In the Matter of

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

MB Docket No. 07-51

COMMENTS OF THE COMMUNITY ASSOCIATIONS INSTITUTE

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Summary

The Community Associations Institute (“CAI”) opposes Commission regulation of exclusive contracts related to the provision of video services in multiple dwelling unit communities and other real estate developments. Such regulation would deprive community associations of a valuable tool in ensuring that their members have access to the kinds of services they want, and would exceed the Commission’s authority. The Commission has recognized in the past that exclusive agreements can help advance competition. This remains true today, and the Commission should not change its policy.

Community associations are democratically-governed organizations. Regardless of their legal form – condominium, cooperative, or planned unit development – community associations are governed by and responsible to their members. Because community associations respond to the needs of their members, Commission regulation of their agreements is neither necessary nor desirable.

In addition, community associations depend on their ability to enter into exclusive contracts in order to obtain a variety of benefits for their members. Without exclusivity, video programming providers are often unwilling to assume the cost of meeting an association’s needs. For example, community associations can currently negotiate agreements in which they pay a bulk rate for service, giving members the benefit of a reduced price. Agreements with video programming providers also often contain quality of service commitments designed to ensure high-quality service to association residents. Such agreements also may provide for specific services tailored to the needs of the community, such as particular programming packages and community channels. Finally, service providers may require insist on exclusivity as a condition of upgrading their facilities in a community.
More fundamentally, the Commission has no power to regulate agreements between community associations and video programming providers. The Commission’s jurisdiction is limited by the terms of Sections 1 and 2 of the Communications Act, which do not refer to community associations or the management of residential communities. The courts have repeatedly found that the Commission must be able to point to express authority over a subject if it is to regulate the activities of entities that are not engaged in the provision of communications services, such as community associations. Section 207 of the Communications Act, for example, expressly directed the Commission to adopt rules preempting restrictions on the installation of direct broadcast satellite antennas. Congress has not adopted any statute analogous to Section 207 that would allow it to regulate any kinds of contracts between community associations and video programming providers.

The Notice of Proposed Rulemaking points to various statutes for authority, including Sections 623 and 628 of the Communications Act and Section 706 of the Telecommunications Act of 1996, but none of those statutes expressly directs the Commission to regulate any kind of agreement between a community association and a video programming provider. Furthermore, the Commissions’ ancillary jurisdiction does not extend to entities that are not engaged in the communications business. The purpose of ancillary jurisdiction is to fill in gaps in the Commission’s statutory authority, not to expand its authority to unregulated entities. The Commission has no ancillary authority in this case.

CAI urges the Commission to recognize its past wisdom, and once again refrain from attempting to regulate agreements between community associations and providers of video programming.
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COMMENTS OF THE COMMUNITY ASSOCIATIONS INSTITUTE

Introduction

The Community Associations Institute ("CAI")\(^1\) respectfully submits these Comments in response to the Commission’s Notice of Proposed Rulemaking (the “NPRM”) soliciting comment on the need for regulation of “exclusive contracts for the provision of video services to multiple dwelling units or other real estate developments.”\(^2\) CAI opposes such regulation as an unnecessary intrusion into the property rights of community associations and their members. As democratically-governed organizations, community associations act in the best interests of their members and respond to their concerns. Individual community associations are in a far better

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\(^1\) CAI was created to educate and represent America’s residential community association industry. CAI’s members include condominium and homeowner associations, cooperatives, and association-governed planned communities of all sizes and architectural types; community association managers and management firms; individual homeowners; lawyers, accountants, engineers, builders/developers and other providers of professional services and products for community associations. CAI has nearly 29,000 members in 55 chapters throughout the United States and in several foreign countries.

\(^2\) NPRM at ¶ 1.
position to address their own needs than any national regulatory scheme could ever be. In addition, the Commission has no legal authority over such agreements. Finally, the Commission has already found that such agreements should not be regulated because they can be used to advance competition.\textsuperscript{3} Circumstances have not changed.

Accordingly, CAI urges the Commission to take no action that would alter or interfere with the ability of communications associations to enter into such agreements with any type of provider. CAI also urges the Commission to reject the notion that mandating the establishment of competitive options within individual buildings or community associations is necessarily the only or best option. A cable-telephone company duopoly would not represent true competition and the quality of service and other benefits available to many community associations would actually diminish. The Commission must allow community associations to make their own choices about how to manage their property and obtain access to the services their members want.

