

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the Matter of

Telecommunications Services Inside Wiring

Customer Premises Equipment

CS Docket No. 95-184

CS Docket No. 92-260

APR 17 1996
COMMUNICATIONS DIVISION

CONSOLIDATED REPLY COMMENTS

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April 17, 1996

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY ii

I. THE COMMISSION SHOULD ASSURE THAT MDU RESIDENTS HAVE THE ABILITY TO CHOOSE THE SERVICES OF A FRANCHISED CABLE OPERATOR 2

 A. The Comments Demonstrate The Need For A Multiple Wire Solution To MDU Service 2

 B. Multiple Wires In MDUs Are Practical 7

 C. The Commission Should Adopt A Regulation Assuring Access To Premises . 10

 1. No Preemption of State Access Laws. 10

 2. A National Access Rule. 11

 a. Conditional Right to Obtain Cable Wiring 13

 b. National Access to MDU Regulation 13

II. THE TELEPHONE MODEL OF INSIDE WIRING REGULATION IS NOT APPROPRIATE FOR CABLE TELEVISION WIRING 15

 A. Telephone and Cable Networks Are Separate In Terms Of Technology And Historical Development, And A Single Rule To Govern Both Would Not Account For Those Differences 15

 B. One Wire For Multiple Service Providers Is Not Technically Feasible Or Desirable 17

 C. Section 16(d) of the Cable Act of 1992 Authorizes Only Rules Governing Disposition of Subscriber Inside Wiring Upon Termination of Service. 19

 D. The Commission May Not Divest Cable Operators of Their MDU Wiring Unless Operators Are Compensated Based On the Fair Market Value of Lost Subscribers 20

CONCLUSION 24

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY ii

I. THE COMMISSION SHOULD ASSURE THAT MDU RESIDENTS HAVE THE ABILITY TO CHOOSE THE SERVICES OF A FRANCHISED CABLE OPERATOR 2

 A. The Comments Demonstrate The Need For A Multiple Wire Solution To MDU Service 2

 B. Multiple Wires In MDUs Are Practical 7

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 1. No Preemption of State Access Laws. 10

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 D. The Commission May Not Divest Cable Operators of Their MDU Wiring Unless Operators Are Compensated Based On the Fair Market Value of Lost Subscriber~~20~~

CONCLUSION 24

INTRODUCTION AND SUMMARY

The comments filed in these proceedings strongly reinforce each of the points raised by the initial Comments filed by the Joint Commenters. For example, the Comments filed by SMATV, wireless cable operators, and commercial real estate interests are uniform in both their zeal to preclude MDU residents from choosing the service of a franchised cable operator, and in their inability to articulate any practical or legal foundation for their proposals. In the words of New York City's cable regulators, proposals that allow building owners and cable competitors to use cable-owned MDU wiring are "neither competitive nor fair," and should be rejected.

Instead, the record shows that it is practical and preferable to issue rules that promote multiple wire service to all subscribers. In contrast to the absence of concrete detail to support claims that multiple wire solutions are unworkable, the experience of cable operators in Guam and elsewhere shows the long-term success of rules that promote separate wires for separate service providers. Any concerns regarding "aesthetics" can be readily addressed through simple construction standards (to the extent they are not already addressed in national standards). The cost of installing additional wiring has not been shown to be any barrier, and is well under the investment deemed reasonable by the wireless industry and its RBOC investors.

The wireless, SMATV and real estate commenters would like the FCC to override laws in those few states which have attempted to assure that MDU residents have the ability to receive franchised cable service on fair terms. The Commission, however, should not become an accomplice in their attempt to block competition to MDUs, but rather should adopt a rule

guaranteeing that cable operators are able to serve in these markets. Section 706 of the Telecommunications Act of 1996, in fact, requires the FCC to "remove barriers to infrastructure investment," so that all Americans have access to advanced telecommunications capability. Without a national access rule, many MDU residents will be isolated from the most widely-deployed residential broadband network that exists. The Commission may assure that these residents continue to have access to cable networks by either (a) conditioning any rights landlords, wireless cable and SMATV entities may have over inside wiring on their surrender of any rights they may have in the United States to exclude other competitors from subscriber premises, or (b) adopting a national regulation guaranteeing access to MDU residents, similar to existing statutes in Virginia, Connecticut, Illinois, New York and other states.

