

# FEDERAL REGULATION AND COMPETITIVE ACCESS TO MULTIPLE-UNIT PREMISES: MORE CHOICE IN COMMUNICATIONS SERVICES?

LYNNE HOLT\* & MARK JAMISON\*\*

## I. INTRODUCTION

The nature of competition in the United States' communications sector changed significantly over the past two decades. Before the 1990s, "competition" referred to the fight among providers of discrete services, such as the contest among AT&T, MCI, and Sprint over the long-distance slice of the communications pie. Today, competition is much more likely to describe the fight over the *entire* pie, among firms offering a "triple play" of services—high-speed Internet service, video, and telephony—over a single broadband platform. Some firms recently expanded the pie with a "quadruple play" that includes wireless services as well. Cable operators, traditional wireline telephone companies, and, increasingly, wireless providers are competing to offer consumers both the underlying broadband platform and various bundled services that ride across it. However, not all consumers benefit from this competition in like manner.<sup>1</sup>

Public policy deliberations tend to focus more on differences in access to communications services either between consumers in rural and

---

\* Dr. Lynne Holt, Policy Analyst, Public Utility Research Center, University of Florida, Gainesville, FL 32611-7142, [lynne.holt@cba.ufl.edu](mailto:lynne.holt@cba.ufl.edu).

\*\* Dr. Mark A. Jamison, Director, Public Utility Research Center, University of Florida, Gainesville, FL 32611-7142, [mark.jamison@cba.ufl.edu](mailto:mark.jamison@cba.ufl.edu). The authors appreciate the review by Mr. William Cox, Able Band Chartered, and his suggestions for improving an earlier version of this paper.

1. For example, the staff of the New York Public Service Commission found differences between geographic areas in terms of the competitive alternatives that customers enjoyed. Customers in Verizon's territories tended to have more competitive service alternatives than customers in areas served by smaller telephone companies. Even within Verizon's traditional service areas there were differences in the availability of wireless and cable alternatives. See DEP'T OF PUB. SERV. STAFF, STATE OF NEW YORK, TELECOMM. IN NEW YORK: COMPETITION AND CONSUMER PROTECTION (2005), *available at* [http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/C76443168615205885257083006ADF64/\\$File/05c0616.coverltr.09.21.05.pdf](http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/Web/C76443168615205885257083006ADF64/$File/05c0616.coverltr.09.21.05.pdf):OpenElement.

urban areas or between low-income and more affluent consumers. Policymakers focus considerably less attention on differences in access for consumers living or working in multi-unit premises—including planned-unit developments—compared to their counterparts in detached single-unit dwellings. For example, consumers in single-family homes choose among the available broadband platforms to obtain the desired services. In contrast, building owners or developers of multi-unit premises often choose both the types of broadband platforms serving a building and the specific broadband providers that will serve the consumers living or working in the premises. The owners may even negotiate the mix of communications services and terms of delivery offered within the building or planned development. In these cases, the consumer faces a limited set of choices due to the decisions of the owner or developer; the person who controls the access to the services and the person who consumes the services are likely different and their interests misaligned. Consumers who live in multi-unit premises might have greater choice for communications services if there is more competition in the technology platforms underlying these services.

In this Article, we address three overarching questions: (1) How has providers' access to multi-unit premises been affected by federal communications regulatory regimes in the past? (2) How might current regulatory regimes affect this access and, by extension, consumer choice in the future? and (3) Is there a better way to promote competitive access going forward?

### A. Background

The issue of competitive access to multiunit residential and commercial buildings affects a sizable segment of this nation's population. According to the Federal Communications Commission ("FCC" or "Commission"), America contained over 750,000 office buildings in 2000.<sup>2</sup> An estimated 30% of all Americans now live in residential multiple-dwelling units.<sup>3</sup> In addition, estimates suggest that fifty-seven million U.S. residents (roughly 19% of the total population) lived in association-governed planned communities as of 2006.<sup>4</sup>

---

2. Promotion of Competitive Networks in Local Telecomm. Mkts., *First Report & Order & Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 22,983, ¶ 15 (2000) [hereinafter *Competitive Networks Order*].

3. Exclusive Serv. Contracts for Provision of Video Servs. in Multiple Dwelling Units and Other Real Estate Devs., *Report & Order & Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 21,828, ¶¶ 1, 8 (2007) [hereinafter *Exclusive Service Contracts Order*].

4. Community Associations Institute (CAI), Industry Data, <http://www.caionline.org/about/facts.cfm> (last visited Apr. 10, 2008). The percentage is based on the U.S. Census estimate of 298.4 million as of July 2006.

Communications providers frequently hanker for opportunities to offer their “triple-play” and “quadruple-play” solutions to consumers in multi-unit premises. With all things being equal, the lower per capita connection and customer acquisition costs in multi-unit dwellings relative to single-family residences produces greater profits. Providers with exclusive or perpetual contracts to serve entire buildings or developments typically are assured both a dependable customer base and steady stream of revenue, which lowers their risk in building out the required infrastructure. Providers therefore seek to “lock-in” those customers.<sup>5</sup>

Presently, broadband competition comes primarily from two platforms: cable modem and digital subscriber line (“DSL”). As of March 2006, DSL connections accounted for 50% of all home broadband connections, with cable modems representing 41%.<sup>6</sup> Increasingly, fixed wireless service is contributing another platform in the competition to provide broadband with 8% of residential high-speed users having wireless broadband connections.<sup>7</sup>

In contrast to broadband service, enhanced video service has been more resistant to competition. Until recently, enhanced video service was transmitted to homes primarily through cable. Now, fiber-to-the-home offers another platform for video delivery, in addition to high speed Internet and Voice over IP (“VoIP”) services. As of September 2006, fiber-to-the-home passed over six million homes of which over one million were connected.<sup>8</sup> The former Regional Bell Operating Companies (“RBOCs”)—now AT&T, Verizon, and Qwest—provided almost 48% of those connections.<sup>9</sup> Fiber-to-the-home is admittedly in its infancy, but the growth rate has been rapid—over 213% in increased connections from September 2005 to September 2006.<sup>10</sup>

According to standard economic theory, we would expect

5. Exclusive contracts prevent customers from switching to another provider even if customers want to switch, or at least make it costly for customers to do so. This is called lock-in because it is more costly for a customer to change to another provider than to stay with the current provider, all other things being equal. See CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 11-13 (1998).

6. JOHN B. HERRIGAN, PEW INTERNET & AMERICAN LIFE PROJECT, HOME BROADBAND ADOPTION 2006 ii (2006), available at [http://www.pewinternet.org/pdfs/PIP\\_Broadband\\_trends2006.pdf](http://www.pewinternet.org/pdfs/PIP_Broadband_trends2006.pdf).

7. *Id.*

8. RVA LLC MARKET RESEARCH & CONSULTING, FTTH/FTTP UPDATE: OCTOBER 2006 4, 7 (2006), available at [http://www.tiaonline.org/business/media/press\\_releases/2006/documents/RVAFTTHCChartsOct06A.ppt](http://www.tiaonline.org/business/media/press_releases/2006/documents/RVAFTTHCChartsOct06A.ppt).

9. *Id.* at 16.

10. *Id.* at 7. In September 2005, only 322,700 homes were connected; in September 2006, the number was 1,011,000.

competitive platforms delivering multiple integrated services (video, Internet, voice) at high speeds to provide consumers with more choice at a lower price than would be the case under monopoly regimes. Investment pressures drive companies to expand their subscriber base for such services. Companies know that it is costly for tenants to relocate, so if they secure them as customers they are likely to continue serving them. The extent to which tenants actually leave if their telecommunications needs are not met is the “million dollar” question. For tenants of commercial buildings, the decision to leave probably depends on the nature of their business and their options for relocation.<sup>11</sup> However, consumer choice might be undermined by strategies employed by building owners and developers, on the one hand, and communications providers, on the other hand, to protect their respective “turfs” and maximize profit through exclusive single-provider access and the delivery of bundled services. Depending on contractual terms, consumers still may have a choice in communications services even if an owner or developer enters into an exclusive agreement with a single provider to serve all the tenants.

Because convergence in telecommunications allows a single pipe to offer multiple, high-value services, we might expect bundled services to account for a growing number of contracts between building owners or developers and communications providers in the future, particularly with the migration of traditional voice telephony to VoIP and traditional cable television to Internet Protocol Television (“IPTV”). Why do providers aggressively compete to provide bundled services? From the provider’s perspective, bundled services are responding to perceived consumer preferences that enable them to sell more services. Many consumers prefer having all their communications services delivered by a single provider and bundled on one bill.<sup>12</sup> Moreover, consumers of bundled

---

11. We can assume that some indeterminate number of tenants might leave. For example, the Building Owners and Managers Association (“BOMA”) commissioned a survey of available telecommunications competition which found that 40% of tenants surveyed indicated they would leave a property if their telecommunications needs were unmet. The survey was filed with the FCC on February 23, 2001. Of course, whether these tenants actually would leave is unknown. We only know what they said. *See generally* Joint Comments of Bldg. Owners and Managers Ass’n Int’l et al., to the Inquiry Concerning Promotion of Competitive Networks in Local Telecomms., WT Dkt. No. 99-217, CC Dkt. No. 96-98, at Ex. D (Aug. 27, 1999), available at [http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&cid\\_document=6009449382](http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&cid_document=6009449382).