I. EXCLUSIVE AGREEMENTS BENEFIT COMMUNITY ASSOCIATIONS AND THEIR MEMBERS.

CAI opposes regulation of exclusive contracts because community associations need flexibility to respond to the needs of their members and other local circumstances. Not all community associations enter into agreements with communications service providers. Those that do not would gain no benefit from Commission regulation of such agreements, but those that do would lose a valuable right. Because community associations are democratically-governed

organizations, ultimately responsible to their members, the Commission should not interfere with their right to make their own decisions about how to obtain access to communications services.

CAI also notes that there are essentially three types of exclusive agreements: (1) exclusive access agreements; (2) exclusive marketing agreements; and (3) agreements giving exclusive rights to use wiring. CAI is primarily concerned with exclusive access agreements, because they are the most common type entered into by CAI members. Nevertheless, all three should be preserved.

A. Community Associations Respond to Residents’ Needs.

As democratically-governed organizations, community associations have strong incentives to seek the services their members desire. Like other consumers, community association members want advanced services, and ideally they want access to competitive services. But association members are also capable of making rational, informed decisions about how their communities should be run, which may entail making compromises and trade-offs.

There are three types of community associations: condominiums, cooperatives, and planned unit developments. Community associations vary throughout the nation in legal structure, size, architectural style, and other factors. In general, however, they share certain characteristics. Real property is divided into individually-owned property and common property by a developer’s declaration and by deed. Owners in a community association have limited ownership rights in common property, but exclusive ownership rights in individually-owned property. Through the declaration and deeds, owners are bound to covenants, rules, and restrictions, which regulate the use of individually-owned property, for the benefit of all. State laws typically require full disclosure of all such restrictions before a purchase can be completed.
Owners are also members of the community association, which operates the community and manages common property.

Condominiums are associations in which each individual unit owner owns a particular unit and has non-exclusive joint interest with all other co-owners in common property. Cooperatives are associations in which an owner has ownership of shares in a cooperative association. Share ownership entitles owners to a proprietary lease of an apartment, but the cooperative association actually owns all real property. In a planned community, each owner owns a unit, while the association owns all common property.

No matter what form an association takes, however, all the owners of an association are members of the association’s voting body. The owners are responsible for electing a board of directors to govern the association and provide for the health, safety and welfare of the residents while maintaining, protecting and preserving the common areas and the value of all property controlled by the association. Owners in an association may participate in its governance by seeking election to the board of directors, by voting for directors, and by participating in meetings and serving on committees. Thus, associations provide for democratic governance, and directors must respond to the membership if they desire to be reelected. Such matters as the amount of annual assessments and the budgetary expenditures such assessments support are important items of debate in many communities, as are rules concerning the use of common property.

Through these organizational structures and governance procedures, association members can make their policy preferences known. If access to competitive services is paramount to the membership of an association, the boards of directors will become aware of that desire. Conversely, if other benefits are more important, the board of directors will know that as well.
In their case, the Commission should continue to allow community associations the flexibility to make their own policy decisions.

B. Community Associations Depend on Exclusive Access Rights In Order To Obtain Bulk Rates, Quality of Service Commitments, Facility Upgrades, and Other Benefits from Providers.

The principal reason that CAI opposes Commission regulation of exclusive contracts is that retaining the power to grant exclusive access rights is a valuable property right, which community associations use in negotiations with providers of communications services – including video, voice and high-speed internet – in order to obtain a wide range of benefits that would otherwise not be available. Cable operators and other service providers are willing to provide these benefits – which may result in additional costs to them – because they have the assurance of a defined revenue stream for a specified period. This certainty makes it possible for the provider to make commitments it would never be able to justify if it faced the risk of a significantly lower revenue stream. Many of these benefits would simply be unavailable if exclusive contracts were not an option.

For example, many community associations have negotiated agreements in which they pay a bulk rate for service, typically video or Internet service. The bulk rate allows association residents access to the service at a reduced price. They may pay for the service as a part of association dues or fees, or as a separate fee to the association, but because of the associations’ contract with the service provider, residents pay less than they would if purchasing service on an individual basis.