Whereas the Joint Commenters propose an inside wiring rule based upon the distinction between broadband and narrowband wiring, some comments propose that the FCC superimpose the telephone model of wiring regulation upon the cable industry. These proposals, however, fail to articulate any reason why the FCC should ignore the technological and historical differences between the two industries that militate against a single standard. More importantly, nothing in the record suggests that it is technologically possible for multiple service providers to use one wire, eliminating a fundamental premise of those who would advocate the imposition of telephony inside wiring regulation.

Finally, the Commission has no lawful authority to redefine cable inside wiring in a way that would allow application of the telephone wiring rules. The 1992 Cable Act only authorizes the FCC to adopt rules governing cable wiring "within the premises" of a subscriber, and then only upon the termination of service. If, despite these limitations, the Commission were

to force cable operators to transfer ownership of their MDU wiring, fundamental principles of Fifth Amendment jurisprudence would require that the Commission's rules assure that cable operators are compensated for the value of lost subscribers, not just wire.

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CONSOLIDATED REPLY COMMENTS

Marcus Cable Co.; American Cable Entertainment; Greater Media, Inc.; TCA Cable TV, Inc., the Cable Television Association of Maryland, Delaware and the District of Columbia; the Cable Television Association of Georgia; the Minnesota Cable Communications Association; the New Jersey Cable Telecommunications Association; the Ohio Cable Telecommunications Association; the Oregon Cable Telecommunications Association; the South Carolina Cable Television Association; the Tennessee Cable Television Association; and the Texas Cable Telecommunications Association ("Joint Commenters"), hereby submit their Reply Comments in response to the Commission's Notice of Proposed Rulemaking in CS Docket 95-184,¹ and its Further Notice of Proposed Rulemaking in CS Docket No. 92-260.²

¹ Telecommunications Services Inside Wiring, Notice of Proposed Rulemaking, CS Docket 95-184, FCC 95-504 (released Jan. 26, 1996) ("NPRM").

² Cable Home Wiring, First Order On Recon. and Further Notice of Proposed Rulemaking, MM Docket 92260, FCC 95-503 (released Jan. 26, 1996) ("FNPRM").

I. THE COMMISSION SHOULD ASSURE THAT MDU RESIDENTS HAVE THE ABILITY TO CHOOSE THE SERVICES OF A FRANCHISED CABLE OPERATOR

In the NPRM in CS Docket 95-184, the Commission seeks to "harmonize" its inside wiring rules to promote competitive markets for telecommunications services. In the FNPRM in CS Docket No. 92-260, the Commission is considering extending the application of its inside wire rules to "loop through" wire configurations serving multiple dwelling units (MDUs) such as apartment buildings and condominiums. Although the Joint Commenters question the existence of a factual record supporting the need for changes in the Commission's inside wiring rules, based on the initial comments submitted in these proceedings, it is clear that in order to promote true competition the Commission should adopt rules assuring that every MDU resident has a meaningful option to choose the services of a franchised cable operator, as opposed to whatever service provider a landlord or developer selects for them. The comments filed demonstrate that Congress was correct in choosing a multiple wire approach for competition in the telecommunications markets. Moreover, the initial comments demonstrate that placement of multiple wires in MDUs is possible and practical. Finally, the initial comments show that to promote the development of multi-wire competition, the Commission should adopt a rule assuring franchised cable operators access to all customers living in MDUs.

A. The Comments Demonstrate The Need For A Multiple Wire Solution To MDU Service

In our initial Comments in this proceeding, the Joint Commenters demonstrated that the Telecommunications Act of 1996 embodies Congress' intention that competition in the telecommunications marketplace be premised on the existence of multiple facilities — *i.e.*, that each provider construct and control its own wires. The comments of other parties support that

conclusion.³ Indeed, the New York City Department of Information Technology and Telecommunications ("NYC"), the local regulator and a first hand witness to one of the most contentious battles for MDU subscribers in the country, squarely rejects any proposal to allow MDU building owners and managers to control cable wiring.⁴ As NYC explains:

Contrary to the purpose of the Commission's home wiring rules, [the proposal to transfer ownership of loop wiring to building owners] promotes neither competition nor subscriber choice. It merely benefits alternative MVPDs at the incumbent cable operator's expense, essentially allowing the alternative provider to compete by appropriating a portion of the incumbent's distribution plant. At the same time, a cable operator would be burdened unfairly with the additional cost of rewiring if it receives a request for service from a subscriber or subscribers in an MDU where the operator has been previously required to sell its loop-through wiring. . . . The City believes such a result is neither competitive nor fair.⁵

The case law outlined in our initial comments further demonstrates that landlords and developers stand as deterrents to the implementation of facilities-based competition through their role as gatekeepers controlling access to essential MDU ducts, risers, and other common areas; through this control, they limit the ability of franchised operators to extend their network facilities and services to MDU residents.⁶

The comments filed by commercial real estate interests drive home this point: developers, landlords and other real estate professionals cherish their ability to exploit residents by restricting their choice to a single, unfranchised provider of video services. For example, in

³ See, e.g., Comment of Tele-Communications, Inc. at 3; NCTA Comments at 6-10.