12. According to a communications survey by Telephia for the second quarter of 2006, 43% of U.S. households subscribe to bundled communications services from one provider. “Double-play” and “triple-play” bundles were the most subscribed with 23 million and 10 million subscribers, respectively. Three-hundred thousand households subscribed to “quadruple-play” bundles. Price was the most important reason, followed by convenience. *Telephia: 43% of U.S. Households Subscribe to Bundled Communications and Entertainment Services from One Provider*, WIRELESS NEWS, Sept. 6, 2006. Findings from various survey

services are less likely to switch companies. The more services that are bundled, the lower the churn rate.<sup>13</sup> Furthermore, bundling allows an operator to offer a single price that is attractive to many types of consumers such that they are likely to buy more services than if the services were priced individually.<sup>14</sup> For their part, building owners and developers might prefer to provide access to, and purchase bundled services from, a specific provider for multiple reasons: to maximize profit; to respond to the perceived needs of most of the residents in the complex; to reduce exposure to safety, security, and liability risks; to better ensure compliance with fire and building code requirements; to avoid costs related to adapting a building to accommodate the networks of other carriers; and to simplify negotiations by dealing with one provider instead of multiple providers.<sup>15</sup> Finally, in a recent order, the FCC has taken the position that bundling is desirable, particularly if bundling is coupled with competition for the delivery of such services.<sup>16</sup>

How does the FCC's objective of competitive delivery of bundled services comport with the FCC's view on consumer choice? Consumer choice—making “competitive alternatives available to individual subscribers”—certainly was one of the intended goals of introducing competition into local telecommunications markets.<sup>17</sup> It also was one of the goals for video markets. According to FCC Chairman Kevin Martin, the FCC will take measures to “remove regulatory impediments to the entry of new service providers into the video market by, for instance, ensuring that consumers living in apartment buildings are not

---

reports indicate that the majority of small businesses purchase bundled communications services primarily to cut costs and deal with only one provider. Most of the small companies indicated satisfaction with their provider. See Tracy Barbour, *Bundled Communications Services Big with Consumers: Most U.S. Small and Medium Businesses Prefer to Buy Bundled Communications*, ALASKA BUS. MONTHLY, Dec. 2006, at 52-55.

13. According to the Yankee Group, the more services are bundled, the lower the churn rate. See Susana Schwartz, *The Race to Bundle Voice, Video, and Data*, BILLING & OSS WORLD, June 1, 2004, available at <http://www.billingworld.com/articles/archives/The-Race-to-Bundle-Voice-Data-and-Video.html>.

14. SHAPIRO & VARIAN, *supra* note 5, at 74.

15. COMM. ON COMM'NS & PUB. UTILS., INTERIM PROJECT REPORT: REVIEW OF ACCESS BY COMMUNICATIONS COMPANIES TO CUSTOMERS IN MULTITENANT ENVIRONMENTS, S. 2006-106 (Fla. 2005), available at [http://www.flsenate.gov/data/Publications/2006/Senate/reports/interim\\_reports/pdf/2006-106cu.pdf](http://www.flsenate.gov/data/Publications/2006/Senate/reports/interim_reports/pdf/2006-106cu.pdf).

16. Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984 as Amended by the Cable Television Consumer Prot. and Competition Act of 1992, *Report & Order & Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 5101, ¶ 2 (2007) [hereinafter Franchising Reform Order].

17. Promotion of Competitive Networks in Local Telecomms. Mkts., *Notice of Proposed Rulemaking & Notice of Inquiry*, 14 FCC Rcd. 12,673, ¶ 18 (1999) [hereinafter Promotion of Competitive Networks].

denied a choice of cable operators.”<sup>18</sup> He further said the regulatory environment also should give consumers greater control of video programming, enable new companies to compete with incumbents in providing telephony, and prevent existing providers from impeding the development of innovations currently taking place in consumer electronics.<sup>19</sup> The road to realizing the objectives outlined by Chairman Martin might be bumpy, but past regulatory decisions might provide some insight into their likely success. Throughout the years, provider efforts to secure profits often have boiled down to who ultimately controls the access to the buildings in which consumers live and work. So the overarching question remains: to what extent, if at all, have past FCC decisions promoted and impeded competitive access?

Two regulatory issues in particular have presented challenges to competitive access and, ultimately, have impeded consumer choice in multi-unit buildings and planned developments: (1) inside wiring and demarcation points, and (2) exclusive contracts. FCC actions to redress impediments presented by both issues have different legacies in telephony and cable service. Because wireless broadband is an emerging platform, we have confined our discussion to telephone and cable providers since they are the more established competitors for subscribers in multi-unit buildings and planned developments. The FCC’s proceedings on inside wiring pertain to access to multi-tenant buildings and not to planned communities. The FCC’s proceedings addressing exclusive and perpetual contracts affect multi-tenant buildings, as well as planned developments. We conclude with a discussion of the implications of the “old world” legacies of these services for the “new world” of bundled, digitized services for consumers in multi-unit building and planned developments.

### *B. The Early Days of Competition in Multiple-Unit Premises*

From the 1930s to the 1990s, monopoly provision of local telephony service was the only show in town. But as consumer demand for new telecommunications technologies grew, building providers with multiple tenants stepped into the market, possibly because of the opportunity to gain competitive advantage or perhaps because the economics of local telephone monopolies made it costly for the monopolies to address diverse customer interests. For example, a local

---

18. See *Accessing the Communications Marketplace: A View from the FCC: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 110th Cong. 8 (2007) (written statement of Kevin J. Martin, Chairman, FCC), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-270192A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270192A1.pdf).

19. *Id.*

telephone company would have had to upgrade its entire local network with digital technology to meet the demand of a small group of business customers for digital services. Furthermore, the telephone company would have needed to develop entirely new ways of marketing services. However, the building providers' interests in providing telecommunications services to their tenants challenged the local monopoly tradition. Several states adopted rules for Shared Tenant Services in response to telephone companies' concerns that property owners would act as resellers of telecommunications services and potentially threaten what they considered to be their monopoly franchise. These rules protected the companies' markets by limiting resale and sharing of telephony services, and were supported at the time by phone companies.<sup>20</sup> A typical arrangement was for the telephone company to sell a large volume of services to the property owner who would, in turn, resell telephony services to building occupants. Consumers presumably benefited from this arrangement by receiving customized service and by sharing the costs of their more sophisticated telephony services with other tenants. Rules promulgated by state public service commissions outlined the conditions under which shared services could be offered.<sup>21</sup>

The federal Telecommunications Act of 1996 ("1996 Act")<sup>22</sup> was largely responsible for promoting inter-modal competition among communications providers on a national basis. The FCC acknowledged the local loop as one of the last obstacles to inter-modal competition and predicted that growing competition would cause the traditional distinctions between platforms to blur.<sup>23</sup> From 1996 until as recently as

---

20. For example, a definition in the glossary maintained by the Louisiana Department of Education website defines "Shared Tenant Service" as:

The provision of PBX services (frequently by a landlord) to multiple customers located in the same building, campus or group of buildings. External calls can be placed and received over common lines and intracompany calls can be made without the use of outside LEC lines. State regulations frequently restrict the provision of STS to protect LEC interests.

University of Louisiana at Lafayette Information Networks, Glossary: S, <http://info.louisiana.edu/dept/gloss.html> (last visited Apr. 10, 2008).

21. States with Shared Tenant Service rules included, among others, Florida, Kansas, New Hampshire, and Virginia. See FLA. ADMIN. CODE ANN. r. 25-24.567 (2007); N.H. REV. STAT. ANN. § 374:22-1 (2007); 20 VA. ADMIN. CODE § 5-409-10 (2007); see also General Investigation into Resale of Local Tel. Serv. (Shared Tenant Serv.), *Order*, Kan. Corp. Comm'n Dkt. No. 141975-u (1990), available at <http://www.kcc.state.ks.us/telecom/aps/141975.pdf>.

22. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15, 18 and 47 U.S.C.) [hereinafter "1996 Act"].

23. Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, *First Report & Order*, 11 FCC Rcd. 15,499, ¶ 4 (1996).

Thus, under the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications — the local exchange and exchange access markets — to competition is intended to pave the way for enhanced competition in

2006, most of the competition in telephony resided in battles for market control between incumbent local exchange carriers (“ILECs”) and competitive local exchange carriers (“CLECs”) over access to consumers. Much of this struggle revolved around the degree to which ILECs should be required to unbundle network elements. The Court of Appeals for the D.C. Circuit stated: “[t]his tug of war—between CLECs advocating more unbundling and ILECs advocating less—has been the nub of an ongoing decade-long dispute between incumbents and their would-be competitors.”<sup>24</sup>

The FCC understood that multi-unit premises presented special obstacles and challenges for facilities-based competitors in furnishing tenants with telecommunications services.<sup>25</sup> To refer to multi-unit premises in the context of telecommunications services, the FCC has used the term “multiple tenant environment” (“MTE”) in the Competitive Networks Order and subsequent telecommunications-related proceedings. This term includes “apartment buildings (rental, condominium, or co-op), office buildings, office parks, shopping centers, and manufactured housing communities.”<sup>26</sup> Specifically, competitive providers must be able to access inside wiring or access space to install their own equipment. If they use wireless technologies, they might need to access a roof to install antennas. So, the FCC acknowledged that access was more complicated for facilities-based competitors than simply negotiating with owners of single home dwellings.<sup>27</sup> The FCC’s proceedings on inside wiring, discussed below, aptly underscore the complexity of getting the conditions right for such competition to occur.<sup>28</sup>

---

*all* telecommunications markets, by allowing all providers to enter all markets. The opening of all telecommunications markets to all providers will blur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers. The world envisioned by the 1996 Act is one in which all providers will have new competitive opportunities as well as new competitive challenges.

