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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
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Telecommunications Services Inside Wiring	)	
	)	
Customer Premises Equipment	)	CS Dkt. No. 95-184
	)	
and	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992:	)	
	)	
Cable Home Wiring	)	MM Dkt. No. 92-260

COMMENTS OF COX COMMUNICATIONS, INC.

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TABLE OF CONTENTS

I. SUMMARY AND INTRODUCTION 2

II. EFFORTS TO HARMONIZE TELEPHONE AND CABLE INSIDE WIRING RULES ARE PREMATURE 8

III. THE COMMISSION SHOULD RETAIN ITS EXISTING POLICIES WITH REGARD TO THE DEMARCATION POINT FOR CABLE WIRING 12

A. The Commission's Authority to Require Cable Operators to Surrender Control Over Wiring Installed in MDUs by Moving the Demarcation Point Is Circumscribed by the Communications Act and the Fifth Amendment 13

B. The Demarcation Point for Cable and Telephone Differ for Technical and Regulatory Reasons 17

C. Requiring Cable Operators to Surrender Control over Wiring Installed in MDUs by Moving the Demarcation Point Does Not Promote Facilities-Based Competition 19

D. The Commission Can Achieve Regulatory Parity by Using the Existing Cable Demarcation Point for all Broadband Wiring 22

IV. THE COMMISSION SHOULD APPLY ITS SIGNAL LEAKAGE AND TECHNICAL STANDARDS TO ALL VIDEO PROGRAMMING DISTRIBUTORS THAT UTILIZE BROADBAND FACILITIES. 23

A. Signal Leakage Standards 24

B. Technical Standards 26

V. PROHIBITION ON EXCLUSIVE AGREEMENTS WITH MDUS 27

VI. STATE LAW SHOULD GOVERN CONTROL OF PLANT IN A LOOP-THROUGH WIRED MDU 29

VII. IN THE ABSENCE OF A COMPETITIVE ENVIRONMENT FOR SECURED CPE, CONTINUED REGULATION OF CABLE EQUIPMENT IS REASONABLE 32

VI. CONCLUSION 34

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COMMENTS OF COX COMMUNICATIONS, INC.

Dow, Lohnes & Albertson, on behalf of Cox Communications, Inc. ("Cox"), hereby submits these comments in response to the above-captioned *Notices of Proposed Rulemaking* regarding telecommunications inside wiring, customer premises equipment ("CPE"), and cable home wiring.[1/]

1/ Telecommunications Services Inside Wiring, Customer Premises Equipment, *Notice of Proposed Rulemaking*, MM Dkt. No. 95-184, FCC 95-504 (rel. Jan. 26, 1996) (the "*Notice*"); Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, *First Order on Reconsideration and Further Notice of Proposed Rulemaking*, MM Dkt. No. 92-260, FCC 95-503 (rel. Jan. 26, 1996) ("*First Recon. Order*" and "*Further Notice*"). The *First Recon. Order* was adopted in response to petitions for reconsideration of the Commission's initial cable wiring order, *Report and Order*, 8 FCC Rcd 1435 (1993) ("*Cable Home Wiring Order*"). In its *Notice*, the Commission incorporates by reference the record in the *Further Notice* proceeding. *Notice* at 2 n.2. Therefore, Cox has consolidated its comments in the two rulemaking proceedings.

I. SUMMARY AND INTRODUCTION.

In these proceedings, the Commission proposes to reexamine its telephone and cable television inside wiring rules "in light of today's evolving and converging telecommunications marketplace."[2/] The Commission correctly notes that the statutory frameworks and rules governing telephone and cable wiring are different, reflecting not only technological differences but also different regulatory objectives. The Commission also correctly recognizes that "telephone companies and cable operators have begun to enter each other's businesses."[3/]

According to the Commission, "[a]s telephone companies and cable operators upgrade their systems to offer telephony, data and video programming services — *sometimes over a single wire* — the type of wiring and the wiring configurations used may become indistinguishable."[4/] In Cox's experience, both telephone and cable companies are upgrading the backbones of their networks with coaxial cable and fiber optic to increase capacity and reliability. However, the notion that, as the types of services offered by cable operators[5/] and telephone companies become increasingly similar, "the facilities used to deliver those

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2/ *Notice* ¶ 1.