⁴ NYC comments at 4.

⁵ NYC at 4 - 5.

⁶ Joint Comments at 8-9.

their Joint Comments, the Building Owners and Managers Association, *et al.* ("BOMA") assert that MDU owners must retain full control of their properties, including discretion regarding which service providers have access.⁷ BOMA's comments focus not on resident-subscribers' ability to choose from multiple competing service providers, but rather, on the landlord's or developer's control over the property.⁸ Indeed, BOMA, like other commenters representing commercial real estate interests, perceive the landlord or developer as the provider of services to tenants, and argue that they alone have the power to decide whether to provide tenants with cable television service, in the same manner that they would decide whether to install an elevator.⁹

The same sentiment was expressed in a form letter submitted *en masse* by real estate interests.¹⁰ The letters state that a landlord will make sure "*efficient* telephone and cable

⁷ BOMA Comments at iii.

⁸ BOMA Comments at 7-8.

⁹ BOMA Comments at 8; *see also* Comments of the National Housing Partnership at 1 (arguing owners should choose combination of telecommunications services that "*best fits the needs of the building and its residents*").

¹⁰ Commercial real estate developers and landlords submitted approximately 100 copies of a form letter which was retyped onto each developer's or landlord's letterhead (there were two "versions" of the form letter: one a long version and one a single-page summarization of the longer version). At least two of the letters left the "blanks" from the form intact. Letter from New Plan Realty Trust; Letter from View Pointe. Further, at least one company, Courtyard Place of South Bend, Indiana, submitted multiple copies of the same letter, each signed by a different employee; those employees included the janitors and a security guard. Letter from Kevin Rees, Maintenance/Groundsman, Courtyard Place; Letter from William Lowe, Maintenance Supervisor, Courtyard Place; Letter from Thomas Weber, Maintenance, Courtyard Place; Letter from Lou Ann Susan, Site Manager, Courtyard Place; Letter from Marcus Wright, Courtyard Security/South Bend Police Officer, Courtyard Place. The Town and Country Management Company of Baltimore, Maryland similarly submitted multiple copies of the same letter, each signed by a different company employee. The Commission may disregard these re-typed form letters as redundant and surplusage.

service is provided to our residents at a reasonable cost."¹¹ The efficiency and cost of such service, however, should be a matter for individual subscribers to consider as they choose among various services offered by multiple providers.

The interests of the commercial real estate developers are squarely aligned with those of wireless cable and SMATV entities.¹² Free from the regulatory costs and burdens of franchising -- including the 5% franchise fee typically paid by most cable operators -- these video providers instead pay a fee or "kickback," in the words of one court,¹³ to the developer or landlord for exclusive access to subscribers.¹⁴ To help advance their deals with landlords and developers, the wireless and SMATV commenters urge the Commission to turn over all cable-owned inside wiring, and then to preempt state statutes designed to assure MDU residents have

¹¹ See, e.g., Letter from New Plan Realty Trust (emphasis added). The long version of the letter states that the landlord will make sure "those services are available to the best of *our* ability." See, e.g., Letters from Town and Country Management Co. (emphasis added).

¹² The alignment of landlords, wireless, and SMATV operators is clearly demonstrated by the Comments of the Independent Cable and Telecommunications Association, which lists as members "private cable operators (referred to also as satellite master antenna television), shared tenant service providers, equipment manufacturers, program distributors, and property management and development companies." ICTA Comments at 2.

¹³ Joint Comments at 8; *Multichannel TV Cable v. Charlottesville Quality Cable*, No. 93-0073-C (W.D. Va. Dec. 3, 1993), *aff'd*, 22 F.3d 546 (4th Cir. 1994).