*Id.* (emphasis added).

24. *Covad Commc'ns Co. v. F.C.C.*, 450 F.3d 528, 532-33 (D.C. Cir. 2006).

25. Competitive Networks Order, *supra* note 2, at ¶ 14.

26. *Id.* ¶ 11.

27. *Id.* ¶ 17.

28. A recent report by the U.S. Government Accountability Office illustrates this point. An analysis was performed of dedicated access services for voice and data services provided in federal government agencies in 16 major metropolitan areas. The report concluded that fiber-based competitors served on average less than 6% of buildings with demand for such services. There was some speculation as to why consumers saw such a low degree of competition despite pricing flexibility for network elements authorized in recent years. Competitors cited barriers to entry, including charges imposed by building owners as a condition for competitors to provide services. See U.S. GOV'T ACCOUNTABILITY OFFICE, TELECOMMUNICATIONS: FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF



### C. Inside Wiring and Demarcation Points

With respect to telephony, the FCC began its involvement with inside wiring issues in the 1970s through Part 68 of its rules, which governs the interconnection of telephone customers to the public switched network.<sup>29</sup> In 1984, the FCC adopted rules allowing customers to install and connect telecommunications equipment and inside wiring to the public switched network. The FCC defined “inside wiring” as the installation of wiring located on the customer premises side of the demarcation point.<sup>30</sup> The “demarcation point” is the point at which the wiring controlled by the telephone company ends and the property owner or customer begins.<sup>31</sup> The FCC revisited this issue several times. Initially, the telephone company was authorized to determine the demarcation point. In 1990, the FCC revised the definition of the “demarcation point” to increase the amount of wiring controlled by the property owner or customer. For multiple-tenant buildings in existence before August 13, 1990, the demarcation point still would be determined by the telephone company. However, after that date, the telephone company was authorized to place the demarcation point at the minimum point of entry.<sup>32</sup> If the company decided not to do so, the decision reverted to the property owner.<sup>33</sup> If the demarcation point is not already at the minimum point of entry, a property owner can request that the demarcation point be relocated there, and the telephone company must comply with the request.<sup>34</sup> The problem, of course, arises if there is no certainty about the site of the demarcation point in multi-unit dwellings. It stands to reason that when the demarcation point cannot be established, CLECs would be unable to negotiate with incumbents for access to a building’s inside wiring.<sup>35</sup>

---

COMPETITION IN DEDICATED ACCESS SERVICES (2006), *available at* <http://www.gao.gov/new.items/d0780.pdf>.

29. 47 C.F.R. § 68.1 (2006).

30. *Id.* § 68.3.

31. *Id.* The demarcation point is defined as: “the point of demarcation and/or interconnection between the communications facilities of a provider of wireline telecommunications, and terminal equipment, protective apparatus or wiring at a subscriber’s premises.” *Id.*

32. *Id.* § 68.105(b). The “minimum point of entry” is defined as “either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings.” *Id.*

33. Review of Sections 68.104 and 68.213 of the Commission’s Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68.213 of the Commission’s Rules filed by the Electronic Indus. Ass’n, *Report & Order & Further Notice of Proposed Rulemaking*, 5 FCC Rcd. 4686, ¶ 31 (1990).

34. 47 C.F.R. § 68.105(d)(3).

35. Carl E. Kandutsch, *FTTH in Multitenant Environments: Some Regulatory and Competitive Questions*, BROADBAND PROPS., Dec. 2005, at 56, *available at* <http://www.broadbandproperties.com/2005issues/dec05issues/FTTH%20in%20Multi->

In its pre-1996 deliberations, the FCC's inside wiring decisions were not directed toward promoting competitive access because competitive access was not an issue at that time. The intent of the Part 68 rules was "to create a competitive market in the installation and maintenance of inside wiring."<sup>36</sup> However, the 1996 Act promoted competitive access by authorizing CLECs to lease unbundled loops from incumbents.<sup>37</sup> ILECs typically transport signals in MTEs from the network interface device located in the basement or the ground floor to locations on each floor by means of riser cables, and to individual units by inside wiring.<sup>38</sup> In 1997, the FCC required ILECs to allow unbundled access to the network interface device in MTEs.<sup>39</sup> In response to CLECs' allegations that they still had problems with access because ILEC equipment did not always include network interface devices, the FCC attempted to provide more clarity in its 1999 Unbundled Network Element ("UNE") Remand Order by defining the loop as a transmission facility between a distribution frame in the incumbent's central office to the demarcation point.<sup>40</sup> Moreover, the FCC defined the network interface device in functional terms,<sup>41</sup> and defined the subloop requiring it to be unbundled.<sup>42</sup>

Yet, bottlenecks to competitive access persisted despite these unbundling requirements. If competitive providers cannot access inside wiring in MTEs, how can they hope to compete with incumbents? To that end, the FCC sought comment as to whether a uniform demarcation point should be adopted, either at the minimum point of entry or at some other point.<sup>43</sup> In the Competitive Networks Order, the FCC decided not to set a uniform standard, such as requiring the demarcation point to be placed at the minimum point of entry.<sup>44</sup>

---

Tenant%20Environment,%20Kandutsch.pdf.

36. Competitive Networks Order, *supra* note 2, at ¶ 49.

37. 47 U.S.C. § 251(c)(3) (2006). ILECs were required to provide requesting CLECs unbundled access to network elements on "just, reasonable, and nondiscriminatory" terms. *Id.*

38. *Cf.* Promotion of Competitive Networks, *supra* note 17, at ¶ 39.

39. Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, *First Report & Order*, 11 FCC Rcd. 15,499 (1996), *aff'd in part, vacated in part sub nom.* Competitive Telecomms. Ass'n v. F.C.C., 117 F.3d 1068 (8th Cir. 1997).

40. 47 C.F.R. § 51.319(a).

41. *Id.* § 51.319(c).

42. *Id.* § 51.319(b)(2) ("The subloop for access to multiunit premises wiring is defined as any portion of the loop that is technically feasible to access at a terminal in the incumbent LEC's outside plant at or near a multiunit premises.")

43. Promotion of Competitive Networks, *supra* note 17, at ¶ 65.

44. Competitive Networks Order, *supra* note 2, at ¶¶ 50-53. On the one hand, certain CLECs argued that, despite unbundling requirements, ILECs continued to thwart their access to inside wiring. They suggested moving the demarcation point to an MPOE so that all facilities-based carriers would operate under the same terms in interconnecting with inside wiring which would be controlled by the owner. *Id.* ¶ 50. The FCC clearly had to weigh

However, in that proceeding, the FCC did take other actions to open access to competitors by prohibiting exclusive contracts in commercial MTEs,<sup>45</sup> requiring electric utilities and ILECs to extend reasonable and nondiscriminatory access rights-of-way and ducts on campuses and customer buildings, and prohibiting restrictions on the use of antennas to receive and transmit telecommunications and fixed wireless signals.<sup>46</sup> Further measures were adopted when the FCC, in response to a petition by Cox Oklahoma Telecom, L.L.C., further clarified the conditions under which competing providers may access local exchange carrier's ("LECs") inside wiring in MTEs—specifically, the FCC required LECs to have direct access to inside wire subloops and provided the framework for such installations to occur.<sup>47</sup> The FCC's decisions on competitive access with respect to cable television facilities have followed a different trajectory than that for telephone facilities, although they shared a similar overarching goal stemming from federal legislation. As in the 1996 Act, competition was a goal in the 1992 Cable Television Consumer Protection and Competition Act.<sup>48</sup> The FCC promoted competitive access to cable inside-wiring in multiple-dwelling units ("MDUs") as one means of moving toward that goal.<sup>49</sup> In a 2003 order, the Cable

---

those considerations against the competitive interests of DSL providers and potentially stranded investments by the ILECs. Therefore, the FCC concluded:

The record shows that although moving the demarcation point to the MPOE would reduce costs and facilitate deployment for competitive LECs that rely on their own facilities to reach MTEs, it would increase costs and hinder deployment for carriers that rely on unbundled local loops. In the absence of convincing evidence that the benefits to one group of competitors would significantly outweigh the harms to the other, we find the best course is to continue to leave the choice in the first instance to the building owner.

*Id.* ¶ 53.

45. The prohibition did not apply to residential buildings because the FCC did not believe it had adequate information to justify a determination at that time. The FCC requested comments on whether to extend the prohibition governing exclusive contracts to residential buildings. See Competitive Networks Order, *supra* note 2, at ¶ 158. Also, more recently, the FCC requested comments in Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, *Notice of Proposed Rulemaking*, 22 FCC Rcd. 5935 (2007) [hereinafter Exclusive Service Contracts for Provision of Video Services]. The FCC noted: "We intend to issue a public notice seeking to refresh the record in that proceeding." *Id.* ¶ 3 n.10. So the FCC does not consider the possibility of extending the prohibition to residential buildings to be a "dead" issue.

46. Competitive Networks Order, *supra* note 2, ¶ 6.

47. Telecomms. Servs. Inside Wiring, *Report & Order & Declaratory Ruling*, 22 FCC Rcd. 10,640, ¶¶ 48-55 (2007) [hereinafter Telecomms. Servs. Inside Wiring Order].

48. 47 U.S.C. § 521(6) includes among its goals: "promot[ing] competition in cable communications and minimize[ing] unnecessary regulation that would impose an undue economic burden on cable systems."