Associations may also obtain the benefits of a range of other amenities. Video programming providers often agree to make special community channels available to the association. These channels, which are not available outside the community and would not be
available at all if the community simply received the same service as other residents of the surrounding area, allow the community association to make announcements to residents over the cable system or carry special programming of interest to residents. Similarly, service agreements may provide for specific, tailored packages for programming consisting of specific channels requested by the association, which may not be available to ordinary subscribers outside the community.

Community associations are also very concerned with ensuring that residents receive good customer service. If a service provider suffers from poor picture quality, slow Internet connection speeds, service outages, and other problems, residents will complain to the community association’s governing board. Community associations therefore often negotiate quality of service standards for both video and Internet services and performance remedies – including termination rights -- that can be more stringent than those provided for in local franchise agreements. Furthermore, by creating a contractual relationship between the association and the provider, such agreements increase the provider’s incentive to respond to complaints and requests from residents or the governing board.

Finally, grants of exclusivity can be used to accelerate service improvements. Many community associations do not own the inside wiring or other communications facilities serving their members. Even if they do, associations rarely want to assume the technical and management challenges of installing and maintaining such facilities if an upgrade is needed to replace aging wiring or allow provision of new services. Thus, community associations typically prefer to make the service provider responsible for all aspects of the facilities, including bearing the cost. Providers naturally want some form of compensation if they are to bear substantial capital costs, either at the time of initial installation or at renewal. Grants of exclusive rights are
therefore common in contracts calling for upgraded facilities and introduction of new services, particularly when the provider is not convinced that the demographics of a community warrant the investment. Without such grants, providers may delay upgrades until they meet other, more conservative financial criteria.

Inherent in the right to negotiate contractual agreements is the possibility that a board of directors will enter into an agreement that grants exclusive rights without securing commensurate benefits for association members. In such cases, the association has recourse through the democratic process, and in the rare case of unconscionability, legal remedies, such as claims for breach of fiduciary duty, may also be available. But it is not the Commission’s role to correct such errors. As agreements come up for renewal, individual associations can exercise their rights of self-governance and correct past errors by renegotiating agreements or replacing an inadequate provider. In any event, the Commission should not interfere with the rights of those associations that make better informed decisions and negotiate agreements that bring them and their members real value. Nor should the Commission intercede even in case in which associations have been forced to enter into exclusive agreements by the monopoly power of a provider that refused to extend service except on its own terms. While such situations are unfortunate and unfair, they do not outweigh the benefits of exclusive contracts for those associations that are able to use them wisely.

C. **Preserving Exclusivity Promotes Competition Among Providers.**

As discussed in the preceding section, exclusivity is a valuable tool for community associations in their negotiations with service providers. Exclusivity thus promotes competition because community associations can use the promise of exclusivity to prompt competition between different service providers. When a contract is up for renewal, for example, an
association can essentially require providers to bid for the association’s business. Without exclusivity, this bargaining power would be eliminated. Not only does the association benefit from this competition, but so does the broader market, because in order to win exclusive agreements, providers are forced to become more efficient and innovative.

The Commission has previously accepted the principle that allowing associations to enter into exclusive contracts allows smaller companies to develop their markets and, if they are efficient, expand to serve larger number of associations and other customers.\(^4\) This remains true. Conversely, discouraging exclusive agreements would reduce the number of competitors and over time result in a duopoly consisting of the cable company and the telephone company.\(^5\) Even assuming that both duopolists would choose to serve every community association – which is not necessarily the case – the loss of exclusivity would allow the duopolists to simply dictate terms to associations. Community associations and their residents would be thus be harmed.

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

Banning exclusive agreements will not reduce subscriber rates, and for many associations would clearly increase rates, because providers would be far less willing to enter into bulk agreements. In the absence of a bulk agreement, providers routinely charge the same rates to community association residents that they charge in the local franchise area as a whole. As discussed further below, they are required to do so by law unless the area is subject to effective competition. Even when they are allowed by law to charge different rates, providers have little

\(^4\) 2003 Inside Wiring Order at ¶ 69.

\(^5\) In fact, given the marketing strength of their brand names and their practices regarding control over inside wiring, the incumbent local exchange carriers could well become the sole providers of voice, video and data in many buildings and developments.
incentive to do so. They generally find it is much easier and more effective to market their services at the same rates on a regional basis.