¹⁴ Liberty Cable makes the misleading statement that, in its New York markets, "loop-through wiring is used almost exclusively for bulk cable service and the building owner never takes a profit from the bulk service." Liberty Comments at n. 5. The landlord never "takes a profit" or extracts other payments from operators because New York has a law that prohibits them from demanding more than \$1 as payment from either tenants or operators as the price of admission. N.Y. Exec. Law § 28 (prohibits landlord from demanding or accepting payment from tenant or subscriber, except for any payment allowed by the state cable commission); 9 N.Y.C.R.R. § 598.q (establishing \$1 as presumptive compensation).

the ability to choose the service of franchised cable operators.¹⁵ At the same time as they ask for protection from cable competition, they claim that market forces will assure that their facilities provide a strong and leakage-free signal, so that the Commission should excuse them from the Commission regulations in these areas.¹⁶

The comments of the real estate and unfranchised video interests demonstrate the need for the Commission to adopt rules advancing multiple wire competition, not competition for the single wire already installed by a cable operator. Without such rules, the landlords and unfranchised video interests will continue to foreclose true competition for MDU residents, by stripping franchised cable operators of their facilities and forcing residents to take service exclusively from the provider that is paying the highest kickback. In turn, the franchised operator will become a mere contractor for construction of wiring, instead of a competitive service provider.

¹⁵ Comments of Multimedia Development Corp. at 3; Comments of Wireless Cable Ass'n Int'l at 6.

¹⁶ Comments of Wireless Cable Ass'n Int'l at 22-24.

B. Multiple Wires In MDUs Are Practical

A key premise of the Commission's inquiry in this proceeding appears to be that it is impossible or infeasible to install more than one wire for the provision of video or broadband services in existing MDUs.¹⁷ Yet, after the initial round of comments, there is no factual record supporting that conclusion. The initial comments of landlords and developers contain only rhetoric regarding "security" concerns, and "aesthetics," and even this rhetoric is devoid of any persuasive detail.

To the extent landlords and developers have legitimate concerns regarding safety, security, and aesthetics, however, those concerns could be easily addressed in simple rules adopted by the Commission, such as one requiring video providers' personnel to "check-in" with landlords before doing work. Moreover, as the landlords themselves point out, safety concerns regarding wiring are already governed by industry standards, such as the National Electric Safety Code, and local building codes.¹⁸ To the extent landlords express concerns regarding aesthetics or harm to the building, such as drilling holes in siding, existing access to premises statutes already require that cable operators compensate landlords and developers for damage caused in the installation or removal of wiring; a similar provision could be imposed by the Commission.¹⁹ The absence of any record to support claims that multiple wires are not feasible, and the simple

¹⁷ See *In the Matter of Telecommunications Services Inside Wiring*, Notice of Proposed Rulemaking, FCC 95-504, ¶ 16 (released Jan. 26, 1996) ("NPRM").

¹⁸ See, e.g., Letter from New Plan Realty Trust.

¹⁹ Conn. Gen. Stat. § 16-333A(a); Va. Code Ann. § 55-248.13:2; 26 Del. Code § 613 (1994); Kan. Stat. Ann. § 58-2553(a)(5) (1994); D.C. Code § 43-1844.1; Wis. Stat. § 66.085(2). R.I. Gen. Laws § 39-19-10(d); 65 ILCS 5/11-42-11.1 (1993).

remedies for any legitimate concerns raised by the installation of multiple wires, demonstrates that landlords' and developers' real interest is retaining gatekeeper control for monetary gain.²⁰

In contrast to the rhetorical assertions of commercial real estate interests, the Commission has been supplied a factual record demonstrating that multiple wires for the provision of broadband services can practically and economically be deployed in new and existing MDUs. The comments of Guam Cable TV explain how, in Guam, MDU residents have had the option to receive service from multiple providers over multiple wires through the installation of internal conduit without any harm to buildings. Guam Cable TV explains that "by using RG-59 and miniature co-axial cable, and by the building owner insisting each user leave in a pull cord for the next provider to use, half-inch conduits can accommodate three or four cables with minimal inconvenience to the occupants who want more than one service."²¹ This manner of operation has allowed six or seven cables to be pulled into *existing buildings*.²²

Guam Cable TV's comments also emphasize an important point: the cost of installing an additional wire in an MDU is not an impediment to new providers. In Guam, providers have installed six or seven wires in existing buildings. Clearly, those providers would not have undertaken such installation if it were not economically justified. Other comments further support this point. Media Access Project suggests that it costs, on average, only \$50 per

²⁰ Joint Comments at 9; *see also* NCTA Comments at 15; *C/R TV Cable, Inc. v. Shannondale, Inc.*, 27 F.3d 104 (4th Cir. 1994).