49. The FCC's reasoning was that "the inability of alternative MVPDs [multichannel video programming distributors] to access existing wiring in MDUs at the end of incumbent service providers' service contracts tends to undermine competition in the MDU marketplace

Television Consumer Protection and Competition Order, the FCC defined a “multiple dwelling unit” for cable inside-wiring purposes as “a building or buildings with two or more residences, such as an apartment building, condominium building, or cooperative.”<sup>50</sup> Subsequently, the FCC expanded that definition to include “gated communities, mobile home parks, garden apartments, and other centrally managed real estate developments.”<sup>51</sup> That order prohibited cable operators from enforcing or entering into new exclusivity clauses for the provision of video services.<sup>52</sup> The definition of “multiple dwelling unit” in that order and prior proceedings pertaining to MDUs does not apply to commercial buildings affected by the Competitive Networks Order discussed above.<sup>53</sup> The FCC’s cable home run wiring rules were intended to facilitate competition in the event that the contract between the provider and building owner was no longer in effect, but they did not override the contract.<sup>54</sup> We will return to this point in our discussion of exclusive contracts below.

The cable inside-wiring proceedings apply to multichannel video programming distributors (“MVPDs”), which historically were predominantly traditional cable and satellite companies.<sup>55</sup> Companies may be exempt from regulations governing MVPDs if the video services provided are solely “on-demand interactive services”<sup>56</sup> The rules

---

and thereby deprive MDU tenants of choice.” See *Telecomms. Servs. Inside Wiring, First Order on Reconsideration & Second Report & Order*, 18 FCC Rcd. 1342, ¶ 7 (2003) [hereinafter *Cable Television Consumer Protection and Competition Order*].

50. *Id.* at ¶ 1 n.2; see also 47 C.F.R. § 76.800(a).

51. Exclusive Service Contracts Order, *supra* note 3, at ¶ 7.

52. *Id.* at ¶ 1.

53. Competitive Networks Order, *supra* note 2, at ¶ 11. The definition of “Multiple Tenant Environment” includes “apartment buildings (rental, condominium, or co-op), office buildings, office parks, shopping centers, and manufactured housing communities.” *Id.*

54. 47 C.F.R. § 76.800(d). The definition of cable home run wiring is “wiring [that runs] from the demarcation point to the point at which the MVPD’s wiring becomes devoted to an individual subscriber or individual loop.” *Id.* By contrast, “cable home wiring” is the internal wiring within the consumer’s premises, beginning at the demarcation point and extending to the consumer’s television set or other customer premises equipment. The FCC links the home run wiring rules to the objective of promoting competition in cable communications in the Cable Television Consumer Protection and Competition Order, *supra* note 49, at ¶ 7.

55. A MVPD is “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming . . .” 47 U.S.C. § 522(13).

56. The cable inside-wiring proceedings apply to MVPDs and, as noted above, the definition of MVPDs includes cable operators, among others. To see how all this connects, we note that “cable operator” is defined in 47 U.S.C. § 522(5) as:

[A]ny person or groups of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any

governing demarcation points for MVPDs serving multiple-dwelling unit buildings are not the same as for telephone companies.<sup>57</sup> Specifically, FCC rules prohibit an incumbent MVPD from impeding a competitor's access to inside wiring at the demarcation point.<sup>58</sup> Whereas, the FCC refused to set a uniform standard for the demarcation point for telephone company installations, the FCC did so for cable television installations.<sup>59</sup> According to the FCC:

Location of the demarcation point is significant because . . . the demarcation point is the place where competing providers may access existing home wiring in an MDU building. A demarcation point that allows relatively unimpeded access to existing wire is likely to foster competitive entry into the MDU marketplace.<sup>60</sup>

An issue of contention has been the setting of the demarcation point when a location is "physically inaccessible." Competitors are concerned that they cannot access demarcation points that are physically inaccessible. So, in that event, the demarcation point would have to be located in an accessible spot, such as the operator's junction box.<sup>61</sup> Therefore, the definition of this term is extremely important for competitive access. The easier it is for competitors to access the wiring, one would expect, the greater the loss of market share for the incumbent cable operators. In its 2003 order, the FCC interpreted its existing rule on physical inaccessibility to include wiring located behind drywall.<sup>62</sup> That interpretation was challenged in the Court of Appeals for the D.C.

---

arrangement, the management and operation of such a cable system . . . .

The definition of "cable system" in 47 U.S.C. § 522(7) applies to a facility "to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services . . . ." For leading us through this definitional labyrinth, we are indebted to Carl E. Kandutsch, see Kandutsch, *supra* note 35 (providing in-depth analysis of the defining modalities of communications services).

57. Competitive Networks Order, *supra* note 2, at n.105.

58. 47 C.F.R. § 76.802(j); *see also* Cable Television Consumer Protection and Competition Order, *supra* note 49, at ¶ 48.

59. 47 C.F.R. § 76.5(mm).

60. Cable Television Consumer Protection and Competition Order, *supra* note 49, at ¶ 49.

61. *Id.* ¶ 51.

62. *Id.* ¶ 53 (amending the note to 47 C.F.R. § 76.5(mm)(4) to include the reference to sheet rock). 47 C.F.R. § 76.5(mm)(4) states that "the term 'physically inaccessible' describes a location that: (i) Would require significant modification of, or significant damage to, preexisting structural elements, and (ii) Would add significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring." The note further explains that "wiring embedded in brick, metal conduit, cinder blocks, or sheet rock with limited or without access openings would likely be physically inaccessible; wiring enclosed within hallway molding would not." 47 C.F.R. § 76.5(mm)(4) n.

Circuit, which remanded the issue to the FCC for further proceedings after determining that the FCC had not amassed sufficient evidence to support its finding.<sup>63</sup> The FCC issued a *Further Notice of Proposed Rule Making* on the Matter in 2004.<sup>64</sup> In June 2007, the FCC determined that cable wiring located behind drywall is indeed physically inaccessible<sup>65</sup> on the grounds that accessing the demarcation point behind drywall would be physically laborious or drive up costs (or both).<sup>66</sup> The FCC concluded that “the Commission’s inside wiring rules are intended to facilitate competition in video distribution market:” clarification as to the conditions affecting competitive access to existing home run wiring would move toward that objective.<sup>67</sup> Customer choice was also an issue for the FCC in its deliberations on the disposition of home run wiring where the incumbent provider no longer has an enforceable right to remain in an MDU. In its deliberations on that issue in 1997, the FCC established procedures for the disposition of cable home run wiring.<sup>68</sup> Various petitioners commented that building owners’ interests were not necessarily aligned with those of their tenants; however, the owners should not have authority to select alternative providers.<sup>69</sup> In response to various arguments to the contrary, the FCC opted to give the building owner, and not the individual subscribers, the option of acquiring the home run wiring of departing MVPDs. The FCC reaffirmed its decision by reasoning that:

The record contains no evidence that the decisions MDU owners make with regard to video providers are depriving their tenants of diverse sources of information. The Commission concluded in the *Report and Order* that the property owner should have the ability to control the wiring because the property owner is responsible for the common areas of a building. Property owners have safety and security responsibilities, maintain compliance with building and

---

63. Nat’l Cable & Telecomms. Ass’n v. F.C.C., 89 F. App’x 743 (D.C. Cir. 2004).

64. Telecomms. Servs. Inside Wiring, *Further Notice of Proposed Rule Making*, 20 FCC Rcd. 1233 (2004); see also GERRY LEDERER, MILLER & VAN EATON, P.L.L.C., 2007 TELECOMMUNICATIONS CHECKLIST 4 (2007), available at <http://www.millervaneaton.com/00126970.pdf>. Meanwhile, the explanatory note for the definition of “physically inaccessible” still references sheet rock. See 47 C.F.R. § 76.5(mm)(4)n.; *supra* note 62 and accompanying text.

65. Telecomms. Servs. Inside Wiring Order, *supra* note 47, at ¶ 56.

66. *Id.* ¶ 36.

67. *Id.* ¶ 56.

68. Telecomms. Servs. Inside Wiring, *Report & Order & Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 3659 (1997). In 47 C.F.R. § 76.800(d), “home run wiring” is defined as “[t]he wiring from the demarcation point to the point at which the MVPD’s wiring becomes devoted to an individual subscriber or individual loop.”

69. Cable Television Consumer Protection and Competition Order, *supra* note 49, at ¶ 14.

electrical codes, maintain the aesthetics of the building, and balance the concerns of the residents. Individual subscribers will not be disadvantaged by having the MDU owner own or control the home run wiring. Considerations of fairness and efficiency persuade us to leave this aspect of our rules intact, rather than adopting the petitioner's proposals.<sup>70</sup>

Moreover, the FCC observed that in most cases building owners would be influenced by market forces to recognize their tenants' interests in selecting providers.<sup>71</sup> So market incentives would, for the most part, provide incentives to building owners to align their interest with their tenants' interests.<sup>72</sup> Yet, despite the FCC's efforts to provide building owners with more control over inside wiring for both cable and telephone installations in recent years, building owners still appear to have less discretion over inside cable wires than inside telephone wiring. Cable companies are only required to comply with FCC regulations on the disposition of inside wiring if they no longer have an enforceable right to be in the building. The same constraints do not appear to apply to telecommunications companies.

