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

In the Matter of	)	
	)	
Telecommunications Services -	)	CS Docket No. 95-184
Inside Wiring	)	
	)	
Customer Premises Equipment	)	

COMMENTS OF
<u>THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.</u>

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The National Cable Television Association, Inc. ("NCTA") hereby submits its comments on the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry in the United States, representing the owners and operators of cable systems serving over 80 percent of the nation's 60 million cable households. Its members also include cable programmers, cable equipment manufacturers and others affiliated with the cable television industry.

INTRODUCTION AND SUMMARY

In its NPRM, the Commission considers sweeping changes in its cable home wiring and telephone inside wiring and related equipment rules in an effort to achieve uniformity in the regulatory scheme applied to the video and telephony industries. Its analysis is based on the fundamental assumption that today's telecommunications marketplace is converging into one all-encompassing distribution medium, capable of delivering telephony, data and video services over one wire.

In granting the United States Telephone Association's Petition for Rulemaking on access to cable home wiring, the Commission opened this broad inquiry on the theory that the distribution facilities of telephone companies and cable operators should be treated alike in order to promote competition for broadband services, particularly in multiple dwelling units ("MDUs"). In particular, the NPRM considers setting a common demarcation point for subscriber premises wiring for all wireline communications networks. NCTA submits, as we have since the origins of this rulemaking, that Congress spoke on this matter in the 1992 Cable Act when it instructed the Commission to adopt cable home wiring rules limited solely to the wiring <u>inside</u> a subscriber's premises. Congress drew a definitive line between subscriber access to internal wiring for use with an alternative multichannel provider and the cable operator's plant outside the unit.

Since the adoption of this proceeding late last year, Congress has again spoken -- indeed, proclaimed in the most comprehensive reform of telecommunications law in over 60 years -- that telephone companies and cable systems are not interchangeable and that they are still subject to a different regulatory scheme, regardless of the types of services delivered over their networks. For example, in removing barriers to local telecommunications competition, Congress required common carrier telephone companies to permit competitors to interconnect to their networks on a reasonable and nondiscriminatory basis by, among other things, unbundling network features such as switching, billing and routing. It also preempted state and local laws and regulations that bar or limit competition for local telephone service.

Moreover, the Act codifies a policy widely articulated by the Administration, Congress and the FCC: facilities-based competition. In particular, the Act outlawed buy-outs and mergers of telephone and cable companies in the same market. In a limited exception to this rule, Congress allowed "joint use" of cable transmission facilities by a LEC and cable operator <u>provided the operator gives its consent</u>. This provision alone repudiates the Commission's notion that it has the authority to set a demarcation point that takes the cable operator's wiring out of its control.

Congress has recognized that the cable network is the most likely facility to bring competition to the entrenched telephone monopoly. And, as recent trials have shown, MDUs are likely to be fertile ground for initial forays into telephone competition and the provision of new telecommunications services. If the cable demarcation point is moved well outside the individual unit, the Commission will strip away the operator's pipeline into the home, requiring him to rebuild the system to reach that subscriber. And by simply displacing one provider with another, such rules will only create disincentives for ever building a second wire to the home.

Furthermore, we are not starting from a clean slate here. In the past decade and half alone, the cable industry has invested over $26 billion dollars to wire America. The telephone industry has not. Cable's enormous capital outlay has made a broadband network available to approximately 98 percent of all households. And now the network is being rebuilt and upgraded to enable cable to improve its core services and to compete in the provision of advanced telecommunications services. In the name of convergence, the telephone industry should not be permitted to piggyback onto this massive capital expenditure, particularly where it will only expand and solidify its monopoly in telecommunications rather than enhance consumer choice.

Aside from being at odds with the legal and statutory mandates, the Commission's proposal to divest cable operators of their facilities in MDUs will, as a practical matter, only give landlords -- not consumers -- greater control over who provides service in the building. Indeed, most buildings can easily accommodate more than one supplier, but once the cable operator is forced to give up substantial portions of his plant, the landlord will be empowered to limit access to the provider that offers the best financial deal.

