds in a reasoned manner to significant comments received.") (citation omitted).

29 The MDU petitioners assert (Br. 51-53) that the Commission arbitrarily misrepresented the record when it quoted (*Order* ¶ 19 n.56 (J.A.)) the RAA's statement that "some property owners might welcome the opportunity to void some existing contracts to introduce competitors for new services." There is nothing inappropriate about the Commission's quote from the

submitted by other parties showing that that many exclusive access provisions were entered into (often by developers, not present-day managers) when cable service in an area was limited to a single provider and before the development of competitive technologies offered by LECs and other video providers. *See id.* ¶ 12 (J.A.) ("[M]any 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."); *id.* ¶ 23 (J.A.) ("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.").

After considering the evidence, and based on a careful review of the record (including comments filed by the RAA), the Commission rejected the MDU owners' position that exclusivity clauses mostly work to the benefit of MDU owners and residents, citing seven factors:

> *First*, * * * 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

RAA's comments. The *Order* does not state that the RAA supported the prohibition on exclusive access agreements that the Commission adopted. Rather, the excerpt simply reports what the RAA itself concedes: that exclusive access provisions prevent new entrants into an MDU from offering new services, and that some MDU owners might want to allow these entrants but for exclusive access provisions.

> 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.

Id. ¶ 28 (J.A.) (footnotes omitted) (emphasis added).

In light of these factors, the Commission found that "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." *Ibid.* It certainly did not outweigh the documented harms – including that they "bar new entry and competition for both MVPD services and * * * 'triple play'" offerings – caused by exclusive access contracts. *Order* ¶ 16 (J.A.). That careful weighing of the evidence is entitled to this Court's deference. *Astroline Comm'cns Co. Ltd. P'ship v. FCC*, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988) ("[T]he Commission 'may determine how much weight to accord disputed facts based on the record before it.'") (quoting *Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987)); *Z-Tel Comm'cns, Inc. v. FCC*, 333 F.3d 262, 271-72 (D.C. Cir. 2003) ("The Commission has considerable discretion in weighing the evidence before it.") (citing *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000)).

(3) The Commission Did Not Unlawfully Ignore Regulatory Alternatives

The MDU petitioners contend that the Commission arbitrarily failed to consider regulatory alternatives that were presented to it. In particular, petitioners assert that the RAA suggested below that the agency consider steps to promote MDU owner installation of advanced wiring systems that can be used by multiple providers, and consider requiring service providers that install wiring inside buildings to make such wiring available to competitors. The MDU petitioners assert that the Commission did not reject these proposals, but arbitrarily failed to mention them. MDU Br. 58-59.

This claim presents no basis for finding legal error. The purpose of the rulemaking that resulted in the *Order* on review was to consider whether the Commission should prohibit the use by cable operators of exclusive access provisions in cable agreements. *See NPRM* ¶ 1 (J.A.). By contrast, inside wiring questions, such as those presented by the RAA's "alternatives," have been handled in other proceedings.[30] The Commission was justified in disregarding commentary not within the scope of the proceeding. *Biggerstaff v. FCC*, 511 F.3d 178, 186 (D.C. Cir. 2007) (dismissing challenge to a prior administrative exemption as outside the scope of the applicable rulemaking); *Central Texas Tel. Co-op., Inc. v. FCC*, 402 F.3d 205, 257-58 (D.C. Cir. 2005) (recognizing FCC authority to refrain from considering issues "outside the scope" of the order).[31]

The MDU petitioners also contend that rather than adopting a national ban on exclusive access clauses, the Commission should have applied the individual complaint process set out in section 628(d). That provision, petitioners note, authorizes aggrieved providers to commence adjudicatory proceedings before the Commission, while section 628(e) establishes remedies for violations and section 628(f) directs the Commission to adopt procedural rules governing such

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[30] *See In re Telecommunications Services Inside Wiring, Customer Premises Equipment and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, 18 FCC Rcd 1342 (2003), *remanded in part*, *NCTA v. FCC*, 89 Fed. Appx. 743 (D.C. Cir. 2004); *on remand*, 22 FCC Rcd 10640 (2007), *petition for review pending*, *NCTA v. FCC*, No. 07-1356 (D.C. Circuit filed Sept. 7, 2007)).

