

**STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL, CONCURRING**

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

Today the FCC helps give many consumers who live in apartment buildings and other multiple dwelling units (MDUs) the hope of having more choices among video service providers. If you live in a building where the property owner limits your freedom to choose among video service providers through an exclusive arrangement with just one company, today's Order liberates you.

In our Order, the Commission finds that contractual agreements granting cable operators exclusive access to MDUs is harmful to competition. Accordingly, our Order prohibits the enforcement of existing exclusivity clauses, and the execution of new ones, as an unfair method of competition. Although I agree that increased competition among video providers in MDUs will result in better service, innovative offerings to consumers, and lower prices, I am concerned about the legal sustainability of the Order, should it be appealed. My concern is this: after unanimously inviting cable companies and building owners to strike such deals in 2003, the FCC may now be abrogating those exact same agreements immediately rather than waiting for them to expire and without providing a grace period. In some cases, cable companies relied upon our 2003 Order to make arrangements with owners of older buildings to wire them for the first time, or to upgrade them with newer technologies, in exchange for a limited period of time when they could be the exclusive video service provider to allow for recovery of their investments. The record indicates that many buildings may have been upgraded, or brought online for the first time, as a result of this policy. To flash cut to a new regulatory regime without a sensible transition period only begs for an appeal that could result in a court throwing out all of our Order, the good with the bad. I am disappointed that our Order does not take the simple and small step of avoiding such exposure.

My concern is underscored by what can be perceived as a lack of sufficient evidence in the record to justify such an immediate mandate. In fact, in 2003, the Commission unanimously held that "the record developed in this proceeding indicates little support for governmental interference with privately negotiated exclusive MDU contracts.... We do not find a sufficient basis in this record to ban or cap the term of exclusive contracts."¹ Because the 2003 record reflected both pro-competitive and anti-competitive aspects of exclusive contracts, the Commission decided not to act. Now, only four years later, we do take action despite similar arguments being presented in the record. The Order should do a better job of distinguishing these apparent contradictions.

I am also concerned that our Order may not give sufficient deference to states that have passed their own laws helping consumers with this issue. The record indicates that 20 states have enacted such legislation and no state has abrogated existing contracts such as we are doing here. Arguments that our actions today may constitute a regulatory taking that requires compensation may have merit as well, and I wish the Commission's appellate lawyers the best of luck in defending against such claims. I only wish we were giving our attorneys more legal ammunition to use to defend the agency. At the end of the day, because I agree with the thrust of what the Commission is attempting to do today, namely giving consumers the freedom to choose among a variety of video services providers, I concur in this Order.

¹ *Telecommunications Services Inside Wiring: Cable Television Consumer Protection & Competition Act of 1992*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342 (2003), at ¶ 68.