Lastly, NCTA believes that the Commission's proposals to harmonize the cable and telephone wiring and equipment rules are misguided for the following reasons:

- Rules based on the convergence of video, telephony and data services over one wire are at best premature. Although the trend is toward integrating networks, these services will be delivered on separate platforms for the foreseeable future.

- The narrowband telephone network and the broadband cable network are vastly different technologies, possessing distinct technical characteristics and network design. The danger of signal leakage, signal theft and harm to signal quality only arises in the context of broadband cable technology.

- Cable customer premises equipment and telephone customer premises equipment are like apples and oranges: they possess radically different characteristics and perform entirely different functions. The Commission should not rush into changing its CPE rules for either service given the speculative nature of cable/telephony convergence. Moreover, the Commission is addressing the issue of consumer access to cable navigation devices in a separate proceeding pursuant to section 304 of the 1996 Act.

- In light of ongoing industry standards-setting work, the Commission should not impose technical standards for interface jacks and other broadband connections. Regulation in this area will only stifle innovation and experimentation with new delivery systems.

In sum, just as Congress has laid the ground rules for competition in telecommunications, the Commission should not proceed with actions that could take away cable's ability to compete in this marketplace.

DISCUSSION

I. THE TELECOMMUNICATIONS ACT OF 1996 IS PREMISED ON FACILITIES-BASED COMPETITION

In the 1996 Telecommunications Act, Congress completed a broad reexamination of telecommunications policy.[1] Its goal was "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . ."[2] The Act removes barriers to local competition by, inter alia, requiring local exchange carriers to interconnect with other carriers, and requiring incumbent LECs to unbundle their networks and to permit collocation of equipment necessary for interconnection. It also preempts state and local legal and regulatory barriers to the competitive provision of local telephone service.

The cornerstone of the Telecommunications Act is facilities-based competition.[3] Vice President Gore staunchly advocated this policy in the

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1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

2 H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 1, (1996) ("Conference Report").

3 H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 47 ("House Report") ("H.R. 1555, the Communications Act of 1995, as amended, promotes competition and reduces regulation in order to secure lower prices and higher quality service for American telecommunications consumers and encourage the rapid development of new telecommunications technologies. . . . Technological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies. Consequently, the Communications Act of 1995 opens all communications services to competition.")

deployment of the National Information Infrastructure (NII).[4] And the Commission promoted this concept in its video dialtone and other proceedings.[5] By opening up the local telephone loop to competition, Congress has now paved the way for consumers to choose from among several different telecommunications providers -- each deploying its own broadband networks.

Congress envisioned that cable television systems would provide an existing platform to launch competition to the telephone monopoly. This scenario will be stopped dead in its tracks, however, if the telephone industry's convergence subterfuge is given further credence. The coming convergence of services over the broadband network has nothing to do with the appropriate demarcation point. It is only being used by the telephone companies to insulate them from facilities-based competition in MDU buildings and as a regulatory shortcut to not pay for construction of facilities.

If the Commission forces a cable operator to cede a substantial portion of its distribution infrastructure in MDU buildings for the benefit of a competitor, that operator will be foreclosed from continuing to offer video, data or voice services, to the resident of that dwelling unit. Instead of providing real choice, the subscriber

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[4] Speech by Vice President Al Gore on National Telecommunications Reform before Academy of Television Arts and Sciences, January 11, 1994.