3/ *Id.* ¶ 2.

4/ *Id.* (emphasis added).

5/ It should be noted that the term "cable operator" means a provider of video services over broadband facilities that may or may not be offering Title VI "cable service." Thus, the terms "cable operator" and "video provider" are used interchangeably throughout these comments.

services will become increasingly similar"[6] — appears to be premature at best and, for a variety of economic and technical reasons, may never come to pass. As cable operators begin to offer telephony services, they will deliver such services over the same hybrid fiber-coaxial infrastructure of trunk and feeder lines that they use to deliver data and video programming services. But *inside* single dwelling units ("SDUs") and multiple dwelling units ("MDUs"), their telephone service will be provided over traditional, narrowband "twisted pair" copper wiring, and their video service will be provided over broadband coaxial cable — and the same will be true of the telephony and video services provided by telephone companies. As discussed in more detail below, telephone and video services will not be provided over a single wire *inside* subscriber units.

What this means is that, for the foreseeable future, there is no "issue of parity between [the Commission's] telephone and cable inside wiring rules."[7] As telephone companies and cable operators enter each other's businesses, they will each be subject to the *same* two sets of rules that apply to narrowband telephone inside wiring and to broadband cable inside wiring. Moreover, although telephone service and cable service both are provided by wire to residents of MDUs, the wiring, architecture and technology by which the services are provided are markedly different. There is, therefore, no reason to "anticipate that certain differences between [the] cable and telephone inside wiring rules may

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6/ *Id.* (emphasis added).

7/ *Id.* ¶ 1.

cause confusion and impede the development of competition"[8] between cable operators and telephone companies.

In fact, any effort to "harmonize" the telephone and cable inside wiring rules by changing the existing cable rules — in particular, by moving the "demarcation point" for cable inside wiring further away from individual subscriber units — would impede substantially the development of competition. Under the rules implementing the cable inside wiring requirements of the Cable Television Consumer Protection and Competition Act of 1992,[9] cable operators are required to offer subscribers who terminate their service the opportunity to purchase wiring within their premises before they may remove such wiring.[10] The demarcation point is the point at which wiring is deemed to be within a customer's premises and therefore subject to this requirement.[11] Moving the demarcation point in MDUs from the point at which wiring enters an individual resident's unit would diminish rather than enhance the competitive alternatives available to residents of such buildings.

8/ *Id.* ¶ 3.

9/ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (the "1992 Cable Act").

10/ 47 C.F.R. §§ 76.801, .802 (1994).

11/ The demarcation point for cable home wiring is at or about 12 inches outside of where the cable enters the subscriber's premises in SDUs, and at or about 12 inches outside of where cable wire enters individual subscriber units in MDUs. 47 C.F.R. § 76.5(mm)(1), (2) (1994); *Notice* ¶ 7. The Commission's rules set the telephone wiring demarcation point for new and existing single unit installations at a point within 12 inches of where the telephone wiring enters the customer's premise. *Notice* ¶ 8 (citation omitted). The telephone wiring demarcation point in MDUs generally is based on standard operating practices. *Id.*

The recently enacted Telecommunications Act of 1996[12/] reflects a recognition by Congress that facilities-based competition maximizes consumer choice and best promotes the public interest — and this is clearly the case with regard to MDUs. Currently, the most effective way to promote facilities-based competition is to allow alternate service provider to install a second set of wiring to compete with the incumbent service provider. The principle reason for this is that technology has not developed to the point where it is economically and practically feasible for multiple providers of broadband services to simultaneously "tap" into a single broadband facility in an MDU. Unless there are multiple sets of wiring carrying broadband services throughout an MDU and into the units of MDU residents, individual residents will be unable to choose from among the services of multiple providers.