[31] Moreover, the RAA did not, and the MDU petitioners do not, explain why inside wiring rules are relevant if cable operators would be able to continue using exclusive access agreements to prohibit an MVPD from offering competing video services. Shared wiring means little for video delivery if an exclusive access agreement compels an MDU owner to permit only one competitor to deliver video.

complaints. Petitioners contend that, "[a]ssuming *arguendo* that exclusivity clauses fall within the ambit of [s]ection 628 in the first place," the *Order* arbitrarily ignored this process in favor of a regime that artificially collapses separate statutory inquiries into whether exclusive access agreements are *both* (1) unfair methods of competition *and* (2) practices that significantly hinder or prevent the provision of satellite programming, into a single rule that assumes the former from the latter. MDU Br. 53-58. That claim is insubstantial.

As an initial matter, the Commission did not simply assume that any practice that hinders the provision of satellite programming necessarily is unfair. Rather, the Commission found, on the record before it, that exclusive access provisions are unfair "when used in current market conditions by incumbent cable operators." *Order* ¶ 26 (J.A.). Those conditions included, among other things, the fact that "a significant percentage of consumers live in MDUs," that incumbent cable operators "have increased their use of exclusivity clauses" in the face of prospective entry by new competitors, and that the effect of such clauses is to prevent new MVPDs from competing for MDU residents and to deny such residents the opportunity to choose among providers. *Id.* ¶ 27 (J.A.).

Moreover, the agency was entirely justified in reaching this determination through rulemaking and in expressly rejecting a case-by-case adjudicatory approach. *Order* ¶ 38 (J.A.). It is a long-standing principle of administrative law that the decision to proceed through a generalized rulemaking rather than individualized adjudications is within the delegated discretion of the Commission. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."); *accord Nat'l Small Shipments Traffic Conference, Inc. v. I.C.C.*, 725 F.2d 1442, 1447 (D.C. Cir. 1984) (citing *Chenery*, 332 U.S. at

203) ("It is hornbook administrative law that the choice of proceeding by individual adjudication or general rulemaking lies largely within the agency's discretion."). As pertinent here, the Commission found that the use by cable operators of exclusive access provisions is "widespread" and that such agreements bar new entrants "on a large scale." *Order* ¶ 10 (J.A.). Moreover, contrary to the MDU petitioners' arguments, insofar as section 628 is concerned, all of the exclusive access provisions covered by the *Order are* alike in one important respect: they prohibit MVPDs from offering satellite cable and broadcast programming to consumers in the MDU covered by the agreement. A case-by-case adjudicatory approach in these circumstances would have been burdensome without producing offsetting benefits, and the Commission quite reasonably opted for a prophylactic rule. *Id.* ¶ 38 (J.A.). *See generally Star Wireless, LLC v. FCC*, 522 F.3d 469, 475 (D.C. Cir. 2008) ("general bright-line prophylactic measures" are "appropriate when 'the probability of abuse * * * is significant enough that it is more efficient to prevent the opportunity for abuse from arising than it is to try to detect actual incidents of abuse'") (*quoting Biloxi Reg'l Med. Ctr. v. Bowen*, 835 F.2d 345, 350 (D.C. Cir. 1987)).

At the same time, MDU owners remain free to tailor their relationships with MVPDs to their individual circumstances in situations outside the scope of the *Order*'s narrow proscription. An MDU owner still possesses (subject to state law) the unilateral right to exclude an MVPD from servicing its MDU, *Order* ¶ 37 (J.A.), and is not prevented from entering into binding contracts with cable operators regarding wire and marketing exclusivity, *id.* ¶¶ 1 n.2, 57 (J.A.). Moreover, even in those cases in which the MDU owner has entered into contracts with exclusive access agreements, nothing in the *Order* bars the parties from continuing to enforce the other terms of the contract. In particular, the Commission's *Order* does not abrogate existing contracts; it simply renders a single type of contractual provision in these agreements unenforceable as contrary to public policy.