#### *D. New Entrants: Implications for Inside Wiring Regulations*

What are the implications of these two strands of regulatory decisions on inside wiring (telephony and cable) for new entrants seeking to install fiber in multiple-unit buildings? First, the telecommunications regulations affect building owners and consumers in a broader array of buildings: "apartment buildings (rental, condominium, or co-op), office buildings, office parks, shopping centers, and manufactured housing communities."<sup>73</sup> These proceedings focused largely on competition between ILECs and CLECs.<sup>74</sup> In an effort to encourage investments in broadband services, the FCC in 2004, relieved LECs from certain unbundling requirements if they deploy fiber-to-the-home loops, regardless of the ownership of the inside wiring, to the minimum point of entry in MDUs.<sup>75</sup> The FCC qualified that the MDUs must be predominantly residential.<sup>76</sup> The decision in the 2004 proceeding was

70. *Id.* ¶ 14; *see also* 47 C.F.R. § 76.804(a)(3) (outlining arbitration procedures for disputes as to what price an MDU owner should pay for an MVPD's home-run wiring).

71. Cable Television Consumer Protection and Competition Order, *supra* note 49, at ¶ 15.

72. *Id.*

73. Competitive Networks Order, *supra* note 2, at ¶ 11.

74. Competitive Networks Order, *id.*, refers throughout to "incumbent LECs" and "competitive LECs" in the context of exclusive contracts and access to wiring.

75. Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Order on Reconsideration*, 19 FCC Rcd. 15,856, ¶¶ 10-11 (2004).

76. *Id.* ¶¶ 1-2. In ¶ 6, the FCC also included planned development units as an example

actually intended as a reconsideration and clarification of the FCC's "Triennial Review Order," which imposed limited requirements on ILECs to unbundle broadband loops.<sup>77</sup>

In contrast to telephony consumers, cable television subscribers historically have been residential and not commercial, so the inside wiring proceedings have applied to MDUs that, by definition, include apartment buildings, condominiums, cooperatives, and other centrally managed real estate developments.<sup>78</sup> In prior years, these two strands of regulations—telephony and cable—were distinct because the services provided historically were easily classified as voice provided by telephone companies, data provided by cable or telephone companies, or video provided by cable and satellite companies. Each type of service presented a unique set of safety, quality, and access issues.

Yet, as the technology evolves, it may sometimes be unclear which set of inside wiring requirements should be invoked. One such example is IPTV, which is increasingly a service provided in "triple play" or "quadruple play" plans. If a company provides IPTV, is that service considered a "cable service" or not?<sup>79</sup> A "cable service" is defined as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."<sup>80</sup> Other questions include the following: under what conditions does an RBOC providing video service over fiber become a MVPD, which automatically invokes cable inside-wiring rules? Should IPTV be subject to the same regulations as traditional cable television? Will consumers be adequately protected if IPTV is defined by the FCC as an "information service?" Would IPTV even satisfy that definition?

The 1996 Act defined an "information service" as:

[T]he offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system

---

of an MDU, although they are not included as an example in the definition in 47 C.F.R. § 76.800(a). *Id.* ¶ 6.

77. *Id.* ¶ 1.

78. Exclusive Service Contracts Order, *supra* note 3, at ¶ 7.

79. Kandutsch, *supra* note 35, at 55. Kandutsch also raised the question about the implications of classifying IPTV as an "information services" for competition in MDUs and, by extension, for the FCC's inside wiring rules. *Id.* We think this is a good example of how technology outpaces FCC classifications.

80. 47 U.S.C. § 522(6).



or the management of a telecommunications service.<sup>81</sup>

The FCC, subsequently, has determined that the following services should be included under the definition of “information service”: cable modem Internet access service, wireline broadband Internet access service, Broadband over Powerline (“BPL”)-enabled Internet access service, and wireless broadband Internet access service.<sup>82</sup> As we have seen, terms have precise meanings in FCC proceedings. At the time of writing, we note that the FCC has not determined a classification for IPTV.<sup>83</sup> If IPTV is defined as an “information service,” it is not subject to common carrier regulation. Therefore, consumers could expect less regulatory protection.<sup>84</sup> However, companies may be induced to provide more bundled services using fiber in MDU premises if a growing number of services are subject to little or no regulation.

Evolving technology will continue to raise questions about the applicability of various federal regulations for new types of services. If the past is any indicator for future actions, we can expect the FCC to consider new services on a case-by-case basis. However, in the Franchising Reform Order, the FCC did provide us with some insight into its philosophy about mixed-use networks. The FCC provided that if an LEC deploys fiber optic cable for both cable and non-cable services, the LEC is not required to obtain a cable franchise based exclusively on

81. *Id.* § 153(20).

82. Wireless broadband Internet access service was the most recent service to be included as an “information service.” See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks, *Declaratory Ruling*, 22 FCC Rcd. 5901, ¶¶ 1-2 (2007) [hereinafter Appropriate Regulatory Treatment for Broadband Access]. Declaratory rulings for the other Internet access services are referenced in nn. 4-6 of that document. *Id.* ¶ 2.

83. The FCC also declined to address the regulatory classification of IP-based television in its Franchising Reform Order, *supra* note 16, at ¶ 124.

84. The FCC’s classification of “information services” does not remove its jurisdiction over those services but reduces regulatory requirements that were designed to protect consumers in a non-competitive market. There are two underlying concepts for this designation. One underlying concept is that the market is sufficiently competitive to make a greater level of regulatory oversight unnecessary and that such oversight would impede rather foster greater competition. The other underlying concept is that the services and markets are evolving rapidly and that regulation would delay development and discourage entry. The FCC appeared to have the latter concept in mind when it classified broadband as an information service. The FCC described its regulatory stance in Appropriate Regulatory Treatment for Broadband Access, *supra* note 82, at ¶ 4, as follows:

In proceedings involving cable, wireline, and BPL, the Commission has examined the regulatory classification applicable to certain broadband services and determined to adopt a *pro-competitive, deregulatory regime* for these services. In particular, the Commission has classified cable, wireline, and BPL broadband Internet access services as “information services,” thus reducing regulatory requirements and uncertainties that could have slowed development of these broadband services.

(emphasis added).

that deployment.<sup>85</sup> The FCC also found that a local franchise agreement may not be used to regulate the LEC's entire network or any services beyond cable services.<sup>86</sup> The FCC also reasserted that facilities used solely to provide "interactive on demand services" are excluded from the definition of "cable system."<sup>87</sup> Of course, that leaves the question we previously raised about IP-based video services that have other features.

*E. Exclusive Contracts and Other Contractual Forms*

Contractual restrictions are another frequently discussed barrier to competitive access. Customer choice could be limited if exclusive or perpetual contracts prevent competitors from accessing the incumbent's inside wiring to provide service to tenants in multiunit buildings or in planned communities. On the other hand, competition might be reduced if exclusive access contracts were banned. A ban might reduce the number of small providers that depend on exclusive access contracts to generate an adequate, dependable revenue stream for their investments and possibly differentiate themselves from incumbents.<sup>88</sup> In 1999, the FCC initiated its inquiry into exclusive contracts for telephony services in MTEs.<sup>89</sup> In that proceeding, the FCC recounted the arguments for and against exclusive contracts. These contracts prevented competitive entry during the term of the contract; meanwhile, they were reported to provide new entrants with dependable revenue streams to recover investments.<sup>90</sup> Proponents of exclusive contracts contended that without the contracts, competition would not evolve.<sup>91</sup> In response, the FCC requested comments on its authority to forbid exclusive contracts with building owners or managers, the scope and implementation of any rule banning exclusive contracts, the application of and conditions for such a ban, and the legal and policy issues associated with abrogation of existing contracts or with allowing them to continue.<sup>92</sup> In its inquiry, the FCC was clearly trying to discern whether the potential benefits, in the form of greater discounts to end users, might offset the anti-competitiveness of such contracts. The FCC stated:

---

85. Franchising Reform Order, *supra* note 16, at ¶¶ 121-22.

86. *Id.*

87. *Id.* ¶ 123.

88. Carl E. Kandutsch, *Are Exclusive MDU Access Agreements on Thin Regulatory Ice?*, BROADBAND PROPS., Nov. 2006, at 86, available at [http://www.broadbandproperties.com/2006issues/nov06issues/kandutsch\\_nov.pdf](http://www.broadbandproperties.com/2006issues/nov06issues/kandutsch_nov.pdf) (focusing on the competitive stature of private cable operators in particular).

89. Promotion of Competitive Networks, *supra* note 17.

90. *Id.* ¶ 61.

91. *Id.*

92. *Id.* ¶ 64; Competitive Networks Order, *supra* note 2, at ¶ 25.

We seek comment on the extent to which, and under which circumstances, the ability to enter into exclusive contracts materially advances the ability of competitive carriers to serve customers in multiple tenant environments. We also seek comment on whether end users may benefit from a property owner's ability to enter into an exclusive contract, for example by negotiating a discount with the carrier.<sup>93</sup>

In the Competitive Networks Order, the FCC concluded that exclusive contracts should be banned in commercial settings, but declined to prohibit them in residential settings due to insufficient information.<sup>94</sup> The FCC noted its reasoning for not banning exclusive contracts for residential buildings: some parties contended that absent exclusive contracts, residential buildings did not generate sufficient revenue to draw competitive entrants.<sup>95</sup> Other parties to the proceeding countered that exclusive contracts should be banned across the board.<sup>96</sup> However, the FCC made it clear that exclusive contracts (existing or new; commercial and residential) could indeed constitute "barrier[s] preventing customers from obtaining the benefits of the more competitive access environment envisioned in the 1996 Act."<sup>97</sup>

A comparison of the FCC's decision regarding cable home wiring is instructive. In that decision, the FCC viewed building owners' interests to be aligned, for the most part, with those of tenants. In its position on exclusive contracts for telecommunications services in the Competitive Networks Order, the FCC clearly viewed the interests of building owners as not always being aligned to those of tenants:

An exclusive contract may benefit a building owner when it possesses some market power over tenants, such as where tenants are already committed to long-term leases and moving costs are prohibitive. Where that is the case, building owners may have the ability and incentive to engage in behavior that does not maximize tenant welfare.<sup>98</sup>

If the building owners' and tenants' interests were aligned to a significant degree, we might expect the FCC to see no need to impose a ban on exclusive contracts in commercial settings, nor to invite further

93. Promotion of Competitive Networks, *supra* note 17, at ¶ 61.

94. Competitive Networks Order, *supra* note 2, at ¶ 27. For later procedural developments, see Exclusive Service Contracts for Provision of Video Services, *supra* note 45 and accompanying text.