[5] See e.g., Telephone Company-Cable Television Cross-Ownership, CC Docket No. 87-266, Second Report and Order and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, ¶ 109-10 (1992); Cellular Communications Systems, CC Docket No. 79-318, Report and Order, 86 FCC 2d 469, ¶ 16 (1981), Reconsideration, 89 FCC 2d 56, ¶¶ 6-8 (1982).

would be boxed into an either/or, one-wire world where all broadband communications services must be delivered by a single provider, rather than the multiple-provider model of facilities-based competition in the new Act. In the name of short-run competition for video service, the MDU occupant will be denied facilities-based competition for broadband services. A customer might take conventional video from one company, high speed internet access or near video-on-demand from someone else. The FCC's Notices head down the wrong policy track, however, in suggesting that the competitor simply take over the incumbent's facilities (at the landlord's bidding to be sure, as discussed below) instead of committing the capital spending to construct separate facilities. In short, it takes facilities to have facilities-based competition.

Indeed, Congress expected that telephone companies would build their own networks to compete in the delivery of video services:

> Telephone company entry into the delivery of video services will encourage telephone companies to modernize their communications infrastructure. Specifically, the deployment of broadband networks would be accelerated if telephone companies were permitted to offer video programming. These networks would be capable of transmitting voice, data and video to consumers. Without this incentive, telephone companies will build advanced networks more slowly. Moreover, telephone company entry into cable would encourage technological innovation. Telephone company entry into cable also would create a healthier communications marketplace.[6]

The current definition of the point of demarcation for cable home wiring, 12 inches outside of the customer's premises, promotes facilities-based competition

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[6] House Report at 53.

because each provider constructs and controls its own MDU distribution plant. The customer retains the flexibility to switch between providers or to receive service from more than one provider simultaneously. Adopting a demarcation point that goes well beyond the individual subscriber's unit will give enormous advantage to the LECs where there is no local competition today and would adversely affect the ability of cable and other competitors to raise capital to upgrade to a fully competitive infrastructure.

Most importantly, as described below, the Commission's proposal to treat cable home wiring the same as telephone inside wiring is at odds with the statutory mandate. Indeed, the buy-out provision in the 1996 Act, combined with the precise "cable home wiring" provision in the 1992 Cable Act, is a direct repudiation of the Commission's inside wiring initiative.

A. The Act Prohibits Buy-Outs and Requires LECs to Obtain Cable Operator Concurrence to Use Cable Transmission Facilities

In an effort to promote facilities-based competition, Congress expressly prohibited buy-outs of cable systems by local exchange carriers (LECs) and prohibited joint ventures or partnerships to provide video programming directly to subscribers or to provide telecommunications services within the same market in the Act.[7] The conferees decided, in general, to take the most restrictive provisions

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7 In Section 652 of the Telecommunications Act of 1996, LECs are prohibited from holding greater than a 10 percent financial interest or any management interest in a cable operator which provides cable service within the LEC's telephone service area. Similarly, cable operators are prohibited from acquiring greater than a 10 percent financial interest or any management interest in a LEC serving the same market. LECs and cable operators serving the same market are prohibited from entering into

on mergers and acquisitions of both the Senate bill and the House amendment "in order to maximize competition between local exchange carriers and cable operators within local markets."[8]

The general ban on buy-outs and joint ventures is lifted in certain limited circumstances. For example, Congress allowed "joint use" of cable facilities by local exchange carriers and cable operators for a short duration, but in granting this limited exception, it recognized that cable operators control their own distribution facilities and have no common carrier obligations:

> Notwithstanding subsection (c) [prohibition on joint ventures], a local exchange carrier may obtain, <u>with the concurrence of the cable operator</u> 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, if such use is reasonably limited in scope and duration, as determined by the Commission."[9]

Section 652 (d)(2) unequivocally shows that Congress considered that a LEC might wish to use a portion of a cable operator's transmission facilities, but declared that such use should only occur with the operator's consent. Congress understood that at least the cable facilities that extend from the last multi-user terminal to the

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any joint venture or partnership to provide video programming directly to subscribers or to provide telecommunications services to households within that market.