Consequently, the suggestion in the NPRM that banning exclusive agreements has some connection to lower rates is simply wrong. In theory, one might argue that a provider with an exclusive agreement would be free to charge residents of the community a higher rate, and therefore would. But this ignores how communications services are actually marketed and purchased. If providers are competing in the larger market, they will have strong countervailing incentives to charge the same rates inside individual buildings or associations as they do in the larger market. It is very difficult to market a service at an advertised rate on television or in a newspaper, for example, and then both identify potential subscribers ordering services as residents of buildings or other community associations that are not subject to competition, and inform them they are ineligible for the advertised rate. While it is possible to do so, the loss of good will, claims of false advertising, and other costs arising from such practices would tend to discourage providers from engaging in them. It is far easier to offer everybody the same rates.

E. Residents Care About Disruption Caused by New Installations.

As the Commission noted in its most recent inside wiring order, introducing additional providers into an existing multiple dwelling unit (“MDU”) building is very disruptive. The same kinds of issues – trenching and driveway cuts, among others -- arise in single-family communities. It is perfectly rational for community associations to weigh the damage and irritation caused by such construction in deciding whether they want to allow competitive entry.

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F. Individual Community Association Members Are Not Harmed By Exclusive Agreements, Because They Have Recourse Through the Democratic Governance Process.

As noted above, association members have the opportunity to participate in the governance of their communities, including the ability to change association policy. Furthermore, association members are made aware of the nature of their rights before they purchase their units or homes. Therefore, decisions to enter into exclusive agreements are made by duly-elected members of the association, for the benefit of the community, with the support of the community. By definition then, if an association enter into an exclusive agreements, it is because the members, through their representatives, have decided that it represents the best interests of the association as a whole. If a majority of owners decides an error has been made, they can alter association policy and replace any exclusive agreement at the time of renewal, or seek grounds for termination.

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

Exclusive marketing agreements are less common than exclusive access agreements among community associations. In any event, regulating such agreements would be illogical, because they do not prohibit entry. There is no reason to ban or regulate such agreements.

H. Exclusive Access To Wiring Agreements Should Not Be Banned Because They Do Not Prohibit Entry By Competitors and Are Reasonably Related to the Costs of Entry.

Exclusive access to wiring agreements likewise do not prohibit entry. Under such an arrangement, a competitor is still free to serve an association, if it is willing and able to install new infrastructure to reach its customers. If an association happens to own its own wiring and wishes to make it available to a single provider, it should be allowed to do so. Any attempt to interfere with such arrangements would raise Fifth Amendment takings issues.
II. THE FCC DOES NOT HAVE THE AUTHORITY TO BAN OR REGULATE THE TERMS OF AGREEMENTS GRANTING ACCESS TO THE PROPERTY OF COMMUNITY ASSOCIATIONS.

The NPRM “tentatively conclude[s] that the Commission has the authority to regulate exclusive contracts for the provisions of video services to MDUs or other real estate developments . . .” NPRM at ¶ 9. The chief problem with this tentative conclusion is that it is utterly unfounded. The NPRM makes no attempt to explain the basis for this conclusion, other than to cite a handful of sections from the Communications Act. None of those sections, individually or in any conceivable combination, justifies the NPRM’s assertion of authority.

A. The Communications Act Gives the FCC No General Jurisdiction Over Community Associations.

The Communications Act does not authorize the Commission to regulate contracts entered into by community associations. The Commission’s jurisdiction is limited by the language of Section 1 and Section 2(a) of the Act. The courts have made it clear in several closely analogous cases that the Commission cannot regulate an activity merely because it might affect some aspect of the communications industry.7 Consequently, the Commission must be able to point to statutory language that clearly and expressly permits the agency to regulate any activity conducted by a community association. This includes contracts that grant cable operators and other video programming providers the right to use a community association’s property in order to serve residents of the association.

Section 2(a) of the Communications Act limits the application of the Act “with respect to cable service, to all persons engaged within the United States in providing such service, and to

the facilities of cable operators which relate to such service, as provided in title VI.” Community associations are not cable operators, and they are not ordinarily engaged in providing cable service or other video programming services. Consequently, unless the Commission can identify a statute that clearly and expressly states that Congress intended the Commission to regulate the activities of a community association, the Commission may not act.