Accordingly, rather than encouraging competition, moving the demarcation point to a point more than 12 inches outside the subscriber's premises would do just the opposite by discouraging the construction of multiple facilities that would otherwise be likely to occur. The only competition that it conceivably would promote would be competition for the right to be the *sole* provider of broadband service in an MDU (or in a residential unit) — a truncated form of competition that may promote the interests of the building's owner but does not best serve the interests of its residents or the public at large.

Therefore, if the Commission had the discretion and authority to move the cable demarcation point to a point more than 12 inches outside each individual resident's premises,

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12/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act").

Cox believes that it would be contrary to the public interest to do so. In any event, as we will show, Congress has not provided the Commission with such discretion and authority. Congress has authorized the Commission to compel cable operators to offer wiring *inside* a subscriber's premises upon termination of service by the subscriber and to ensure that operators are justly compensated for any such compulsory taking of their property. But it has not authorized any such mandatory transfer of control of wiring *outside* individual subscribers' premises — and it clearly has indicated that cable operators have no duty to relinquish control over such wiring.

While ensuring regulatory parity and fair competition does not require that the inside wiring rules for narrowband telephone wiring and for broadband cable wiring be harmonized, it does require that all providers utilizing the *same* type of wiring be subject to the same inside wiring rules. In this respect, the Commission *should* ensure that all competitive providers of *broadband* services be subject not only to the same rules regarding the disposition of inside wiring upon termination of service but also to the same technical standards regarding wiring — including, for example, signal leakage and technical standards.

However, the Commission can help ensure that facilities-based competition will be the rule and not the exception is to prohibit service providers from entering into exclusive service contracts with MDU owners. Exclusive contracts prevent competitors from installing wiring or using existing wiring to compete with incumbent video providers. Prohibiting exclusive contracts, therefore, is an important step in promoting facilities-based competition.

Lastly, although in order to provide telephone and video services CPE must be attached to the wiring in the subscriber's residence, the two types of equipment differ markedly in function and technology. The set-top equipment used in the provision of cable service is integral to the distribution, security and metering of such service and is not analogous to the telephone CPE that the Commission deregulated two decades ago. Accordingly, the Commission should not adopt rules which assume that parity does or will exist between cable and telephone CPE.

In sum, technological developments have made it possible to envision competition in the provision of voice, data and video services by multiple providers over competitive facilities. And legislative developments have facilitated this competition by removing the legal and other non-technical barriers that would otherwise have prevented each of the two principal facilities-based competitors — cable operators and telephone companies — from providing the services historically provided by the other. But ensuring that the convergence of telephony and cable services results in long-term facilities-based competition will require a careful and steady hand by the Commission. The implementation of a false regulatory parity resulting from the Commission's failure to distinguish the differences between narrowband and broadband wiring and facilities, and between traditional telephone CPE and cable set-top equipment, would undermine prospects for such sustained competition.

II. EFFORTS TO HARMONIZE TELEPHONE AND CABLE INSIDE WIRING RULES ARE PREMATURE.

The Commission's desire to "harmonize" the rules that apply to telephone and cable inside wiring appear to be premised on the expectation that, as telephone companies and cable operators enter each other's businesses, they each will provide a full range of voice, data and video service over a single broadband facility inside the home. In that case, disparate regulatory treatment of the two providers' inside wiring could have an adverse and unfair affect on competition. However, because telephony and video programming, for the foreseeable future, are unlikely to be provided on an integrated basis over a single broadband facility inside homes and MDUs, there is little danger that competition will be harmed by maintaining the Commission's inside home wiring rules in their current form. Indeed, if anything, moving the cable demarcation point to more closely resemble the demarcation point for telephone services would only undermine competition by eliminating incentives for the build out of alternative facilities.

Early on, Cox recognized the synergies that exist between cable plant and the provision of telecommunications service. For the past six years, for example, Cox has been developing cable-based PCS technologies with the goal of offering the American public a competitive, high quality, full-featured and widely-available telecommunications service. For its efforts, Cox was awarded a pioneer preference license for the Los Angeles-San Diego MTA, an area with a population of more than 19.6 million. Moreover, to enhance its entry into the wireless market, Cox joined TCI, Comcast and Sprint Corporation to create Sprint

Spectrum, L.P. -- a company engaged in the business of providing wireless services through a seamless, integrated nationwide wireless communications network.