²¹ Comments of Guam Cable TV at 4-5.

²² Comments of Guam Cable TV at 5.

subscriber to install redundant home wiring.²³ By comparison, wireless operators are willing to invest at least several hundred dollars to serve each wireless home under their business plans.²⁴ This per-subscriber investment presumably has been deemed economically sound by three of the regional LECs, which in 1995 agreed to invest approximately a combined \$275 million in two of the largest wireless cable operators in the country, CAI Wireless Systems, Inc. and Cross Country Wireless, Inc.²⁵ To turn over wiring owned by cable operators to such entities would do little to assure economic or competitive access for their service, but instead would create *de facto* exclusive arrangements for MDUs, even where the provider has not contracted for exclusivity, by transforming the cable operator into little more than a contractor for wiring installation.

The Guam solution has led to real, multi-wire competition. Guam Cable TV explains that in Saipan, Commonwealth of the Northern Marianas Islands, two cable operators have been competing in an overbuild situation since April 15, 1992.²⁶ Approximately 800 residents subscribe to both of the providers, with two wires going into their homes, and

²³ Comments of Media Access Project, *et al.* at 6-7. OpTel, a SMATV operator, acknowledges that MDUs offer sufficient concentrations of subscribers to justify the investment in facilities, and admits that the cost of inside wiring "generally is not high." *OpTel Comments* at 2,7.

²⁴ "Digital Compression, RBOCs Entry Reshaping Wireless Cable," *New York Law J.* (Jan 19, 1996), p.5 (MMDS investment per addressable subscriber is "usually \$400 to \$500").

²⁵ As stated in the Commission's *Annual Assessment of the Status of Competition In the Market for the Delivery of Video Programming*, Second Annual Report, CS Docket 95-61, FCC 95-491 (released Dec. 11, 1995) at ¶¶ 70, 79, Bell Atlantic and NYNEX invested \$100 million in CAI Wireless, with warrants to purchase a 45% equity interest for an additional \$300 million, and PacBell agreed to purchase Cross Country Wireless outright for \$175 million.

²⁶ Comments of Guam Cable TV at 2.

subscribers using A-B switches to alternate between systems.²⁷ This is exactly the type of competitive opportunity that Congress envisioned in passing the 1996 Act.²⁸ The Commission should adopt a rule that promotes multiple wire service to subscribers.

C. The Commission Should Adopt A Regulation Assuring Access To Premises

1. No Preemption of State Access Laws.

Developers, landlords, and would-be cable competitors have asked the Commission to preempt the few state statutes that attempt to guarantee that MDU residents are not held as captive markets by their landlords and developers.²⁹ Even a careful review of these requests, however, shows that they are grounded almost entirely in fear of competition, rather than any public interest consideration that would justify such drastic action. Preemption of state access statutes would not only deprive many MDU residents of a choice in video service providers, but it would also deprive them of the opportunity to receive all broadband telecommunications services that cable operators are beginning to provide over their terrestrial networks in competition with the entrenched local exchange carriers and interexchange carriers. Indeed, if the Commission were to consider preemption in this proceeding, it should preempt state laws or regulations that might *prohibit* access to premises.

There is no basis in law or policy for the Commission to preempt any state law that guarantees subscribers access to the services of franchised cable operators. The only

²⁷ Comments of Guam Cable TV at 2.

²⁸ See Joint Comments at 4; NCTA Comments at 6.

²⁹ See, e.g., Comments of Multimedia Dev. Corp. at 3-7.

authority cited by commenters proposing such action, *Orth-O-Vision, Inc.*, actually supports a national access rule. In *Orth-O-Vision*, the Commission preempted a state law that *prohibited competitive service* by MMDS providers to MDUs.³⁰ For the same reasons, the FCC should refrain from preempting state access laws: to do so would deprive MDU residents of competitive service from the franchised operator, and would enshrine the one-wire world that allows wireless, SMATV, and developers to force MDU residents to accept whatever service the gatekeepers choose to provide.

2. **A National Access Rule.**

The Commission should reject the proposal to preempt state laws governing cable access to subscribers as a flawed policy that would be in direct conflict with the 1996 Act. Instead, the FCC should adopt a regulation that assures cable operators will have access to MDU and other residential subscribers through either or both of two methods, described in greater detail below: through a rule that conditions the exercise of any rights to control wiring on the surrender by landlords or MVPDs of any rights they may have to provide exclusive service to MDU subscribers, and/or: through a national rule modeled after the access provisions in effect in Virginia, Illinois, Connecticut, New York, and other states.