For example, Section 207 of the Telecommunications Act of 1996 expressly directed the Commission to adopt rules preemption homeowners association rules and other restrictions on the installation of direct broadcast satellite antennas. In that case the Commission was instructed to act by Congress and therefore had the power to supersede community association rules. Congress has not, however, adopted any statute analogous to Section 207 that directs or empowers the Commission to regulate any kinds of contracts between community associations and video programming providers.

B. Section 628 of the Communications Act Governs Only Transactions Between Programming Vendors and Competitive Video Service Providers.

The NPRM’s claim for Commission authority appears to rests primarily on Section 628(b) of the Act, 47 U.S.C. § 548(b), which makes it “unlawful for a cable operator….to engage in unfair methods of competition or unfair or deceptive acts or practices.” This argument fails for two reasons. First, reading Section 628(b) in the context of the entirety of Section 628 makes it plain – as the Commission has already ruled in other proceedings – that Congress enacted Section 628 in order to address a completely different problem. Congress was concerned with requiring cable operators and other vendors of satellite programming to make such programming

8 Of course, if an association itself is providing service to its residents, then it may be subject to the Commission’s powers.

9 See BOMA v. FCC, 254 F.3d at 96.
available to competitive providers of video programming. The statute has nothing to do with
access to property or access to community association residents. The second reason the NPRM’s
interpretation is wrong is, as discussed above, that Section 628 does not expressly provide for the
regulation of community associations.

It is true that Section 628(b), if read in isolation and by a person with no knowledge of
the history of the communications industry, might be read broadly enough to encompass the
NPRM’s interpretation. But that would be a clear misreading. The statute is not ambiguous and
the Commission is entitled to no deference in its interpretation. It is well-known and well-
established that Congress was concerned with preventing cable operators that also controlled
certain programming channels from hindering competition by refusing to sell programming to
direct broadcast satellite vendors and other competitors. This is very clear upon reading Section
628 as a whole, as well as the Commission’s own regulations.

- Section 628(b) by its terms applies only to cable operators, satellite cable
  programming vendors and satellite broadcast programming vendors.
- Section 628(c), which directs the Commission to adopt regulations, describes very
  specifically what Congress wanted the Commission to do. Section 628(c)(2)(A)
  addresses the sale of programming by various types of programming vendors to
  unaffiliated multichannel video programming distributors. Section 628(c)(2)(B)
  similarly addresses terms of transactions between programming vendors and
  programming distributors. Section 628(c)(2)(C) and (D) prohibit exclusive
  contracts – but only exclusive contracts between programming vendors and cable
  operators.
Section 628(e) authorizes the Commission to order appropriate remedies, including “prices, terms and conditions of sale of programming to the aggrieved multichannel video programming distributor.” Again, this demonstrates what Congress was concerned about, and authorizes no remedies that would affect contracts with community associations.10

The legislative history states the specific concerns of Congress in the same terms. Section 628 is not a general prohibition on every kind of anticompetitive behavior by cable operators, but a prohibition on unfair practices with respect to transactions between programming vendors and programming providers, arising out of vertical integration in the cable industry.11

The Commission recognized this purpose when it first adopted rules to implement Section 628 in 1993:

In enacting the program access provisions of the 1992 Cable Act, Congress expressed its concern that potential competitors to incumbent cable operators often face unfair hurdles when attempting to gain access to the programming they need in order to provide a viable and competitive multichannel alternative to the American public.12

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

The program access requirements of Section 628 have at their heart the objective of releasing programming to the existing or potential competitors of traditional cable systems . . . . The 1992 Cable Act and its legislative history reflect congressional findings that horizontal concentration in the cable television industry, combined with

10 Section 628(e)(2) does permit the Commission to apply other remedies available under the Communications Act – none of which apply to community associations.


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

Id. at ¶ 21. The Commission left no doubt that the purpose of Section 628 was to address transactions between programming vendors and competitive video service providers. Id. at ¶¶ 27-30. The legislation and rules are not concerned with ensuring that competitive video providers have access to the buildings or developments in which customers may reside.