Consistent with its business strategy, Cox also was the first cable television company to invest in Teleport Communications Group, Inc. and TCG Partners (collectively "TCG"), the largest competitive access provider in the United States. By combining TCG's wireline resources, cable's local broadband networks, and new digital wireless technologies, Cox is establishing a telecommunications platform capable of providing dependable, secure and competitive telecommunications service to the public. Based on its experience, Cox believes that for the foreseeable future, traditional switched voice telephone service will continue to be provided inside homes and MDUs over traditional twisted-pair narrowband copper wiring by telephone companies *and* by cable operators, while both providers will use broadband facilities inside the home to deliver video programming. Most ongoing technology development to provide telecommunications services is dedicated to support convergence of services within the *network*, not within the *home or dwelling unit*. Broadband service travels down an integrated network providing video, voice, and data services to the side of the dwelling unit. But at the side of the dwelling unit, however, it is anticipated that voice services will be delivered over the consumer's twisted pair wiring, video will be delivered over the consumer's coaxial cable, and high speed data will be delivered over the same or a separate coaxial cable. In addition, competitors, including the telephone companies, are designing their full service delivery systems to take advantage of the *existing* wiring in the home by using twisted pair for voice and coaxial cable for video and data. As discussed

below, this is being done for economic and practical reasons, and will enable service providers to bring new services to customers as quickly as possible.

To properly implement future policy, it is important that the Commission and consider the current state of wiring configurations. Wiring configurations in MDUs and subscriber units will not change any time soon. The configurations presently used for cable and telephone service inside MDUs differ significantly for reasons that have to do with technical differences between the services. For example, in most cable wiring configurations, a common distribution cable carries throughout the MDU all the programming that a system provides. Separate wires dedicated to individual units branch off this common plant, usually at points just outside or relatively near the specific units that they serve.[13/] In addition, amplifiers to boost signal strength are added at multiple locations throughout the wiring inside an MDU to ensure adequate signal quality at the subscriber's receiver. This configuration reflects the traditional one-way transmission of cable services to subscribers, who may choose to receive some or all of the services. Typically, services either are transmitted through the system in scrambled form and are unscrambled — for those subscribers who choose to purchase them — by set-top converters, or they are transmitted in unscrambled form but blocked with traps outside the units of those subscribers who choose not to purchase them.

13/ In "loop-through" configurations, *all* the wiring is common, with *no* wiring dedicated to specific units.

The configuration of telephone wiring in MDUs is wholly different. Because of the two-way, point-to-point nature of telephone communications, each unit must be connected by a dedicated twisted pair to the point at which the MDU is connected to the external telephone network.[14/] There is no common wiring carrying the same programming or other transmissions to all residences inside the building. Moreover, in contrast to cable wiring, telephone signals do not need to be amplified to maintain adequate signal quality — yet another reason that common wiring is not used.

It may be technically possible to integrate the provision of telephone service and cable service over a single broadband (or twisted-pair) infrastructure inside the MDU — but it is unlikely that either cable operators or telephone companies will choose to do so in the foreseeable future. Even though cable operators and telephone companies are each increasingly finding it economical and desirable to upgrade their trunk plants with fiber optics, they are continuing to use coaxial cable to provide video and broadband services into and *inside* homes and MDUs and to use twisted pair copper inside wiring to provide telephone service. The costs associated with using integrated broadband inside wiring to provide video programming and switched telephone service remain prohibitively high compared to the use of dual facilities. Furthermore, the existing dual wiring scheme is used in many millions of homes in the United States and it fully serves the needs of customers. There is no economic or technical incentive to change this scheme.

14/ As noted *infra* Part III, from a technical standpoint, the demarcation point in telephone wiring technically is close to the point where common wiring becomes dedicated.