8 Conference Report at 174.

9 Section 652 (d)(2) (emphasis added) The last multi-user terminal in a single family home is typically located at the tap on the pole or underground. In an MDU, it varies depending on the cable architecture in the building. It is typically in the basement, but it may be at a junction box on each floor.

subscriber premises belong to the cable operator.[10] Otherwise, it would not have required the telephone provider to obtain the operator's permission before accessing the facility, nor authorized the operator to set the terms and conditions for its use. It was adopted subsequent to the release of the NPRM and it constitutes a direct repudiation of the view, suggested in the Notices, that the wiring at issue may be appropriated from the cable operator without its concurrence. Whatever policy flexibility the Notice suggests in this area, it cannot ignore the plain language of Section 652(d)(2).

The buy-out provision is aimed at fostering competition between cable companies and telephone companies by prohibiting one from directly or indirectly acquiring the other in the same market. The "joint use" exception is limited in scope and duration because it would hamper the subscriber's ability to choose among multiple providers. And the adoption of FCC rules that move the demarcation point for cable home wiring would surely defeat this goal. Once the cable operator hands over its distribution facilities, the LEC will just subsume the broadband network under its telephone monopoly and stave off competition by displacing the cable provider.

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[10] See also House Report ("the exemption would permit a carrier to obtain , by contract with a cable operator, use of the "drop" from the curb to the home that is controlled by the cable company, if such use was reasonably limited in scope and duration as determined by the Commission." (emphasis added)) In determining whether an arrangement between a cable company and a telephone company is "limited in scope and duration", the Commission is to look to the underlying policy goals of the legislation: to promote competition both in services and facilities, and to encourage long term investment in the infrastructure. House Report at 103.

B. The 1992 Cable Act Decided the Scope of FCC Examination of Cable Wiring

Although the 1992 Cable Act set the parameters of FCC regulation of cable home wiring -- and Congress did not change this determination in the 1996 Act -- the Commission revisits the issue in this NPRM. There is no doubt that Congress knew what it was talking about when it legislated on "cable home wiring" in 1992. It did not intend for the Commission to adopt rules that would confiscate a cable operator's facilities beyond the internal wiring in the home and thereby eliminate competition between multichannel video and other service providers. Any other interpretation would make long term facilities-based competition meaningless.

In the 1992 Act, Congress purposefully limited the scope of the home wiring provision to wiring "installed by the cable operator within the premises of such subscriber."[11] As we have argued throughout the cable home wiring proceeding, the statutory language and legislative history could not be clearer.[12]

The House Report, which accompanied the statutory language adopted by the conference agreement, clearly states that "this provision applies only to internal wiring contained within the home and does not apply to . . . any wiring,

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11 47 U.S.C. § 544(i).

12 See In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, MM Docket No. 92-260, Comments of NCTA, December 1, 1992; Reply Comments of NCTA, December 15, 1992; NCTA Opposition to Petitions for Reconsideration, May 18, 1993; In the Matter of Joint Petition for Rulemaking to Establish Rules for Subscriber Access to Cable Home Wiring for the Delivery of Competing and Complimentary Video Services, RM-8380, Comments of NCTA, December 21, 1993; Reply Comments of NCTA, January 19, 1994.

equipment or property located outside of the home or dwelling unit.[13] The use of the term dwelling unit is significant in that it evidences Congress' express understanding of the applicability of this provision in the MDU context. Indeed, Congress repeated its intentions regarding MDUs several times in the legislative history of the provision:

> This section deals with internal wiring within a subscriber's home or individual dwelling unit. In 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.[14]
>
> The Committee is concerned especially about the potential for theft of service within apartment buildings. Therefore, this section limits the right to acquire home wiring to the cable installed within the interior premises of a subscriber's dwelling unit.[15]

In an effort to ensure that the Commission did not impose improper home wiring rules, Congress made clear that "the Committee does not intend that cable operators be treated as common carriers with respect to the internal cabling installed in subscribers' homes."[16] And it directed the FCC to give subscribers the right to acquire the internal wiring only upon termination of cable service -- not from the time of initial installation. Requiring cable operators to give up their facilities is inconsistent with cable's non-common carrier status.