It is black-letter contract law that, as a general rule, "[i]f less than all of an agreement is unenforceable [as a matter of public policy], a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange." Restatement (Second) of Contracts § 184(1) (1981). Under that principle, for example, "a promise not to compete that is unreasonably in restraint of trade will often not invalidate the entire agreement of which it is a part." *Id.* at cmt. a. And reinforcing that principle, the record before the FCC showed that many contracts containing exclusivity provisions also include severability clauses expressly providing that the remainder of the contract would remain in force even if a provision becomes unenforceable. *See Order* ¶ 37 & n.112 (J.A.). The Commission's decision to adopt a prophylactic rule directed narrowly to provisions that would entirely preclude the competitive provision of wireline video services in MDUs was hardly the ill-considered or "extreme" action the MDU petitioners attempt to depict. MDU Br. 56.

B. The Commission's Decision To Prohibit Enforcement of Existing Exclusive Access Provisions Was Not Unlawfully Retroactive

The *Order* prohibits the use of exclusive access provisions in contracts between cable operators and MDU owners and prohibits the enforcement of such provisions in current contracts. In applying the prohibition to existing as well as future provisions, the Commission explained that "[b]oth have the same competition- and broadband-deterring effect that harms consumers." *Order* ¶ 35 (J.A.). Moreover, because "[a] rule that left exclusivity clauses in effect would allow the vast majority of the harms caused by such clauses to continue for years," the agency determined that it "was strongly in the public interest to prohibit such clauses from being enforced." *Ibid.*

NCTA argues that the prohibition on enforcement of existing exclusive access provisions constitutes an unlawful "retroactive rule" in a "direct [as opposed to secondary] sense" because it "'impairs rights' that cable operators possessed when they signed exclusivity agreements." NCTA Br. 42 (quoting *DirecTV, Inc. v. FCC*, 110 F.3d at 825-26). NCTA further contends, as a fallback, that "the *Order* certainly imposes a 'secondarily retroactive' effect" that allegedly fails under standards of reasoned decisionmaking. NCTA Br. 43 (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring)). The Court should reject these claims.

As an initial matter, NCTA does not appear to argue that regulating the terms of existing contracts is beyond the Commission's authority under section 628 itself. Such an argument would be foreclosed by the provision's structure. Because section 628(h) expressly contemplates that rules defining prohibited "acts or practices" under section 628(b) will apply to existing contracts,[32] the *Order*'s prohibition on enforcement of existing exclusive access provisions is clearly authorized.

Ignoring section 628 itself, NCTA contends that the Commission's rule is directly retroactive in violation of general principles of administrative law. Under well-established retroactivity principles, however, the *Order* is not directly retroactive because it does not alter

[32] In section 628(h), Congress provided a limited "exemption" from the prohibitions of subsection (b) for "prior contracts" that satisfied two criteria: (1) as to substance, the contract "grant[ed] exclusive distribution rights to any person with respect to satellite cable programming," and (2) as to time, the contracts must have been "entered into on or before June 1, 1990." 47 U.S.C. § 548(h)(1). In all other circumstances, Congress plainly contemplated that the Commission had authority to prohibit cable operators from enforcing existing contracts that violate the requirements of section 628(b). Otherwise, the limited grandfathering carved out in section 628(h) would have been unnecessary.

the *past* legal status of exclusive access provisions. It does not, for example, allow competitive entrants to sue incumbent providers for damages for having previously enforced existing agreements or allow the Commission to take adjudicatory action against cable operators for having enforced such clauses before the effective date of the *Order*. Rather, it merely adjusts obligations prospectively: exclusivity clauses that were fully enforceable before the *Order* are no longer enforceable after the *Order*. As this Court recently held:

> Retroactive rules 'alter[ ] the past legal consequences of past actions.' Bowen v. Georgetown University Hospital, 488 U.S. 204, 219 (1988) (Scalia, J., concurring) (emphasis in original). However, an agency order that 'alters the future effect, not the past legal consequences' of an action, *Sinclair Broad. Group v. FCC*, 284 F.3d 148, 166 (D.C. Cir. 2002), or that 'upsets expectations based on prior law,' DIRECTV, Inc. v. FCC, 110 F.3d 816, 826 (D.C. Cir.1997) (quotation omitted), is not retroactive.