Even though Cox has expended substantial resources to deploy fiber optics, it represents only 18% of its entire hybrid fiber plant. The additional 82% includes, among other plant, all wiring from the drop to the inside of subscribers' premises. Nothing in Cox's present business plans to offer a full range of voice, video and data services justifies pushing fiber any further into its network. Moreover, because the capacity of hybrid fiber networks will be increased as providers such as Cox move to switched networks, there is no need to build out further fiber plant.

Thus, although cable and telephone companies plan to distribute video, telephony and data services in each other's market, the distribution of these services and the provision of multiple services by multiple service providers over a single wire is many years away.[15/]

III. THE COMMISSION SHOULD RETAIN ITS EXISTING POLICIES WITH REGARD TO THE DEMARCATION POINT FOR CABLE WIRING.

The Commission in the *Notice* raises a variety of questions regarding the desirability of establishing a common demarcation point for cable and telephone wiring by its proposal to move the existing demarcation point for one or the other.[16/] As the Commission recognized, a host of difficult issues are raised by the prospect of moving the demarcation point of cable

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15/ In fact, currently network hardware vendors have not attempted to develop and market the facilities necessary to provide multiple services from different providers over the same wire given the state of current technology. One vendor, First Pacific, has investigated the possibility of developing such hardware but has not been successful in its efforts to date in view of the enormous technical difficulties to be overcome.

16/ *Notice* ¶¶ 12-19.

wiring, particularly as it affects wiring in MDUs.[17] Of course, as discussed below, the Commission is without legal authority to move the cable demarcation point. But even if the Commission had the requisite legal authority, moving the demarcation point in MDUs would be undesirable because it would impede, rather than promote, facilities-based competition and consumer choice.

The demarcation point should remain where it is for cable inside wiring, and broadband wiring installed by a telephone company or any other company should be subject to the same rules which are now applicable to cable operators. Ownership of broadband wiring inside an MDU but *outside* the subscriber's premises should remain subject to agreement between the landlord and the cable operator.

A. The Commission's Authority to Require Cable Operators to Surrender Control Over Wiring Installed in MDUs by Moving the Demarcation Point Is Circumscribed by the Communications Act and the Fifth Amendment.

Section 624(i) of the Communications Act directed the Commission to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator *within the premises of such subscriber.*" 47 U.S.C. § 544(i) (Supp. IV 1992) (emphasis added). Accordingly, the Commission established the demarcation point in MDUs at (or about) twelve inches outside of where the cable wire enters the outside wall of the subscriber's individual dwelling unit.[18] As the Commission

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17/ *Id.* ¶¶ 13, 18. These comments focus more specifically on wiring inside MDUs. MDU wiring configurations pose novel issues which are not relevant to wiring in SDUs

18/ *Cable Home Wiring Order*, 8 FCC Rcd at 1437.

recognized then, this result was consistent not only with the language of the statute but also with its legislative history, which specifically stated that

> [i]n the case of multiple dwelling units, *this section is not intended to cover common wiring within the building*, but only the wiring within the dwelling unit of individual subscribers.[19/]

Thus, any proposal to amend the definition of cable home wiring to move the demarcation point for cable wiring in MDUs to include wiring *outside* a subscriber's unit would contravene clear evidence of Congress' intent and repudiate the Commission's own interpretation of its statutory directive. The Supreme Court recently confirmed that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear," and that "the Commission's estimations of desirable policy cannot alter the meaning of the Federal Communications Act of 1934."[20/] Especially in light of this legislative history, there is simply no way that the term "premises" could be construed to refer to areas of an MDU outside the individual resident's dwelling area.

Congress' intent in this regard, and its reliance on facilities-based competition, was clarified even further in the 1996 Act. The 1996 Act confirms that Congress did not — and still does not — intend that cable operators be forced to divest wiring outside an individual subscriber's unit. Section 652(d)(2) of the Communications Act, as amended by the 1996 Act, generally prohibits a telephone company from acquiring a cable operator located in its

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19/ *Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7349, 7349 (1992) (*citing* H.R. Rep. No. 628, 102d Cong., 2d Sess. ("House Report") at 119 (1992)) (emphasis added). *See Cable Home Wiring Order*, 8 FCC Rcd at 1436.