The Commission *must*, in fact, adopt such a rule under Section 706 of the Telecommunications Act of 1996 (revised Section 7 of the Communications Act of 1934). In that provision, Congress mandated that the Commission "*shall* encourage the deployment on a

³⁰ 82 F.C.C. 2d 178, 183-84 (1980), *aff'd*, *New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982). The Commission noted that it preempted the rule because it would have "inhibit[ed] the growth of MDS in the provision of freely competitive interstate service." 82 F.C.C.2d at 184.

reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."³¹ This is explicit direction to take action that assures access to and development of broadband *networks*. Moreover, this provision directs and authorizes the Commission to adopt rules removing barriers to the development of such infrastructure investment.

Cable operators, as the Commission knows, are now beginning to provide telecommunications services over such broadband networks. For example, Jones Intercable has petitioned the Virginia State Corporation Commission for authority to provide residential telephony service as a local exchange carrier in Alexandria.³² Other operators are pursuing plans for telephony service as well.³³ TCI is working out the final testing phases of the @Home data service in Sunnyvale, California, with plans to begin service in other markets next year.³⁴ The record in this proceeding demonstrates that MDU landlords' and developers' control over access to premises and residents stands as a barrier to the continued development and provision of such new broadband services and network investment. The Commission must, therefore, act to remove

³¹ 1996 Act § 706 (emphasis added).

³² *Application of Jones Telecommunications of Virginia, Inc. For a Certificate of Public Convenience and Necessity to Provide Local Exchange Telephone Services*, Case No. PUC960003 (filed Feb. 20, 1996).

³³ See, e.g., "Tellabs Snares Cox Cable Phone Test For San Diego," *Multichannel News*, April 8, 1996, p. 43-44.

³⁴ " @Home Pushes Back Launch In Sunnyvale, Calif.," *Cable World*, April 1, 1996, p.6.

that barrier through the adoption of a national access to premises rule, which could be modelled after provisions, now in effect in Virginia, Illinois, Connecticut and New York.³⁵

a. Conditional Right to Obtain Cable Wiring

One option for a national access rule is to revise the existing inside wire rules so that any SMATV, wireless cable, landlord, developer or other entity (including subscribers, who may be one of these entities) that wishes to obtain ownership of cable inside wiring may only do so upon the condition that it surrender any of its existing or future rights to exclude other competitors from any subscriber premises nationwide. At the very least, this type of rule assures that franchised operators remain a viable choice to residents. The cable operator could still be forced to rewire buildings in many cases, but at least the goal of facilities-based competition could eventually be served.³⁶

b. National Access to MDU Regulation

A second option, which could be used alone or as a supplement to conditions on exercise of any right to control wiring, the Commission should adopt a national access to MDU

³⁵ Some of the state laws delegate enforcement authority to an administrative agency. *See, e.g.,* N.Y. Exec. Law § 828(b); D.C. Code Ann. § 43-1844-1(a)(2). Other state laws, like that in Virginia, vest enforcement responsibility with the courts. *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.* No. 93-0035-C, supplemental findings and Conclusions at 5 (W.D. Va. Aug. 5, 1994) (citing VA Code Ann. § 55-248.40). The Commission could choose either enforcement method, electing itself or the courts as the primary venue for enforcement of access rights.

³⁶ The Commission has ample authority to condition the exercise of any inside wiring rights on conditions that promote the ultimate goal of competition that underlies the statute.

rule modeled after access statutes in Virginia, Illinois, New York, and other states. As the cases referenced in our initial Comments demonstrate, the courts in a number of jurisdictions have undermined the application of the existing statutory provision governing cable use of utility easements to MDUs.³⁷ The adoption of a national rule would promote the deployment of broadband infrastructure. Such a rule would also advance competitive choices for individual subscribers not only by allowing residents of MDUs a choice of video service providers, but also by allowing cable operators to begin providing a competitive alternative for local exchange and long distance telephone services. Contrary to landlords' and developers' assertions, such a rule would not raise any Fifth Amendment problem so long as the rule is structured in a manner that either does not compel access, but merely prohibits exclusive arrangements and payments to landlords (like the Virginia law), or which allows a building owner to demonstrate that the installation of cable warrants just compensation beyond \$1 (like the Illinois, New York, and New Jersey laws).³⁸

³⁷ See Joint Comments at 7-10; see also *Century Southwest Cable TV, Inc. v. CIIF Assocs.*, 1994 U.S. App. LEXIS 21989 (9th Cir. 1994); *TCI of North Dakota, Inc. v. Schriock Holding Co.*, 11 F.3d 812 (8th Cir. 1993); *Media General Cable, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993); *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Limited*, 953 F.2d 600 (11th Cir.), cert. denied, 113 S. Ct. 182 (1992), reh'g. en banc denied, 988 F.2d 1071 (11th Cir. 1993) (indicating split in circuit); *Cable Investments, Inc. v. Woolley*, 867 F.2d 150 (3rd Cir. 1989).