Mobile Relay Associates v. FCC, 457 F.3d at 11 (emphasis added).

NCTA's contrary suggestion notwithstanding (Br. 43), this analysis applies in cases involving existing contract rights, as in other circumstances. Indeed, this Court has directly rejected claims that rule changes that bar future enforcement of existing contracts are directly retroactive. In *Sinclair Broad. Group, Inc.*, 284 F.3d 148, the Commission adopted local ownership restrictions for television broadcasters that effectively barred future enforcement of certain existing local marketing agreements ("LMAs") between broadcast licensees. When an affected broadcaster challenged the rule as "impermissibly retroactive" with respect to existing LMAs, this Court rejected the claim because the new rule "di[d] not either alter the past legality of LMAs or impose any liability for having engaged in LMAs that now constitute an impermissible duopoly or introduce any retrospective duties for past conduct." *Sinclair*, 284

F.3d at 166.[33] The same analysis applies with respect to NCTA's retroactivity argument here: Barring *future* enforcement of existing exclusive access agreements is not directly retroactive, because it neither alters the past legality of such provisions, nor imposes any retrospective duties or liabilities in connection with past enforcement of such provisions.

Nor does the *Order* impose unreasonable "secondary retroactivity" judged under the rubric of "arbitrary and capricious" review. *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 589 (D.C. Cir. 2001). As the Commission stressed in the *Order*, the agency has well-established "authority to prohibit the enforcement" on a going forward basis of contracts that violate its lawful assessment of the public interest under the Communications Act. *Order* ¶ 55 & n.176 (J.A.) (citing *BellSouth Telecom, Inc. v. MCImetro Access Transmission Servs., LLC*, 425 F.3d 964, 969-70 (11th Cir. 2005); *Western Union Tel. Co. v. FCC*, 815 F.2d 1501 (D.C. Cir. 1987)).[34] Moreover, as noted above, section 628 itself clearly contemplates that, with the narrow exceptions set out in subsection (h), rules defining prohibited "acts or practices" under section

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[33] *See also McAndrews v. Fleet Bank of Massachusetts*, 989 F.2d 13, 16-17 (1st Cir. 1993) (law that rendered unenforceable an "escape clause" in a pre-existing real estate lease held not to be retroactive).

[34] *See also Monongahela Power Co. v. FCC*, 655 F.2d 1254, 1256-57 (D.C. Cir. 1981) (holding that the Communications Act's grant of authority to the FCC to ensure that "rates, terms, and conditions for pole attachments" are "just and reasonable" necessarily included the power to apply regulations prospectively to existing contracts).

628(b) will be applied to existing contracts. *See Order* ¶ 55 (J.A.).[35] Indeed, application of the *Order* to current contracts most faithfully carries out Congressional policy that makes it "unlawful for a cable operator * * * to engage in unfair methods of competition." 47 U.S.C. § 548(b). Absent compelling circumstances, permitting cable operators to continue engaging in an unfair and unlawful practice merely because it is enshrined in a contract would defeat Congressional design. Doing so would mean that many MDU residents would remain locked in to exclusivity clauses – some of which were executed at a time when there was not cable competition – for years, or even in perpetuity. *See Order* ¶ 10 (J.A.) (discussing exclusivity clauses in record that "typically last between five and 15 years, often with automatic renewal, or are perpetual"); *id.* ¶¶ 12, 38 (J.A.).