20/ *MCI Telecommunications Corp. v. AT&T*, 114 S. Ct. 2223, 2231, 2233 (1994).

telephone service area. But the 1996 Act permits a telephone company to obtain "*with the concurrence of the cable operator* on the rates, terms and conditions, *the use of that part of the transmission facilities of a cable system* extending from the last multi-user terminal to the premises of the end user."[21/] This provision reflects Congress' determination that telephone companies and other distributors hoping to replace an existing provider of cable service have no *right* to acquire the cable operator's wiring outside individual dwelling units (even at a prescribed rate of compensation) but may do so only with the concurrence of the cable operator. This approach contrasts with the interconnection requirements imposed on telephone companies by Section 251(a)(1) of the 1996 Act, under which all local exchange carriers ("LECs") have an affirmative duty to provide access to their essential local exchange facilities upon reasonable request.[22/]

The inside wiring rules, to the extent that they require cable operators to divest their inside wiring upon subscriber termination of service, clearly impose a taking that requires

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21/ 1996 Act, § 302(a) (Communications Act, § 652(d)(2)) (emphasis added).

22/ The 1996 Act also requires LECs to offer their services for resale by others, a requirement that is not applicable to cable operators. 1996 Act, § 101(a) (Communications Act, § 251(a)(11)). Section 251(a)(1) also illustrates that even with regard to essential telephone company facilities, telephone companies are never required to surrender ownership or control to competitive users but only to provide shared use. This is consistent with the antitrust laws' "essential facilities" doctrine, which also may require owners of essential facilities to make the facilities available to competitors — but never to wholly relinquish ownership of such facilities. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992-93 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378, 381 (1973). Of course, cable television is not an essential facility and it is not technically feasible to share facilities in any case.

just compensation.[23] Wholly apart from whether the payment currently required by the Commission for acquiring inside wiring from cable operators is sufficient to constitute just compensation, the Commission may not effectuate a further taking unless it is clearly authorized by Congress.[24]

To the extent that the statute is ambiguous in this regard, the Commission lacks authority to impose a taking of private property. In *Bell Atlantic*, the United States Court of Appeals for the D.C. Circuit ruled that the Commission's decision to permit CAPs to physically collocate facilities in the central offices of LECs was not authorized under the Communications Act, although the Commission had argued that physical collocation was consistent with its authority under Section 201(a) to order "physical connections" between carriers.[25] Because the Commission's order could amount to a taking compensable by the government under the Fifth Amendment (notwithstanding the fact that LECs would collect tariffed rates from CAPs), and because the Communications Act did not provide the Commission with specific authority to bind the government in precisely this way, the court found that it could not give deference to the Commission's interpretation of the statute.[26]

23/ *Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 967 F.2d 648, 656-57 (D.C. Cir. 1992); *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (1992); *cf.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

24/ *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1446-47 (D.C. Cir. 1994).

25/ *Id.*

26/ "*Chevron* deference to agency action that creates a broad class of takings claims . . . would allow agencies to use statutory silence or ambiguity to expose the Treasury to liability both massive and unforseen." *Id.* at 1445.

Where the statute was less than fully clear, the Court refused to construe it in a manner that could raise Fifth Amendment issues.[27]

The statute does not specifically authorize the forced divestiture of wiring outside an MDU resident's individual unit. The statute also limits the applicability of inside wiring requirements to the wiring *within* the subscriber's premises. Even if this limitation were at all ambiguous the Commission would be required to construe it so as not to implicate constitutional issues.[28] Given these considerations, the plain language of the statute prohibits the Commission from adopting rules that result in a taking of wiring outside the units of individual residents in MDUs.