³⁸ See *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1123-24 (4th Cir. 1995) (Virginia landlord-tenant statute does not work a taking of property); *AMSAT Cable Ltd. v. Cablevision of Connecticut*, 6 F.3d 867, 875 (2d Cir. 1993) (Conn. access statute upheld against takings claim); *Times Mirror Cable Television, Inc. v. First Nat'l Bank*, 582 N.E.2d 216, 1991 Ill. App. LEXIS 1919 (Ill. App. 1991) (finding Ill. access statute and administrative procedure provide just compensation); *NET Cable TV v. Homestead at Mansfield, Inc.*, 518 A.2d 748 (N.J. Super. 1986), *aff'd*, 543 A.2d 10 (N.J. 1988) (upheld New Jersey access to tenants statute, and a BPU regulation and decision which adopted the presumption that \$1 is adequate compensation to a landlord); *Loretto v. Teleprompter Manhattan CATV Corp.*, 446

II. THE TELEPHONE MODEL OF INSIDE WIRING REGULATION IS NOT APPROPRIATE FOR CABLE TELEVISION WIRING

In our initial comments, we advocated a rule distinguishing between broadband and narrowband wiring.³⁹ Several Many other commenters support the imposition of existing telco inside wire rules to cable.⁴⁰ Those commenters, however, present no rationale for imposing telephone inside wiring rules on broadband or cable television wires, except that it worked for telephone. Multimedia Development goes so far as to say that cable should adapt to telco because cable infrastructure is "comparatively lesser developed" than telco infrastructure.⁴¹ Yet, the arguments of LECs and other competitors (including Multimedia Development) for the right to take over cable's broadband infrastructure, demonstrates that the cable grid is anything but "less developed" than the telephone network's twisted pair, and totally unsuited to the telco regulatory regime.

A. Telephone and Cable Networks Are Separate In Terms Of Technology And Historical Development, And A Single Rule To Govern Both Would Not Account For Those Differences

The Commission's telephone inside wiring rules were adopted at a time when telephone service was delivered over a uniform and simple network, using equipment that was completely developed and regulated. Moreover, the Commission's main goal in deregulating

N.E.2d 428, 434-35 (N.Y. 1983) (on remand from U.S. Supreme Court, upholding constitutionality of N.Y. Cable Commission compensation scheme).

³⁹ Joint Comments at 6.

⁴⁰ *See, e.g.*, Comments of CEMA at 4; Comments of GTE at 5; Comments of Wireless Cable Ass'n at 21.

⁴¹ Comments of Multimedia Devel. Corp. at 11.

telephone inside wiring and providing individuals greater control over that wiring was to facilitate the development of competition for the installation and maintenance of the wiring itself.⁴² The Commission's rules were not designed to promote, nor could they possibly contemplate, competition by multiple providers for the telephone service provided over those wires. Cable television, by comparison, is presently in a state of dynamic growth in technology.⁴³ Operators are upgrading their wiring and networks to provide a broader variety of video, voice, and data services. Imposing the inside wiring rules of a static technology on cable television would stifle that technological growth.

Besides, as TCI and others point out, the application of telco inside wiring rules in MDUs is not at all clear.⁴⁴ The telco inside wiring demarcation point can fluctuate radically depending on when the MDU was constructed and what the "standard operating practices" of the particular LEC are or were at a particular point in time.⁴⁵ Imposition of those rules, and inherently the practices of LECs, on a dynamic and technologically different cable industry would compound rather than simplify the complexity of determining the demarcation point.

⁴² NPRM at ¶ 40 (citing *CPE Report and Order*, 48 FR at 50541).

⁴³ In the legislative history of the 1996 Act, Congress refers to the cable industry as in an "intensely dynamic technological environment." H.R. Rep. No. 204, 104th Cong., 1st Sess., at 110 (1995).