95. Competitive Networks Order, *supra* note 2, at ¶ 33.

96. *Id.*

97. *Id.* ¶ 36.

98. *Id.* ¶ 31.

consideration of a ban in residential settings. Yet, the FCC reasoned that the ban on exclusive contracts in commercial settings was justified “as primarily a temporary [measure] designed to address a transitional problem.”<sup>99</sup> With growing competition in local telephony markets, competition would make contracts that harm consumers unsustainable, and the market power of building owners would likely erode.<sup>100</sup> The FCC followed up with a *Further Notice of Proposed Rulemaking* in the Competitive Networks Order.<sup>101</sup> The FCC issued two subsequent public notices on access issues related to multi-tenant environments followed by a decision in March 2008 to ban exclusive contracts for telecommunications services in residential settings.<sup>102</sup>

The FCC’s approach toward exclusive or perpetual contracts for video from MVPDs has differed from that toward exclusive telephony contracts involving LECs and CLECs. The FCC also distinguished between “exclusive” and “perpetual” contracts in contracts applying to MVPDs. Exclusive cable contracts “specify that, for a designated term, only a particular MVPD and no other provider may provide video programming and related services to residents of an MDU.”<sup>103</sup> Perpetual contracts permit incumbent providers to maintain wiring and continue to provide service within the multiple-unit premises for indefinite periods of time or for the duration of a franchise.<sup>104</sup>

Exclusive and perpetual contracts were the legacies of a non-competitive era.<sup>105</sup> However, in the Cable Television Consumer Protection and Competition Order, the FCC acknowledged that market conditions for providing video services had become more competitive.<sup>106</sup> According to the Competitive Networks Order, market conditions had

---

99. *Id.* ¶ 34.

100. *Id.*

101. Competitive Networks Order, *supra* note 2, at ¶¶ 160-164. The proposed rule was published in Promotion of Competitive Networks in Local Telecomms. Mkts., 66 Fed. Reg. 1622 (Jan. 9, 2001) (to be codified at 47 C.F.R. pts. 1 and 64).

102. Wireless Telecomms. Bureau Requests Comment on Current State of the Mkt. for Local and Advanced Telecomms. Servs. in Multitenant Environments, *Public Notice*, 16 FCC Rcd. 20,971 (2001). Specifically, the FCC requested updated data on the current state of the market for advanced telecommunications services in multitenant environments and comments were due on February 1, 2002. *Id.* In the March 21, 2008 order, the FCC noted: “Developments in the markets for telecommunications, video, and broadband services over the last several years support our conclusion to extend the ban on exclusivity to residential MTEs.” Promotion of Competitive Networks in Local Telecomms. Mkts., *Report & Order*, FCC 08-87, WT Dkt. No. 99-217, 2008 WL 762860, ¶ 9 (Mar. 21, 2008) [hereinafter March 2008 Order].

103. Cable Television Consumer Protection and Competition Order, *supra* note 49, at ¶ 59.

104. *Id.*

105. *Id.* ¶ 60.

106. *Id.*

also become more competitive for facilities-based telephony services in multi-unit premises.<sup>107</sup> In recounting the comments received in the Competitive Networks (telecommunications) proceeding on this issue, the FCC observed that the different designs of inside wire distribution systems for video and telephony created different market conditions and thus, necessitated a separate examination of contracts.<sup>108</sup> Moreover, these conditions might yield different results for residential telecommunications service than for residential video service.<sup>109</sup>

In the Cable Television Consumer Protection and Competition Order, the FCC summarized arguments from parties supporting and opposing such contracts, but decided not to ban either exclusive or perpetual contracts at the time.<sup>110</sup> Justifying its decision for not banning exclusive contracts, the FCC observed a 3.5% drop from 2000 to 2002 in the percentage of subscribers receiving video programming from franchised cable companies.<sup>111</sup> Justifying its decision for not banning perpetual contracts, the FCC observed there was no record of evidence indicating their prevalence.<sup>112</sup> Despite its decision not to take any action in 2003 (the year that the Cable Television Consumer Protection and Competition Order was issued), the FCC noted that perpetual contracts in MDUs may deter competition.<sup>113</sup>

More than four years later, the FCC revisited the issue of exclusive contracts for video services in MDUs in its *Notice of Proposed Rulemaking*.<sup>114</sup> In that proceeding, the FCC requested comment on the several questions related to the “prevalence, use, and effect of exclusive contracts in today’s marketplace.”<sup>115</sup> In response to comments from that proceeding, the FCC issued an order prohibiting contracts with exclusivity clauses in new and existing contracts—to be further discussed below.<sup>116</sup>

Against the backdrop of deliberations on exclusive and perpetual contracts is the issue of constitutional takings—either physical or regulatory—under the Fifth Amendment.<sup>117</sup> We do not propose to deal

107. Competitive Networks Order, *supra* note 2, at ¶ 14.

108. *Id.* ¶ 62.

109. *Id.*

110. *Id.* ¶¶ 71-72.

111. *Id.* ¶ 69.

112. *Id.* ¶ 72.

113. Competitive Networks Order, *supra* note 2, at ¶ 75.

114. Exclusive Service Contracts for Provision of Video Services, *supra* note 45.

115. *Id.* ¶ 6.

116. Exclusive Service Contracts Order, *supra* note 3, at ¶ 1.

117. A law review article analyzed the potential constitutional implications of proposed rules for banning exclusive telecommunications contracts. These rules did not apply to existing contracts. The case law that was reviewed related to property takings under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Yee v. City of Escondido*,

with the implications of case law on takings here, but have a few brief observations about the FCC's general authority to regulate exclusive contracts and its authority to regulate existing contracts. As to its general regulatory authority, the FCC concluded that it could prohibit telecommunications carriers from entering into exclusive contracts with commercial building owners in connection with interstate service.<sup>118</sup> The FCC was somewhat less conclusive when it came to its authority to regulate exclusive contracts involving video service in MDUs and other real estate, and invited comments to address its tentative conclusion that it has such authority.<sup>119</sup> The FCC ultimately concluded in the Exclusive Service Contracts Order that it is authorized to prohibit exclusivity clauses involving video services in MDUs and other real estate under Section 628(b) and (j) of the Communications Act of 1934 and, in the absence of explicit authority, under Titles I and III of the 1934 Act.<sup>120</sup> Moreover, such a prohibition would represent neither a physical nor a regulatory taking under the Fifth Amendment of the U.S. Constitution.<sup>121</sup> In the Exclusive Service Contracts Order, the Commission noted that the prohibition applied only to cable operators subject to the provisions of Section 628 and sought further comment on the applications of the prohibition to other types of video providers.<sup>122</sup>

---

503 U.S. 519 (1992), and regulatory takings under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The author found that the proposed rules that were under consideration at the time did not appear to constitute a taking. See Kathryn Gordon, Note, *Enhancing Competition: Are Proposed Federal Commission Rules That Treat Local Exchange Carrier Access to Multiple Tenant Environments a Taking?*, 55 FED. COMM. L.J. 99 (2002). Even though there appeared to be no constitutional barriers, there appeared to be public policy problems with subsidizing CLECs if, indeed, competition was really the objective. See *id.*

118. Competitive Networks Order, *supra* note 2, at ¶ 35. In note 85 of the Competitive Networks Order, *id.*, the FCC cites its authority under 47 U.S.C. § 201(b) and the decision of the court in *Cable & Wireless P.L.C. v. F.C.C.*, 166 F.3d 1224, 1230-32 (D.C. Cir. 1999).

119. The FCC based its tentative conclusion on language in § 628(b) of the Communications Act of 1934 and § 706 of the 1996 Telecommunications Act. The FCC also invited comment on whether that authority could be found in several other sections, including § 623 of the Communications Act of 1934. See Exclusive Service Contracts for Provision of Video Services, *supra* note 45, at ¶ 9.

120. Exclusive Service Contracts Order, *supra* note 3, at ¶¶ 40, 52, 60. The FCC claimed in ¶ 60 that it has authority to enforce all aspects of the Cable Act pursuant to Sections 4(i), 201 (b), and 303(r). The FCC also claimed in ¶ 52 that it also has ancillary authority to do so under Titles I and III of the 1934 Act.

121. *Id.* ¶¶ 55-56.

122. *Id.* Specifically, the prohibition applies to cable operators, common carriers or their affiliates that provide video programming directly to subscribers, and operators of open video systems. See *id.* ¶ 60. The prohibition does not apply to Digital Broadcast Satellite ("DBS") providers and other providers not subject to Section 628 of the Communications Act of 1934. See *id.* at ¶ 61. According to the Commission, "there is no evidence in the record that providers of DBS service use exclusivity clauses." See *id.* ¶ 8.