B. The Demarcation Point for Cable and Telephone Differ for Technical and Regulatory Reasons.

As discussed in *supra* Part II, there are practical reasons why the physical location of the demarcation point for cable and telephony historically have differed and why customer-owned wiring must start at a different location. While telephone wiring can span very long distances to and into an MDU without the need for signal amplification, the high attenuation of signals in a broadband network such as that used by video programming providers requires that, from the headend and to and throughout MDUs, the video signals must be amplified. Therefore, while telephone wiring networks can terminate at the entrance to buildings, cable networks, including many of their active components such as amplification

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27/ *Id.*, *citing*, *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575-78 (1988).

28/ *See Rust v. Sullivan*, 500 U.S. at 190-91.

devices, must frequently extend into buildings to overcome the high signal losses associated with the frequencies used over coaxial cable. Therefore, as a practical matter, due to technical considerations, customer-owned wiring in a cable network must start at a different location than in a telephone network.

Moreover, although telephone wiring spans greater distances from the building entrance to a subscriber unit than cable wiring, technically the demarcation point and the common wiring of cable and telephone parallel one another. The cable demarcation point is located at a physical location which is different than the telephone demarcation point — but it is placed at a point which is consistent with the placement of the telephone demarcation point. In both cases, the demarcation point is very close to the location where common wiring becomes dedicated to individual subscribers. Thus, conceptually, the demarcation points for telephone and cable services are very much the same.

C. Requiring Cable Operators to Surrender Control over Wiring Installed in MDUs by Moving the Demarcation Point Does Not Promote Facilities-Based Competition.

A core purpose of the 1996 Act is to encourage facilities-based competition.[29/] Facilities-based competition provides subscribers both the means and the choice to select telephone, video and data services from multiple service providers. This policy goal can and should be implemented with respect to MDUs — but it will not be if the demarcation point for broadband wiring is moved away from its current point just outside the individual resident's unit.

If individual residents are to have a choice of providers of broadband services, there must be multiple broadband facilities *within* an MDU. This is because it is not currently possible for multiple providers simultaneously to "tap in" to a single broadband facility. For two video programming distributors to provide video services over a single wire, the alternate provider would have to use different frequency bands to avoid interference. While theoretically possible, most networks do not have the bandwidth capacity required to carry multiple service providers. Constructing, operating and maintaining a network to function in this fashion is neither practical nor cost-effective. In all likelihood, the provision of multiple

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29/ In discussing restrictions on in-region mergers of cable and telephone companies, Senator Thurmond stressed the need "to promote competition between the two wires — cable and telephone — that already run to the home, and avoid a single monopoly provider of both cable and telephone services, which would result in higher cable and telephone prices for customers." 141 Cong. Rec. S8,472 (June 15, 1995). Senator Kerry echoed that concern for facilities-based competition: "[A]nother particular provision of this legislation that says a local telephone company can buy a local cable company, we cannot allow that in the local area, because then you are only going to get one line to 75 percent of the homes." 141 Cong. Rec. S7,998 (June 8, 1995).

services by multiple service providers over a single wire will not occur until the next century.

Therefore, since only one distributor can use common wiring at any time, *someone* must deploy *additional* common wiring before competition to provide video, data, and other services to individual subscriber units can be realized. Forcing the incumbent cable operator to relinquish control over the common wiring that it has installed would not facilitate or encourage the deployment of this second set of wiring. To the contrary, such a policy would *diminish* the likelihood of facilities-based competition within the building.

Where the building owner has the legal right to restrict access to its premises, forcing cable operators to cede ownership and control of the common wiring in the building will do nothing to enhance the ability of individual residents to choose from among competitive distributors. Only the building's owner will have the right to choose, to the exclusion of subscribers in an MDU, and this right will only serve to increase the leverage of the building owner in negotiating rights to be the sole provider of service in the MDU. And where the building owner, as the result of state or local "access-to-premises" laws, does not have the legal right to deny competitive access, transferring control of common wiring to the owner (and perhaps ultimately to a competitor) will effectively negate the effects of such laws by reducing the likelihood that a second set of common wiring will be deployed.