⁴⁴ Comments of Tele-Communications, Inc. at 6.

⁴⁵ 47 C.F.R. § 68.3.

B. One Wire For Multiple Service Providers Is Not Technically Feasible Or Desirable

In our initial Comments, the Joint Commenters described why it is technically infeasible and undesirable for two providers to share a single coaxial cable.⁴⁶ Other parties agree with that point, including Bell Atlantic, an aggressive new entrant in the video service market.⁴⁷ Yet, in its comments, DIRECTV asserts that multiple providers can provide video service using a single, shared coaxial cable. DIRECTV's claim is unsupported, factually mistaken, and contrary to Congressional intent.

DIRECTV asserts that if a coaxial cable is capable of carrying 80 analog video channels, and the present cable operator is only offering 45 channels, then the remaining capacity can and should be used by a second provider.⁴⁸ While simplistic, and perhaps therefore appealing, DIRECTV's assertion is incorrect on several levels. First, as the Commenters, and other parties, explained in their initial comments, as a technical matter allowing two providers to use the same coaxial cable would require the addition of extensive amplifying, filtering, and other equipment.⁴⁹ The addition of such equipment, however, will substantially increase the likelihood of signal quality degradation and outages.⁵⁰ Accordingly, requiring two providers to share a single coaxial cable drop is not technologically feasible.

⁴⁶ Joint Comments at 6.

⁴⁷ Bell Atlantic Comments at 1-2 (loop-through wiring).

⁴⁸ Comments of DIRECTV at 5-7.

⁴⁹ Joint Comments at 6.

⁵⁰ Joint Comments at 6.

Second, DIRECTV's assertion has several practical problems. For example, DIRECTV's proposal would destroy the existing cable operator's ability to increase its channel and/or service offerings. Cable operators construct their systems with a plan to offer as many channels as are both economically feasible and technologically possible. There are no cable operators warehousing almost half of system capacity, as DIRECTV suggests, but even if there were, requiring the operator to relinquish the remaining capacity to DIRECTV would deprive that operator of the ability to respond to DIRECTV's competition through an increase or reconfiguration of program services offered. DIRECTV's proposal, therefore, would harm the ability of cable operators to respond to competition.

Moreover, DIRECTV assumes that there will only be two operators seeking to provide video programming or other broadband services to subscribers.⁵¹ If a third provider sought to provide services in an MDU where the inside wiring were being shared, the result would be technologically and administratively unworkable. DIRECTV's proposal, if adopted, would simply cut off the competition from entrants.

Ultimately, DIRECTV's assertions conflict with the Congressional preference for multi-wire competition. Under DIRECTV's sharing proposal, providers' capacity would be limited. In enacting the 1996 Act, Congress recognized that multiple wires means greater capacity, and greater capacity means more choice for consumers and more robust competition.

⁵¹ DIRECTV Comments at 6.

C. Section 16(d) of the Cable Act of 1992 Authorizes Only Rules Governing Disposition of Subscriber Inside Wiring Upon Termination of Service.

The telco inside wiring model would involve the transfer of ownership over cable operators' inside wiring to subscriber upon installation, not termination, of service.⁵² Section 16(d) of the 1992 Cable Act authorizes the FCC to regulate disposition of cable only in very narrow circumstances. Commenters who favor transfer of wire before termination of service are uniformly silent as to how this is consistent with the statute, which explicit applies only "after a subscriber to a cable system terminates service."⁵³ Likewise, those who champion transfer of ownership of all MDU wiring⁵⁴ cannot overcome the statutory requirement that the wiring subject to transfer is that "within the premises of such subscriber."

The Wireless Cable Association attempts to support its argument by reading a passage of the legislative history to Section 16(d) out of context. The exact page of this legislative history, however, makes explicit, like the statute itself, that the "provision addresses the issue of what happens to the cable wiring *inside a home when a subscriber terminates cable service.*" S. Rep at 23. The statute, and the Commission's rules implementing it, cannot apply unless *a subscriber* has elected *to terminate service*, and then the statute applies only to wiring *within the subscriber's premises or home*. The Commission cannot govern wiring in the subscriber's home prior to the termination of cable service, and it cannot govern wiring outside of

⁵²See, *Reconsideration Telephone Inside Wiring Second Report and Order*, 1 FCC Rcd. 1190, 1995 (1986).

⁵³ 47 U.S.C. § 544(i).

⁵⁴ See, e.g., Comments of WCA at 6.