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[13] H.R. Rep. No. 628, 102d Cong., 2d. Sess. 118; S. Rep. No. 92, 102d Cong., 1st Sess. 23 (the provision "shall not apply to any wiring outside the home").

[14] House Report at 119.

[15] House Report at 118.

[16] House Report at 118.

The Commission's initial home wiring rules were faithful to the Congressional mandate.[17] In the NPRM, however, the Commission does an about face by proposing to move the demarcation point in MDUs, and essentially ignore the precise dictates of Congress.

However, when the statutes are read together -- i.e., the plain language of the home wiring provision of the 1992 Cable Act and the 1996 Act's provision requiring a LEC to obtain an operator's consent before accessing wiring beyond the subscriber's unit -- it is clear that Congress codified the rule on cable home wiring. The Commission lacks the statutory authority under the Act to force cable operators to relinquish ownership of their transmission facilities for the benefit of a local exchange carrier (or its affiliates).

* * * *

As Chairman Hundt and others have recognized, "direct, facilities-based competition between cable and telephone companies will produce substantial

[17] See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, MM Docket No. 92-260, Report and Order, ¶10 (home wiring rules "apply to cable home wiring located within the premises of the subscriber, i.e., the internal wiring contained within the home or individual unit and not the wiring outside the home or the common wiring in apartment buildings and such."). On reconsideration, the Commission reaffirmed, intra alia, its 12 inch demarcation point in accordance with the statute but immediately revisited the issue in the NPRM. And as recently as the end of last year, the Commission focused on the consumer interest in controlling truly inside wiring. The Time Warner Social Contract permits subscribers to remove, to replace, to rearrange, or to maintain any cable wiring located within the interior of his or her dwelling. Subscribers are responsible for the cost of remedying any improper installation resulting in a violation of the Commission's signal leakage and other rules. In the Matter of Social Contract for Time Warner, Memorandum Opinion and Order, rel. November 30, 1995.

benefits for the American public."[18] Without credible broadband competitors, the incentive to improve productivity, cut costs and deploy new and advanced technologies -- the benefits of competition-- will be significantly diminished. Each multichannel video programming distributor should install and maintain its own distribution facilities in order to facilitate the consumer's ability to choose among end-to-end broadband networks.

II. THE COMMISSION'S PROPOSAL WILL ONLY AUGMENT LANDLORDS' RIGHT TO RESTRICT ACCESS AND REPLACE ONE PROVIDER FOR ANOTHER

As shown above, the Commission's proposal to divest cable operators of ownership and control over the facilities that they have installed in multiple dwelling units is contrary to Congressional directives. But, as a practical matter, it will disserve Congressional intent by giving landlords greater ability to restrict access and thereby make it less likely that an alternative broadband wire will be available to subscribers in the building. Once the cable operator no longer controls its plant, the landlord -- not the consumer -- is empowered to choose the provider or to replace one provider for another based on who makes the highest bid.

The cable industry has a long history of confronting landlords who exercise bottleneck control by denying access to their residents. The industry has found that real estate owners and developers, who control apartments, condominiums, cooperatives, planned communities, and other multiple dwelling units commonly

[18] Statement of Reed E. Hundt, FCC Chairman, before the Committee on Commerce, Science and Transportation, United States Senate, on S. 1822, February 23, 1994.

design the dedications, easements, and restrictive covenants of the development in order to maximize their ability to exclude franchised cable operators from serving the residents. While the developer of a new residential development necessarily provides for telephone, electric, and similar utility services, it may make no explicit provision for cable television. It also may not deed over easements or rights of way for public use, preferring to maintain all streets (or risers) to the company. It may delay the turnover of rights of way for public use until the utility trenches are closed, or never grant any easement for vertical risers in high rises. Each of these actions enhances the developer's control over cable television by making it difficult for the franchised cable operator to extend his lines within the new residential development.