Balanced against the public policy concerns supporting the application of the prohibition to existing agreements and Congressional intent to the same effect, NCTA's claims of detrimental reliance are insubstantial. *See* NCTA Br. 44-50. NCTA contends that any ongoing uncertainty regarding the legality of exclusive access provisions was conclusively resolved by the *2003 Inside Wiring Order.* According to NCTA, its members justifiably relied on that order to make substantial investments they would not otherwise have made, and they suggest that such

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[35] The Commission has previously recognized and used its power under section 628 to prohibit future enforcement of existing contracts. In the First Report and Order implementing section 628, the Commission expressly noted that "the rules we adopt today will apply prospectively to existing contracts and to contracts executed after the effective date of the rules." *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, 3365 (1993). On reconsideration, the Commission affirmed its position, stressing that "given the long-term nature of many programming agreements, [applying the rule only to new contracts] would delay for an unacceptable length of time the relief expected from the program access rules." *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 Development of Competition and Diversity in Video Programming Distribution and Carriage*, 10 FCC Rcd 1902, 1941 (1994).

investment will be rendered "worthless." NCTA Br. 43 (citing *Bowen*, 488 U.S. at 220 (Scalia, J., concurring); *see also id.* at 45-47.

NCTA's claim of reliance on the *2003 Inside Wiring Order*, however, ignores completely other relevant regulatory developments, such as the fact that "exclusivity clauses in MDU contracts have been under active scrutiny [at the Commission] for over a decade," the fact that the agency previously had "prohibited the enforcement of such clauses in similar contexts [involving commercial telecommunications services in multiple tenant environments]," and the fact that a number of states also had "taken action to prohibit" cable/MDU exclusivity clauses. *Order* ¶ 58 (J.A.). NCTA's claims of "worthless" investment are also unsubstantiated and likely exaggerated. Nothing in the *Order* prevents MDU owners from choosing to continue excluding other providers, or bars incumbents from continuing to enforce other (*e.g.*, wire or marketing) exclusivity provisions that may provide them with some competitive advantage over new entrants. *Order* ¶ 57 (J.A.). Even if MDU owners allow new entrants to compete for subscribers in their units, "[n]othing in the rule precludes [the incumbent cable operators] from utilizing the wires they own to [continue to] provide services to MDUs or requires them to jettison capitalized investments" in such circumstances. *Ibid.*[36] Incumbents continue to have every opportunity to retain their customers if they provide a better product.

NCTA's claimed reasonable reliance on a continued right to enforce exclusive access agreements is also contradicted by the plain terms of the *2003 Inside Wiring Order*, which as demonstrated above, spoke only of a lack of evidence in the record and did not endorse exclusive

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[36] This discussion in the *Order* belies NCTA's contention that the Commission did not address cable operators' investments in justifying its decision to prohibit enforcement of existing exclusivity clauses. *See* NCTA Br. 14.

access provisions on the merits. The Commission in that order repeatedly attributed its decision not to regulate exclusive contracts to the state of the record before it, implicitly suggesting that a different record at a later time could lead to a different result. It seems highly unlikely that sophisticated regulated entities such as NCTA's members would have believed that the *2003 Inside Wiring Order* had forever validated exclusive contracts with MDUs.

Finally, NCTA's claim to investment reliance fails in light of the Commission's conclusion that there was "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," *id.* ¶ 28 (J.A.). The *Order*'s secondary retroactive effects, if any, are not unreasonable.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

Respectfully submitted,

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July 25, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL CABLE & TELECOMMUNICATIONS Association, et al., PETITIONERS, v. FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA RESPONDENTS.	)	NO. 08-1016 & 08-1017

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Appellee" in the captioned case contains 17025 words.

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National Cable & Telecommunications Association, Petitioner,

v.

Federal Communcations Commission and USA, Respondents.

Certificate Of Service

I, Tamika S. Parker, hereby certify that the foregoing typewritten "Brief For Respondents" was served this 25th day of July, 2008, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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