Further, the Commission has interpreted its jurisdiction under this section strictly, even refusing to extend the rules beyond “satellite programming” to include “terrestrially-delivered programming.” The issue first arose in 1998 when the Commission considered amending the rules it had adopted in the 1993 Program Access Order.13 In the Ameritech Order, the Commission considered whether disputes over access to terrestrially-delivered programming might be covered by Section 628 in the specific situation where programming was moved from satellite to terrestrial delivery to evade the application of the program access rules. The Commission declined, noting among other things that there were doubts as to the Commission’s jurisdiction over access to terrestrially-delivered programming.14 Specifically, the majority observed: “We note that Congress is considering legislation which, if enacted, would introduce


14 Id. at ¶ 71.
important changes to the program access provisions, including clarification of the Commission’s jurisdiction over terrestrially-delivered programming.”

Subsequently, the Cable Services Bureau analyzed the scope of the Commission’s jurisdiction under Section 628(b) as follows:

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

_EchoStar v. Comcast_, 14 FCC Rcd 2089, 2102 (CSB 1999). If the Commission cannot regulate potentially anti-competitive practices related to terrestrially-delivered programming, which are distinguishable from the types of practices that Congress directed that it regulate only by the location of the transmitting equipment, then surely Section 628 cannot be read to encompass classes of parties and transactions that Congress never mentioned.

The NPRM’s tentative conclusion regarding the potential reach of Section 628 is thus wrong: it contradicts the legislative history, the plain language of the statute, and the Commission’s own previous interpretations.

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15 _Id._

16 This ruling was upheld by the Commission and eventually the United States Court of Appeals for the District of Columbia Circuit. _EchoStar Comm’ns Corp. v. FCC_, 292 F.3d 749 (D.C. Cir. 2002), _aff’g DIRECTV v. Comcast; EchoStar v. Comcast_, 15 F.C.C. Rcd 22802 (2000).
C. Section 623 of the Communications Act Does Not Authorize the Commission to Regulate Contracts Between Community Associations and Video Programming Providers.

The NPRM cites Section 623 of the Act, which authorizes the Commission to adopt rate regulation rules, as a potential source of support for its tentative conclusion authority. Like Section 628, Section 623 is simply irrelevant to this analysis. Section 623 only directs the Commission to adopt a rate regulation scheme subject to certain parameters. It does not direct the Commission to regulate any aspect of any agreements between community associations and video service providers, and its only references to MDUs argue against the application of rate regulation in that context.

To begin with, it is a little difficult to see how Section 623 could possibly bear on this issue. Section 623 lays out a detailed scheme for regulation of rates for cable service, but it is not a broad grant to do anything the Commission chooses if it can claim a tangential connection to rates. Section 623(a)(1) bars all regulation of cable rates except in accordance with the terms of Section 623, and those terms are very specific. The Commission is directed to ensure that rates are “reasonable,” but Section 623(b)(2) immediately tempers the term “reasonable” by laying out seven factors to be considered in developing a rate regulation scheme. See also Section 623(c)(2). Furthermore, the rate regulation provisions of the Act presume regulation at the “franchise area” level, and not with respect to individual buildings or community associations. See 47 U.S.C. §§ 623(d), 623(l)(1) (references to “franchise area”). In fact, the trend in the Commission’s regulation of rates has been to move towards a system that allows regional and national rate standards, rather than more localized ones. There is no suggestion in Section 623 that Congress ever intended the Commission to deal with rate matters at a level lower than that of the franchising authority. In fact, the Commission once rejected a request on the part of cable operators for authority to negotiate rates with MDUs on a building-by-building
basis so operators would be able to match competitors’ offers, because that proposal conflicted with the statutory requirement to provide uniform rates in the entire franchise area.\textsuperscript{17} Any suggestion that the Commission can now, under the same provision, regulate “access” on a building-by-building basis should also be rejected.

In addition, there is no logical connection between the Commission’s authority to regulate rates and the terms under which video programming providers service community associations. The NPRM purports to be concerned with exclusive access to buildings and developments. While agreements of that sort sometimes address subscriber rates, any Commission authority over rates (which we will see below effectively does not exist) does not equate to or create authority over exclusivity. Interestingly, the NPRM itself makes no effort to explain any connection.