The developers have one reason for seeking control over the use by cable of utility easements: they wish to collect a toll from the franchised cable operator. Franchised cable operators usually pay substantial franchise fees to the government (typically 3-5% of revenue) and must satisfy other costly franchise requirements. The developer seeks to exact an additional fee from the cable operator as a price for access to the new development during the critical early stages of construction. The toll demanded might be, for example, a large up-front payment from the franchised cable operator for access to the utility easements, plus a percentage of the operator's revenues. If the franchised operator is unwilling or unable to accede to these demands, the developer will install a controlled or compliant satellite master antenna television system (SMATV) which will pay such a toll.

The same problem arises when cable operators seek to serve existing structures. Although the telephone industry and wireless industry tried to obfuscate this issue in their earlier findings:[19] there is no technological or economic barrier to installing their own distribution infrastructure. Cable operators frequently rewire MDUs. There are usually existing telephone lines, antiquated master antenna lines, or SMATV lines and (in older buildings) gas lines to work around, but franchised cable operators do so in order to reach the end user. Yet even if there is space, and tenants are willing to buy the new service, landlords often resist the installation of a new service. Landlords have resorted to a variety of arguments to preclude customers from a choice of video providers.[20]

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[19] See e.g. Petition for Reconsideration of Liberty Cable Company, Inc. in MM Docket No. 92-260.

[20] Initially, building owners argued that access was not required under state law. When state laws were passed (as they have been in 13 states), landlords attacked them as "takings", Storer Cable TV, Inc. v. Summerwinds Apartments Assoc., 493 So. 2d 417 (Fla. 1986); or inconsistent with jury trial requirements, Walthan Telecommunications v. O'Brien, 403 Mass. 747, 532 N.E.2d 656 (1989); or lacking a "public" purpose under State constitutional limits, City of Lansing v. Edward Rose Realty, 442 Mich. 626, 52 N.W.2d 638 (1993). Even after the 1984 Act adopted Section 621's access-to-easements clause, landlords continued their attempts to repel any rights of access. They argued that 621 provided no private cause of action, Centel Cable Television Co. v. Admiral's Cove Associates, 835 F.2d 1359 (11th Cir. 1988); that there were no easements at all, UACC-Midwest, Inc. v. Occidental Development, Ltd., 1991 US dist LEXIS 4163 (W.D. Mich. March 29, 1991); or that the compatible easements previously granted were not "dedicated," Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169 (4th Cir. 1993). These cases illustrate that landlords are not disinterested trustees, acting on behalf of tenant interests.

The massive resistance by landlords was well illustrated in the West Virginia resort community of Shannondale. The developer granted a purportedly exclusive contract to one company charging $30.20 for basic cable, and forbade the franchised cable operator from installing facilities on the property to offer basic at his standard rate of $17.40. The residents of Shannondale adopted a resolution declaring "[The developer] does not speak for the Association and the Association strongly disagrees with [the developer's] position. The Association wants C/R TV Cable to have access to its members' property so that residents may have the opportunity to subscribe to C/R TV Cable's television service."[21] Over 100 residents signed a similar petition, but the developer resisted, holding his residents hostage to the exclusive contract that enriched him.[22] It took over two years of litigation to bring Shannondale residents the C/R TV's cable service.

Similarly, in Timberlake, South Carolina, an entire planned community sought (unsuccessfully) to prevent access by a franchised operator by recording only "maintenance" easements on its plat. The court ultimately rejected Timberlake's plan, observing that "[b]y granting an exclusive contract to [one cable company] Timberlake [the developer] would effectively create a monopoly depriving

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21 C/R TV Cable, Inc. v. Shannondale, Inc., 27 F.3d 104 (4th Cir. 1994) (Jt. App. Volume II at 622-647).