The FCC's authority in regulating existing contracts proved to be initially more problematic. Therefore, the FCC decided to proceed cautiously with respect to regulating existing exclusive contracts for telecommunications services—concerned with the potential effects of contractual modifications on investments of building owners and providers subject to those contracts.<sup>123</sup> The question of the FCC's authority over existing telecommunications contracts and financial impacts likewise applies to contracts involving video programming. Addressing the question of authority in conjunction with MVPDs, the Commission asked for comments on whether it has authority to regulate exclusive contracts entered into after regulations are promulgated and whether it could declare such contracts void and voidable.<sup>124</sup> In the same proceeding, the Commission asked for comments about its authority to nullify or otherwise regulate perpetual contracts.<sup>125</sup> Based on evidence in the record, the Commission decided to prohibit the enforcement of existing, as well as new, exclusivity clauses by cable companies that would potentially impede competitive access.<sup>126</sup> According to the Commission, “[t]he rule merely prohibits clauses that serve as a bar to other MVPDs that seek to provide services to a MDU.”<sup>127</sup> However, the prohibition does not apply to other provisions in contracts containing exclusivity clauses.<sup>128</sup> The Commission also asked for comments on whether exclusive marketing and bulk billing arrangements should be prohibited, but did not prohibit those arrangements in the order.<sup>129</sup> Finally, the Commission concluded that “the legitimate expectations of investors” will not be adversely affected by the prohibition of exclusive access in existing cable company contracts.<sup>130</sup>

No discussion of exclusive contracts is complete without some mention of state mandatory access laws. These laws generally provide franchised cable companies with the legal authority to install and

---

123. Competitive Networks Order, *supra* note 2, at ¶ 36. In the Exclusive Service Contracts Order, *supra* note 3, the Commission noted that it intended to address the enforceability of exclusivity clauses for telecommunications services within two months due to “competitive parity implications.” Competitive Networks Order, *supra* note 2, at ¶ 46 n.109. In its March 2008 order to ban exclusive contracts in residential settings, the Commission, citing its observations in other orders, noted: “the dramatic growth of service combinations and the ‘triple play’ reduces the concern that a sole telecommunications service revenue stream is insufficient to generate additional competitive entry, even in the residential context.” March 2008 Order, *supra* note 102, at ¶ 9.

124. Exclusive Service Contracts for Provision of Video Services, *supra* note 45, at ¶ 10.

125. *Id.* ¶ 13.

126. Exclusive Service Contracts Order, *supra* note 3, at ¶ 37.

127. *Id.* ¶ 57.

128. *Id.* ¶¶ 37, 57.

129. *Id.* ¶¶ 57, 63. In the *Further Notice of Proposed Rulemaking*, the Commission noted that it was aware of the possible anti-competitiveness of these arrangements.

130. *Id.* ¶¶ 36, 58.

maintain inside wiring in multi-unit premises. For example, Wisconsin's law prohibits an owner or a manager of an MDU, mobile home park, or condominium from preventing, or interfering with, a cable operator providing cable service to residents.<sup>131</sup> The rights of the companies protected by these laws may even supersede building owners' desires or objections.<sup>132</sup> Moreover, they may serve to compromise the FCC's home run wiring rules discussed above.<sup>133</sup> Currently, Texas, Rhode Island, and Indiana have mandatory access statutes affecting telephone companies in multi-unit premises and office buildings.<sup>134</sup> Eighteen states and the District of Columbia have passed mandatory access statutes affecting franchised cable companies.<sup>135</sup> The FCC noted the anti-competitive nature of mandatory access statutes because most of them "give the franchised cable operator a legal right to wire and remain in an MDU,"<sup>136</sup> but declined in 2003 to pre-empt states and municipalities with those laws.<sup>137</sup> The Commission's recent Franchising Reform Order also does not appear to preempt state mandatory access statutes; that order only applies to local franchising laws, regulations, and agreements to the extent that they conflict with the order.<sup>138</sup> The Commission's Exclusive Service Contracts Order appears to override contracts entered into in accordance with state mandatory access statutes to the extent that they conflict with the exclusivity clause prohibition in the order. However, the order does not override MDU owners' authority to deny particular providers access to the premises in keeping with relevant state laws, nor does it require them to provide access to all video providers.<sup>139</sup> The Commission's prohibition is based on its regulatory authority of the contracts of jurisdictional cable operators regardless of any "tangential effect of such regulation on MDU owners."<sup>140</sup>

---

131. WIS. STAT. § 66.0421(2) (2007).

132. Cable Television Consumer Protection and Competition Order, *supra* note 49, at ¶ 35.

133. *Id.*

134. IND. CODE § 8-1-32.6-9 (2007); TEX. UTIL. CODE ANN. §§ 54.259 - 261 (Vernon 2007); R.I. GEN. LAWS § 39-19-10 (2007).

135. See LEDERER, *supra* note 64, at § 11; see also Independent Multi-Family Communications Council, Mandatory Access States, <http://www.imcc-online.org/ISSUES/RESOURCE%20Info/Mandatory%20Access/states.htm> (last visited Apr. 10, 2008) (listing of the states with these statutes, including statutory citations and enactment dates).

136. Cable Television Consumer Protection and Competition Order, *supra* note 49, at ¶ 38.

137. *Id.* ¶ 39.

138. Franchising Reform Order, *supra* note 16, at ¶ 129.

139. Exclusive Service Contracts Order, *supra* note 3, at ¶¶ 37, 60.

140. *Id.* ¶ 60.



## II. LOOKING TOWARD THE FUTURE

We might ask ourselves if there is a better way to ensure competitive access to multi-unit premises. Extensive case law on property and regulatory takings informs much of what the U.S. government can do in terms of ensuring the proper conditions for competitive access. However, other countries with different legal legacies might find they have more flexibility and fewer legal constraints in this respect. For example, Hong Kong is densely populated, with almost seven million residents, and has one of the highest broadband penetration rates in the world (73% of households use broadband service).<sup>141</sup> The Office of the Telecommunications Authority (“OFTA”) regulates the telecommunications industry in Hong Kong.<sup>142</sup> OFTA authorized by ordinance telecommunications network operators to install their networks in common places of the buildings to serve tenants.<sup>143</sup> Common places generally include lobbies, staircases, equipment rooms, risers, roofs, and open spaces.<sup>144</sup> Building owners are not permitted to refuse access to interested operators.<sup>145</sup> Moreover, building owners are prohibited from entering into any reasonable contract that prevents tenants from accessing their choice of public telecommunications services.<sup>146</sup> So, consumer choice is central to access policy here, and the government’s strategy is driven by that goal. In the United States, by contrast, consumer choice considerations must always be considered in the context of constitutional Fifth Amendment rights.

The FCC has deliberately taken very incremental steps to inject competition into the delivery of voice, data, and video services in multi-unit premises. Its approach has been to focus on issues significantly related to competitive access like inside wiring and contractual provisions. The FCC’s efforts to promote competitive access have been impeded to some extent by its historic deference to case law affecting the rights of property owners, and a political awareness of potential opposition from states and local governments whose authority might be preempted.<sup>147</sup> Because FCC proceedings are based on classifications and

---

141. INFO. SERVS. DEP’T, HONG KONG SPECIAL ADMIN. REGION GOV’T, HONG KONG: THE FACTS — TELECOMMUNICATIONS (2008), *available at* <http://www.gov.hk/en/about/abouthk/factsheets/docs/telecommunications.pdf>.

142. *Id.*

143. Office of the Telecommunications Authority, Hong Kong Special Admin. Region Gov’t, Frequently Asked Questions on In-Building Access Issues, <http://www.ofa.gov.hk/en/industry/inbuilding/faq.html> (last visited Apr. 10, 2008).

144. *Id.*

145. *Id.*

146. *Id.*

147. Although the FCC never explicitly admitted to a concern over potential state and local opposition to preemption, this concern appears to be underlying the deference paid to

reclassifications to such a large extent, it is perhaps not surprising that regulatory response and intervention fall behind the changes in technology. Examples are plentiful in the inside wiring deliberations, such as the FCC's change in the definition of the network interconnection device, discussed above, to reflect functionality. This nation's heavy reliance on legalist "fixes" always appears to generate more regulatory proceedings, which are both costly and time consuming, with the inevitable outcome that regulatory decisions give rise to further deliberations either in courts on appeal or in subsequent orders on the same set of issues. This is not an indictment on the FCC or on any other regulator for that matter, but just our observation that all the ramifications of technological applications simply cannot be envisioned at a fixed point in time. The FCC's regulatory decisions are always destined to fall behind technological changes, an argument cogently articulated in Ron Whitworth's 2005 law review article on IPTV.<sup>148</sup> By giving consumers more choice, IP video technology may render video content regulation obsolete and undermine the tier levels of programming offered by cable companies.<sup>149</sup>

Other countries arguably have been more effective than the United States in promoting broadband competition with far less regulatory intervention.<sup>150</sup> Their approaches might not be easily adaptable to that

---

states and local governments "to decide whether the need for mandatory access laws outweighs the anti-competitive effects of such laws." Cable Television Consumer Protection and Competition Order, *supra* note 49, at ¶ 39.

148. Ron Whitworth, Comment, *IP Video: Putting Control in the Hands of Consumers*, 14 COMM'LAW CONSPECTUS 207, 210 (2005).