As it happens, we do believe that Section 623 bears on this matter, but only to make it clear that the Commission has no authority. Indeed, to the extent that the Commission is concerned that exclusive contracts might somehow affect rates for subscribers living in communities subject to such agreements, it need have no fear. There is no evidence that subscribers who live in MDUs are paying higher rates than other subscribers, and for good reason: Section 623(d) requires uniform rates throughout a franchise area. Thus, in any franchise area that is subject to rate regulation, community association residents cannot be charged more for cable service than other subscribers in the area. They may of course, pay lower rates, because Section 623(d) expressly permits bulk discounts. In fact, as noted above, many CAI members benefit from bulk discounts.

\textsuperscript{17} Time Warner Entertainment Co., L.P. v. FCC, 56 F.3d 151, 191 (D.C. Cir. 1995).
Thus, to the extent Section 623 applies, it prevents any potentially harmful connection between rates and exclusivity.

It is true that the uniform rate requirement does not apply where there is effective competition. The justification for that, of course, is that rate regulation is not needed where competition exists. Section 623(d), however, specifically defines “effective competition” in a way that renders this entire discussion moot, because it eliminates the Commission’s authority over rates in just such cases: the Act includes four tests of effective competition, one of which it the case in which a local exchange carrier or its affiliate is providing video service in the franchise area. 47 U.S.C. § 623(l)(D). As soon as Verizon or any other local exchange carrier is providing a video service in a particular franchise area, the incumbent may seek an effective competition ruling and the Commission loses any authority it may have had under Section 623. Note, by the way, that it is effective competition in the franchise area that counts; the statute say nothing about competition within a building.

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

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18 See, e.g., Altro Communications v. Adelphia Communications Corp., 17 F.C.C. Rcd. 22955 (MB 2002); American Cable Co. and Jay Copeland v. TeleCable of Columbus, Inc., 11 F.C.C. Rcd 10093 (CSB 1996); Time Warner Entertainment Co. v. FCC, 56 F.3d 151, 191 (D.C. Cir. 1995); (“…where ‘effective competition’ exists, the consumer is left to the wiles of the marketplace; both the language and the purpose of the 1992 Cable Act make clear that the rates charged by such systems are beyond the Commission’s regulatory reach. The Commission’s
Moreover, the Commission has already declared more than a thousand communities to have effective competition under one or the other of the three other tests in Section 623(l). Thus, in those franchise areas, rate regulation – and the Commission’s power under Section 623 – has already been eliminated. This means that any uniform national regulation that relies on Section 623 for its authority is impossible: any Commission rules would perforce have no effect in areas subject to effective competition.

Incidentally, Section 623 aside, there is no evidence that the elimination of rate regulation authority has increased rates for MDU residents. And in any case, community associations often require service providers to agree not to charge rates higher than those imposed on other residents of the same franchise area.

Thus, to the extent that any proposed regulation is motivated by concerns over rates, or the belief that regulating exclusive contracts may in some way affect subscriber rates, such views are incorrect. And in any event, the Commission has no jurisdiction under Section 623 to take any regulatory action regarding building access agreements.

Arguments highlighting problems with the choice made by Congress are insufficient to overcome this clear evidence of congressional intent.”)

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

The suggestion that Section 706 of the Telecommunications Act of 1996 somehow authorizes the Commission to regulate exclusive contracts is equally unfounded. The Commission has already concluded on several occasions that Section 706 is not an independent grant of authority.\(^{20}\) Section 706 envisions regular inquiries by the Commission into the deployment of advanced telecommunications capability, and authorizes the Commission to improve the pace of deployment “by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” Section 706(a). Furthermore, Section 706 pertains only to telecommunications, and does not apply to cable services and information services.

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

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

*Id.* at ¶ 77. The Commission subsequently affirmed its decision in response to several petitions for reconsideration.\(^{21}\) Although the *Advanced Services Order* addressed the application of the Commission’s forbearance authority, that does not affect the fundamental point that Section 706 is an exhortation to act, not a grant of specific powers.

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\(^{21}\) *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Reconsideration, CC Docket No. 98-147, 15 FCC Rcd. 17044, 17047 (2000).*
E. The Commission’s Ancillary Jurisdiction Extends Only to Entities that Are Engaged in Activities Subject to the Communications Act.