22 Id.

all residents of the subdivision of the benefits competition provides. Such is inconsistent with the letter and spirit of both the state and federal acts."[23]

The flip side occurs with landlord efforts to evict incumbent cable operators and replace them with SMATV's. The landlord seeks to confiscate the inside wiring in order to prohibit the franchised operator from reaching the customer, to provide the SMATV with free access to quality lines, and to shelter the SMATV from competition.[24] The cable operator has wired the property at considerable cost, under the same economics which the Commission has recognized in cost of service: long period of up front losses followed by returns earned in the out years.[25] The landlord seeks to displace the cable operator without providing the opportunity to make that return.

Although the cable operator is ready and able to construct facilities, the landlord exercises gatekeeper authority in order to preclude consumer choice, for his own economic enrichment, and not for the benefit of consumers. It is not only commercial rights that are impaired by such arrangements: by restricting residents' access to an independent source of video programming, the developer

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[23] Timberlake Plantation Co. v. County of Lexington, 307 S.C. 488, 415 S.E.2d 824, 827, aff'd, 431 S.E.2d 573 (S.C. 1993)

[24] Multichannel TV Cable v. Charlottesville Quality Cable, No. 93-0073-C (W.D. Va., December 3, 1993), aff'd, 22 F.2d 546 (4th Cir. 1994) (franchised operator granted injunction against eviction by landlord who favored a SMATV which paid, in the court's words, "a kickback.")

[25] See, e.g., Media General of Fairfax County, Inc., FCC 96-13 at ¶17 (released January 26, 1996) (substantial losses are incurred in early years of a cable investment, with return earned in the out years).

assumes the role of electronic editor, deciding what information new residents may receive. As Congress explained in an earlier version of the Cable Act's access provisions:

> There is simply no point in requiring diverse information sources and services if a large segment of the population ...can be denied access to that information by a landlord who, in effect, functions as an editor for his or her tenants.[26]

Many states have attempted to address this problem head-on. Virginia and Connecticut forbid landlords from accepting any form of payment in exchange for granting access to premises, thereby breaking the economic incentive for landlords to place their own interest above their tenants.[27] (Only last month, the Virginia legislature rejected a bill sponsored by real estate developers to repeal this Act.) Other state laws affirmatively grant access, often with regulated schemes to assure just compensation to the landlord.[28] Others anticipate the delaying games that landlords will play, and provide that a dispute over the amount of compensation shall not delay cable installation at an MDU.[29]

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[26] H.R. Rep. No. 934, 98th Congress, 2d Sess. 36 (1984).

[27] Conn. Gen. Stat. § 16-333A(a); Va. Code Ann. § 55-248.13:2.

[28] See, e.g., 26 Del. Code § 613 (1994); Kan. Stat. Ann. § 58-2553(a)(5) (1994); D.C. Code § 43-1844.1; Wis. Stat. § 66.805(2). R.I. Gen. Laws § 39-19-10(d); 65 ILCS 5/11-42-11.1 (1993) (upheld by Times Mirror Cable Television, Inc. v. First National Bank of Springfield, 582 N.E.2d 216 (Ill. App. Ct. 1991); see also NYT Cable TV v. Homestead at Mansfield, Inc., 518 A.2d 748 (N.J. Super. 1986), aff'd, 543 A.2d 10 (N.J. 1988)

[29] See, e.g., Conn. Gen. Stat. § 16-333A(f); R.I. Gen. Laws § 39-19-10(g)

In situations where the landlord refuses access to a second provider, a federal law that would take away the building owner's power to exclude and provide protections for resident access to alternative services would promote competition. But short of this kind of preemption of state or local property rights, the Commission's rules should at least ensure that wiring owned by one provider is not given over to a competitor. Alternative providers may find that building owners exact an onerous price to access the building or deny access for aesthetic reasons. But those issues are separate from allowing landlords or their surrogates to be permitted to simply seize the wiring already installed by the cable operator -- especially where it is largely because they do not want to bear the costs of wiring the building under any circumstances.

