

bundle of rights"). Thus, either tenant control over, or ownership of (see ICTA initial comments at 11-19), wiring located within the common areas of an MDU poses a takings issue.

III. Exclusive Contracts Are Not Anticompetitive; Perpetual Contracts Are

Most of the commenters that discussed mandatory access agreed with ICTA's comments that the Commission cannot and/or should not mandate access. On a related matter, Cox Communications and NYNEX have asserted that the Commission should prohibit owners of MDUs from entering into exclusive contracts with service providers. Cox's comments at 27-28; NYNEX's comments at 17. ICTA strongly disagrees as apparently most other commenters do since they did not raise exclusive contracts as a problem.

As discussed in ICTA's initial comments, exclusive contracts provide many benefits, and while it may seem counterintuitive, such contracts enhance competition in the marketplace. ICTA's comments at 45-48. It is imperative that the Commission understand that in many instances the property owner, by representing a multitude of customers, can extract a significantly better deal from a service provider for the tenants as a whole, than a tenant who does not have similar leverage. The property owner is interested in a service provider that will supply excellent service, tailor programming and offer lower rates to all residents over a long period of time whereas an individual tenant, given the short-term nature of a tenancy, is far more likely to make decisions that serve the moment. The rental marketplace is highly competitive. Property owners must insure that all kinds of amenities offered to convince a potential occupant to make the decision to rent, including broadband services, are each competitive in their own right.

Where exclusive contracts exist, there is still competition; it is just that the competition is at the property line. Each competitor vies to convince the property owner that the tenants will be best

served if that competitor is chosen. That competition is then repeated each time the contract term expires. Indeed, the single most anticompetitive contracting practice is not exclusive contracting which continually offers the opportunity to compete, but contracting for terms lasting the length of the franchise and all extensions or renewals with rights of assignment and succession. See ICTA initial comments at 55-57. It is these perpetual contracts that foreclose competition altogether.

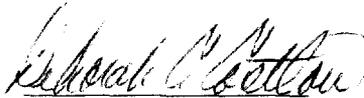
IV. The Commission Should Preempt Discriminatory State and Local Mandatory Access Laws

With one exception, the commenters that discussed discriminatory state and local mandatory access laws agreed with ICTA's position that the FCC should preempt such laws, which are antithetical to the federal policy of promoting competition and prohibiting discrimination against any telecommunications provider. ICTA's comments at 48-55. The State of New Jersey Board of Public Utilities, which implements such a discriminatory access law, urges that this issue should be left to the states where "statutes can be modified to provide for competitive access by all service providers" if the states so choose. Comments of the State of New Jersey Board of Public Utilities at 15. The fact of the matter is that states are not so choosing and are instead continuing to afford forced access rights only to the franchised cable industry whose revenues they share. Because there is no good reason to permit such laws to remain, the Commission should not leave the matter to the states and should preempt such laws. Preemption would assure that no state has such discriminatory laws and would alleviate the need for opponents of such discriminatory laws to expend a tremendous amount of time and resources in each state where such laws exist trying to get such laws revoked or made nondiscriminatory.

CONCLUSION

In light of the foregoing and ICTA's initial comments, ICTA believes that the Commission should adopt rules and regulations consistent with ICTA's comments to the Notice.

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