As part of its vague analysis of the Commission’s sources of authority, the NPRM seeks comment on whether Section 623, in conjunction with Sections 4(i) and 303(r), “can or should serve as a basis for regulating exclusive contracts for the provision of video services to MDUs or other real estate developments. NPRM, ¶ 10. This appears to be a reference to the Commission’s so-called “ancillary jurisdiction.” The NPRM observes that the Commission relied on those provisions in the past for authority to establish procedures for the disposition of MDU home run wiring upon termination of service.22 In that earlier proceeding, the Commission concluded that the procedures, “by facilitating MVPD competition, are an appropriate and reasonable method of fulfilling Section 623’s mandate.”23

As discussed above, however, Section 623 on its own does not even permit the Commission to regulate rates in MDUs, much less the terms of access to property. The Commission’s ancillary jurisdiction adds nothing. In considering whether the Commission has any ancillary jurisdiction over MDU contracts, we have the benefit of many years of Commission decisions, judicial rulings and legislative history. That rich background provides ample evidence that the Commission does not have ancillary authority in this case.

The courts have repeatedly found that the Commission’s ancillary jurisdiction does not extend to entities over whom the Commission has no jurisdiction to begin with. The Commission may not regulate an activity that is unrelated to the communications industry. GTE Service Corp. v. FCC, 474 F.2d 724, 735-36 (2d Cir. 1973) (Commission cannot regulate data

22 Id. citing 2003 Inside Wiring Order at 1345-46.

23 2003 Inside Wiring Order at ¶ 6, n. 10.
processing services provided by regulated entities); *American Library Ass’n. v. FCC*, 406 F.3d at 700 (Commission cannot regulate consumer electronic products that can be used for receipt of wire or radio communication when those devices are not engaged in the process of radio or wire transmission). Similarly, even in the case of a matter that does affect the communications industry, the Commission’s ancillary jurisdiction does not extend to building owners. *Illinois Citizens Comm.*, 467 F.2d at 1400.24

In the current proceeding, the Commission has no jurisdiction because building owners do not engage in communications by wire or radio. The general jurisdictional grant under Title I covers “interstate and foreign commerce in communication by wire and radio.”25 As the court in *American Library Association* noted, when the matter the agency seeks to regulate is not encompassed by the agency’s general jurisdictional grant, it creates an “insurmountable hurdle” to the assertion of ancillary jurisdiction.26

In every case in which the Supreme Court has found that the Commission properly exercised ancillary jurisdiction, the Court has also found that the Commission already had jurisdiction over the activity or over the party pursuant to the Communications Act. The farthest afield the courts have allowed the Commission to go has been the regulation of cable television as an extension of the Commission’s authority over television broadcasting, see *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), and the regulation of telephone holding companies to prevent cross-subsidization, see *North American Telecommunications Ass’n v.*

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


26 *American Library Ass’n. v. FCC*, 406 F.3d at 700.
FCC, 772 F.2d 1282 (7th Cir. 1985). The purpose of ancillary jurisdiction is to ensure that the Commission can fill in gaps in its authority over entities and activities it is empowered to regulate,\textsuperscript{27} not to expand that authority to include otherwise unregulated entities or activities.

Even in \textit{BOMA v. FCC}, which upheld the Commission’s assertion of power to preempt the terms of private leases under the OTARD rule, the court was careful to note that the Commission does not have jurisdiction over the real estate industry, and upheld the OTARD rule only because Congress had granted the Commission authority for the narrow purposes of Section 207. As the D.C. Circuit recently reminded the Commission “ancillary authority has limits.”\textsuperscript{28} The NPRM would have the Commission go well beyond those limits.

\textsuperscript{27} \textit{See, e.g., Lincoln Tel. and Tel. Co. v. FCC}, 659 F.2d 1092 (D.C. Cir. 1981) (finding ancillary jurisdiction to impose upon telecommunications carriers interim billing method for interconnection charges); \textit{New England Tel. and Tel. Co., et al. v. FCC}, 826 F.2d 1101 (D.C. Cir. 1987) (finding ancillary jurisdiction to order telecommunications carriers to reduce telephone rates).

\textsuperscript{28} \textit{American Library Ass ’n. v. FCC}, 406 F.3d at 700.
CONCLUSION

For all the foregoing reasons, the Commission should once again refrain from addressing issues related to exclusive agreements between community associations and providers of video programming and other communications services.

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