In light of the foregoing, the Commission's proposal to move the demarcation point for cable home wiring far from the subscriber's unit will only enhance the landlord's control over who provides service in the building, rather than promote competition and subscriber choice. Indeed, giving the landlord control over the wiring will practically ensure that no provider deploys a second facility in the building.

III. THE COMMISSION'S PROPOSAL TO HARMONIZE CABLE AND TELEPHONE WIRING RULES BASED ON CONVERGENCE OF SERVICES IS MISGUIDED

The Commission has pushed ahead with this NPRM "in light of today's evolving and converging telecommunications marketplace."[30] But its theory that

[30] NPRM at ¶1.

harmonization of wiring rules is needed is based on the misguided notion that cable and telephony delivery will be virtually indistinguishable in the very near future. The convergence of video, voice and data over one wire is far from reality today. While the trend is toward integrating networks, for the foreseeable future, these services will be delivered on divergent platforms. And even if they converge at certain points in the distribution system, they will be received on separate facilities inside the customer's home. Telephone companies are likely to continue to use their narrowband twisted pair wiring for telephone traffic inside the customer's premises, even if they construct complementary broadband facilities for video and other services.

As the Commission notes, the hybrid fiber-coaxial cable network design pioneered by the cable industry is capable of providing a range of competitive telecommunications services in a composite signal. But cable companies are just beginning to deploy telephony services and high speed data services in conjunction with their core video business.[31]

Most cable operators are modernizing their video delivery systems in order to integrate the latest technologies in a newly competitive telecommunications environment.[32] Cable companies are upgrading their plant and equipment in order

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31 For example, Greater Rochester Cablevision, a subsidiary of Time Warner, is providing local, long distance, customer calling features and other services to residents of an apartment complex in Rochester, N. Y., a 450,000 household market. It is also testing delivery of switched voice service to single family homes over its broadband, two-way interactive hybrid fiber-coax system.

32 Continental Cablevision is installing telephony switches in Florida, New England and California and experimenting with data and Internet access in Massachusetts; Jones

to expand channel capacity, improve signal and service quality and integrate new two-way high speed data and telephony services with their existing video delivery service. By upgrading with fiber technology, the cable industry is able to maximize its existing infrastructure without replacing the feeder and drop line that already exist, thereby, reducing the cost of introducing advanced telecommunications services and networks.[33] In the next few years, many more cable operators will be deploying the hybrid fiber-coax architecture in order to deliver telecommunications services. If the Commission adopts new rules, however, that would essentially require cable operators to giveaway their drops and rebuild these facilities, these cost savings and the introduction of new advanced services will be lost.

A. There are Major Distinctions Between Broadband and Narrowband Technology

Given the speculative nature of telephone/cable convergence, there is no basis for unifying the Commission's telephone inside wiring and cable home wiring rules under one umbrella. Apart from the incompatible signal transport parameters and channelization schemes used by narrowband and broadband

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Intercable rebuilt its Alexandria, Virginia system and plans a telephony trial and high speed modem service in 1996; Cox Cable Communications, Comcast Communications and Tele-Communications, Inc. also are preparing to offer telephony on systems upgraded to 750 MHz. See e.g. "Perception Vs. Reality: Can Cable Deliver Telephony?", Multichannel News, November 27, 1995, at 3, 46; Paul Kagan Associates Inc., "Jones Intercable Rebuilds Alexandria, Va.", Cable TV Technology, August 31, 1995, at 8.

[33] Companies are also beginning to deploy "regional hubs" that will interconnect headends via high speed fiber optic rings. This concept allows different systems in the same geographical area to share the benefits and costs of headend equipment, such as digital video libraries and computer data servers, and also speeds the introduction of advanced services such as telephony and interactive two way services.