149. *Id.*

150. According to recent data released by the OECD, the U.S.'s ranking in broadband subscribers per 100 inhabitants is now fifteenth of the 30 nations ranked. The U.S. was ranked fourth in 2001 (Korea, discussed above, now ranks fourth). In December 2006, over 14 million U.S. households had broadband connections with download speeds of 256 kbps. Organisation for Economic Co-operation and Development, OECD Broadband Statistics to December 2006, [http://www.oecd.org/document/7/0,3343,en\\_2649\\_34223\\_38446855\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/7/0,3343,en_2649_34223_38446855_1_1_1_1,00.html) (last visited Apr. 10, 2008). We cite the OECD's rankings for this paper because they are so widely used, however the rankings are affected by the methodology's reliance on raw per capita subscription data. Alternative approaches include that of the Phoenix Center for Advanced Legal & Economic Public Policy Studies, which uses economic and demographic data and that of the Information Technology and Innovation Foundation, which uses average download speed and price per bit of the fastest generally available technology in addition to household penetration. See George S. Ford, Thomas M. Koutsky, & Lawrence J. Spiwak, *The Broadband Performance Index: A Policy-Relevant Method of Comparing Broadband Adoption Among Countries*, PHOENIX CENTER POL'Y PAPER SERIES (Phoenix Ctr. for Advanced Legal & Econ. Pub. Pol'y Studies, Wash., D.C.), July 2007, available at <http://www.phoenix-center.org/pcpp/PCPP29Final.pdf>; DANIEL K. CORREA, INFO. TECH. & INNOVATION FOUND., ASSESSING BROADBAND IN AMERICA: OECD AND ITIF BROADBAND RANKINGS (2007), available at <http://www.itif.org/files/BroadbandRankings.pdf>.

of our nation due to its unique legal system and large population. Nonetheless, they still may provide us with insights into other ways of spurring competition. We already mentioned Hong Kong's approach toward competitive access while acknowledging that the U.S. case law on property rights could make its application problematic at best. South Korea's approach of "more hands-off regulation" might be a useful alternative going forward.

Like Hong Kong, South Korea ranks very high in the concentration of multiple-dwelling units. In South Korea, nearly 48% of the population lives in apartment complexes.<sup>151</sup> And South Korea has the highest broadband penetration by households in the world—over ninety connections per one hundred households.<sup>152</sup> Why is that the case? The Korean government was a "player" in that it had a comprehensive three-stage plan for Korean information infrastructure that spanned the years 1995-2005.<sup>153</sup> The objectives of the plan were to construct a high-capacity backbone, provide incentives for research, and reduce the burden of providers' investments in networks.<sup>154</sup> The total cost of the initiative upon completion was \$2.829 billion.<sup>155</sup> South Korea's regulatory approach toward broadband competition included removing barriers to entry and promoting facilities-based competition among broadband providers.<sup>156</sup> New entrants were first movers in the form of fiber Asymmetric Digital Subscriber Line ("ADSL").<sup>157</sup> In the early stages, the government made facilities-based competition a priority. The government in South Korea also established a certification program several years ago that rates buildings based on the quality/capacity of their data lines. The idea is that developers with fatter pipes can charge

---

151. SEONG JU KANG, MINISTRY OF INFO. & COMM'N, BROADBAND SERVICE IN KOREA 3 (2006), available at <http://www.baller.com/pdfs/korea.pdf>.

152. Broadband Wales Observatory, Broadband Benchmark Update Q3: July - September 2006, Fig. 13, <http://www.broadbandwalesobservatory.org.uk/broadband-3510> (last visited Apr. 10, 2008).

153. NAT'L INFO. SOC'Y AGENCY, IMPLEMENTING NATIONAL ICT ENABLEMENT STRATEGY: THE CASE OF KOREA (2007), available at [http://www.andicom.org.co/memorias/kim\\_chang\\_kon\\_miercoles.pdf](http://www.andicom.org.co/memorias/kim_chang_kon_miercoles.pdf); see also KANG, *supra* note 151, at 11.

154. KANG, *supra* note 151, at 11.

155. *Id.*

156. Broadband Wales Observatory, Korea Broadband Market Report 2005, <http://www.broadbandwalesobservatory.org.uk/broadband-3335> (last visited Apr. 10, 2008).

157. KANG, *supra* note 151, at 15; see also T.Y. Lau et al., *An Examination of Factors Contributing to South Korea's Global Leadership in Broadband Adoption*, 22 TELEMATICS & INFORMATICS 349-59 (2005), available at <http://www.sciencedirect.com/science/article/B6V1H-4FN5JRB-6/2/e1acd69e8923f57ce6231cd0ee5b3c34>. These authors also consider South Korea to be a good example of a government's strategy to enhance broadband diffusion.

more rent.<sup>158</sup>

### III. CONCLUSION

Consumer choice is an objective of the FCC. To move toward that goal, the FCC has initiated numerous proceedings over the past ten years to reduce barriers to competitive access in deploying telecommunications and cable services. Many of these proceedings specifically have focused on barriers to competitive access in multi-unit premises where the building owners' and developers' interests may not be aligned to those of the end users. In addition to the issues of property rights, competitors face challenges in installing telecommunications and cable networks because of the magnitude of the investment involved and the ability to access existing wiring within these premises. The regulatory legacies of the services provided by telecommunications companies and cable companies have been different, and it is therefore not difficult to appreciate that regulatory treatment might lag behind changes in services. For example, in recent years, services have evolved, like IPTV, which resemble more traditional services, but also contain features that straddle different applications. The FCC's method for dealing with such services has been largely definitional. If they are classified as an "information service" under the Communications Act of 1934, as amended by the 1996 Act, they would be subject to little or no regulation.<sup>159</sup>

Admittedly, the process of defining services can be difficult and challenging given the sometimes overlapping attributes of evolving services. As the former FCC Chairman, Michael Powell, observed:

One might ask what is in a name? In the law, a great deal. When Congress crafts legislation it defines the rights, responsibilities and obligations by reference to particular definitions or classifications. In the multifaceted world of communications it has defined the rights and obligations differently, depending on the nature of the service offered without regard to the means in which it is offered.

Thus, the Commission has an inescapable duty to determine the will of Congress by faithfully applying these definitions to new services. This is not an easy task, given all communications services

---

158. J.C. Herz, *The Bandwidth Capital of the World*, WIRED, Aug. 2002, at 2, available at [http://www.wired.com/wired/archive/10.08/korea\\_pr.html](http://www.wired.com/wired/archive/10.08/korea_pr.html).

159. See 47 U.S.C. § 153(20) (defining "information service").

have some similar and overlapping features.<sup>160</sup>

At one time, the FCC's definitional process may have served consumers and providers well. But with the explosive changes in technology that consumers in this nation have been experiencing in recent years, it may be time for a regulatory paradigm shift. At the time of writing, it has been almost 12 years since the passage of the 1996 Act, and companies are still affected by different regulatory rules with respect to accessing multi-unit premises.<sup>161</sup> Therefore, we might ask: how can the FCC move more quickly toward its vision for broadband service as articulated in its most recent strategic plan? That vision calls for all Americans to "have affordable access to robust and reliable broadband products and services. Regulatory policies must promote technological neutrality, competition, investment, and innovation to ensure that broadband service providers have sufficient incentive to develop and offer such products and services."<sup>162</sup> The third objective in support of that vision requires the Commission to ensure harmonized regulatory treatment of competing broadband services.<sup>163</sup>

Recognizing that services will continue to evolve and converge and defy easy definition, we propose an admittedly bold approach: a uniform set of rules for competitive access, regardless of technology platform, that would apply to all multi-unit premises and planned developments and would expedite service deployment. The convergence access plan should be based on the principles of non-discrimination on the basis of technology or service, using competition to empower customers in their choices of communications services and service providers, encouraging investment in advanced technologies for inside wiring, and providing incentives for intermodal competition between traditional telephony, cable, and wireless providers.<sup>164</sup> However, we recognize that there are

160. Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Declaratory Ruling & Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798, 4866 (2002) (separate statement of Michael Powell, Chairman, FCC), available at <http://www.fcc.gov/Speeches/Powell/Statements/2002/stmkp204.pdf>.

161. For example, the Exclusive Service Contracts Order, *supra* note 3, requested comments on whether exclusivity clauses should apply to DBS providers and other providers not subject to Section 628 of the Communications Act of 1934. See *supra* note 119 and accompanying text.

162. FCC, STRATEGIC PLAN 2006-2011 5 (2005), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-261434A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261434A1.pdf).

163. *Id.*

164. We should note that these principles do not provide a definitive answer on the issue of exclusive contracts. If the number of network providers is limited, then exclusive contracts for small network providers could promote the principles we propose. On the other hand, exclusive contracts could limit customer choice if they allow incumbents to create barriers to entry, or promote inefficient entry if they encourage the formation of entrants in an otherwise competitive market whose only means of survival is to secure exclusive arrangements with

many outstanding questions concerning the feasibility of such an undertaking. To that end, we suggest that the FCC initiate a Notice of Inquiry requesting comment on the implications of such an approach. Questions to be posed might include, but not be limited to: the implications of dispensing with definitional classifications for emerging communications services; the economic and legal barriers to phasing in a uniform set of rules for competitive access; and the manner in which phased-in rules could be best accomplished to account for differences throughout the country in broadband penetration. If the FCC determines that the benefits outweigh the costs in terms of expediting competitive access and that its vision for broadband deployment would be realized more rapidly through such an approach, the FCC could proceed with a Notice of Proposed Rulemaking.

We believe that if some type of reform is not forthcoming and the incremental approach to regulation continues as it has in the past, choice in provider platforms might be more of a pipe dream than a reality for many of this nation's consumers, particularly for those who live and work in multi-unit premises and planned developments. And for many companies, providing that pipe might also remain a dream.