If the building owner turns the cable operator's wiring over to a new provider, the cable operator may have the *legal* right to install its own new wiring and continue to provide service. But what incentive does it have to do so, if the building owner retains the right to

expropriate the wiring for use by yet another competitor? And if the incumbent cable operator is allowed to continue using its initially installed wiring, what incentive does a second provider have to build a second facility within the building if that facility can then be turned over for the possible exclusive use of a third competitor? A LEC or a second cable operator would be more likely to incur the costs and risks of installing a second facility if it had the assurance that it would be able to use and control the facility for as long as it wished — rather than for as long as the building owner wished.

Currently, both cable operators and telephone companies are upgrading their facilities to compete with each other and are deploying fiber-based, switched broadband facilities nationwide. Indeed, the core purpose of the 1996 Act was to encourage such facilities-based competition. There is no reason to believe that telephone companies lack the resources or the incentive to supplement the copper wiring in MDUs with upgraded broadband facilities. Therefore, the Commission's rules should clearly be aimed at encouraging — not discouraging — such facilities-based competition. Further, the convergence of telecommunications and video services not only increases the competitive advantages of multiple broadband facilities within MDUs; it also makes the deployment of such multiple facilities entirely feasible and likely.

On the other hand, there is also no doubt that telephone companies and other competitors would prefer to be allowed simply to expropriate the use of the existing broadband facilities installed in MDUs by cable operators. This not only would enable them to save the costs of upgrading their own facilities but also would protect them from

competition in the provision of telephony, video, and data services. In contrast, facilities-based competition would give subscribers the ability to mix and match telephone, video, and data services from the telephone company and the cable operator. Allowing the telephone company to use the single broadband facility installed by the cable operator to provide video programming, data, and/or telephony would not only remove the prospect of competition among video service providers, but also would eliminate the prospect that the sole video provider might compete with the telephone company in the provision of telecommunications services — precisely opposite to the outcome envisioned by Congress.[30/]

These anticompetitive effects would be compounded if the building *owner* rather than the occupant were allowed to control and determine the user of unit-dedicated wiring, or if *common* wiring were under the control of the building owner, or if the building owner had the right under local law to *restrict the access* of competing providers to the building's occupants. In all those circumstances, the building owner could effectively thwart any prospect of facilities-based competition — or, indeed, of any competition at all for individual occupants. Therefore, the building owner, as the "gatekeeper," would be the only party to benefit.

D. The Commission Can Achieve Regulatory Parity by Using the Existing Cable Demarcation Point for all Broadband Wiring.

30/ Moreover, if a competitor could take over the plant of the pre-existing video provider, a video provider should be able to exert control over the facilities of the pre-existing voice provider — but it is evident that this does not enhance facilities-based competition either.

One of the Commission's goals in this proceeding is to establish rules that accommodate the entry of telephone companies and cable operators into each others businesses.[31/] As explained above, it would be premature to change the existing rules applicable to cable and telephone wiring because convergence is not imminent. However, as telephone companies upgrade their facilities to add broadband capabilities, the Commission can achieve its goal of parity by regulating telephone company broadband wiring under the same rules which are now applicable to cable wiring because that would encourage facilities-based competition.

By subjecting similar broadband facilities to the same rules, the Commission can avoid the confusion and any legal concerns of subjecting existing cable and telephone wiring to a new set of rules. At the same time, the Commission can ensure that no service provider has an artificial competitive advantage because it is subject to a different set of wiring rules than its competitors.

IV. THE COMMISSION SHOULD APPLY ITS SIGNAL LEAKAGE AND TECHNICAL STANDARDS TO ALL VIDEO PROGRAMMING DISTRIBUTORS THAT UTILIZE BROADBAND FACILITIES.

The Commission's *Notice* seeks comment on the problems that may result when new broadband common carrier services are delivered over aeronautical and public safety frequencies at power levels sufficient to cause potential interference. *Notice* ¶¶ 24-25. Specifically, the Commission seeks comment on how best to extend its signal leakage limits

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31/ *See Notice* ¶¶ 2-5.