BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-260
	)	
Cable Home Wiring	)	

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REPLY COMMENTS

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., hereby respectfully submits these reply comments in response to the comments filed in the above-captioned Further Notice of Proposed Rulemaking[1] released by the Federal Communications Commission ("Commission") on January 26, 1996. Time Warner owns and operates cable television systems nationwide.

I. INTRODUCTION

The majority of comments filed in response to the FNPRM are consistent with Time Warner's positions that the cable home wiring rules should not be extended to include loop-through wiring, even in the limited situation where all subscribers in the building want to switch to a new service provider,[2] and that rights to cable home wiring should not be

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[1] Further Notice of Proposed Rulemaking in MM Docket 92-260, FCC 95-503, ___ FCC Rcd ___ (rel. January 26, 1996) ("FNPRM").

[2] See Building Owners and Managers Association International Comments at 1 ("BOMA"); Cable Telecommunications Association Comments at 1-2 ("CATA"); Cox Communications Comments at 30-31; GTE Service Corporation Comments at 4 ("GTE"); Marcus Cable Co., et al. Comments at 2; Media Access Project/Consumer Federation of

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granted to persons other than the subscriber or the cable operator.[3] Some commenters, however, disagree with these positions, and Time Warner takes this opportunity to respond and to again urge the Commission: (1) not to amend its home wiring rules to include loop-through configurations under any circumstances, and (2) not to grant rights in cable home wiring to persons other than the subscriber or cable operator.

II. LOOP-THROUGH WIRING SHOULD NOT BE INCLUDED IN THE COMMISSION'S HOME WIRING RULES UNDER ANY CIRCUMSTANCES.

The subject of whether to include loop-through wiring systems in the Commission's home wiring rules has been considered and reconsidered -- each time resulting in the Commission's decision to exclude such wiring from the home wiring rules.[4] The Commission's decision to exclude loop-through wiring from its home wiring rules was carefully and properly made. Liberty Cable Company ("Liberty"), in its relentless pursuit of its scheme to seize its competitor's facilities without having to go through the time and expense of installing such wiring in the multiple dwelling unit ("MDU") buildings in which it seeks to provide service, has proposed that loop-through wiring be included in the home wiring rules in those limited situations where all subscribers in the building simultaneously choose to switch multichannel video programming service providers. As the comments in response to the FNPRM demonstrate, this proposal has been met mostly with disapproval for

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America Comments at 13 ("MAP/CFA"); National Cable Television Association Comments at 2-3 ("NCTA").

[3] See Guam Cable TV Comments at 5; Charter Communications, Inc. Comments at 11.

[4] See Report and Order in MM Docket 92-260, 8 FCC Rcd 1435, ¶ 12 (1993); First Order on Reconsideration in MM Docket 92-260, FCC 95-503, ___ FCC Rcd ___, ¶ 36 (rel. January 26, 1996) ("First Order on Recon.").

a host of reasons -- it is beyond the scope of Congress' explicit intent; it hurts competition; it is impractical; and it raises serious fifth amendment taking concerns.

The most straightforward reason the Commission should not extend its home wiring rules to include loop-through systems, even in the limited situation proposed by Liberty, is that Congress expressly stated that the home wiring statute "is not intended to cover common wiring within the [MDU] building, but only the wiring within the dwelling unit of individual subscribers."[5] Loop-through wiring includes both wiring within dwelling units and wiring within common areas of MDUs outside individual units. Expansion of the home wiring rules to include loop-through configurations would improperly subsume a cable operator's distribution infrastructure installed in the MDU, far outside of the individual dwelling units. Thus, commenters suggesting that the Commission should simply extend its home wiring rules to cover loop-through wiring in MDUs are asking the Commission to act in direct contravention of Congress' intent.[6] The Commission should not amend its home wiring rules such that they contravene clear congressional direction.[7]

If the Commission were to include loop-through wiring in its home wiring rules in the situation proposed by Liberty, competition in the multichannel video programming

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[5]H.R. Rep. No. 628, 102 Cong., 2d Sess. 119 (1992) (emphasis added) ("House Report").

[6]See, e.g., Multimedia Development Corp. Comments at 16-19; Residential Communications Network, Inc. Comments at 1, 3.

[7]Even in certain loop-through configurations, there may be situations where wiring is installed within individual MDU units which is not part of the continuous loop carrying signals to other units. In such cases, the home wiring rules would apply to any such truly internal wiring within individual dwelling units. A former customer could assume ownership of such wiring without affecting the ability of the cable operator to serve other MDU residents.

distribution marketplace would suffer, rather than be promoted.[8] For example, if an MDU building owner were able to acquire a cable operator's loop-through wiring under the home wiring rules, the cable operator will no longer have the opportunity to offer any of the services its system is designed to deliver.[9] Such a result is contrary to one of Congress' primary goals of the 1992 Cable Act and the Telecommunications Act of 1996 -- that of fostering competition in the multichannel video programming distribution marketplace.[10]

Moreover, if loop-through wiring only fell within the scope of the home wiring rules when all subscribers in the building "chose" to switch service providers, landlords, alternative service providers and those subscribers genuinely in favor of switching services would be inclined to bring incredible pressure on all the subscribers to "choose" to switch services.[11] In fact, it has been Time Warner's experience in Manhattan that such strong-

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[8] Contra Residential Communications Network Comments at 3-4. Residential Communications Network argues that competition for bulk cable service on loop-through wiring will be thwarted if the cable operator controls such wiring because, "in that case, neither the building owner nor the individual subscriber has a choice of service providers for the loop." This position overlooks the fact that, with loop-through wiring, the choice of what the subscribers receive necessarily must lie with one person/entity. Each subscriber on a loop cannot choose his own service provider. If one service can be offered over loop-through wiring, it should be the franchised cable service that installed the wiring in the first place. Moreover, Congress did not intend for the building owner to have rights to home wiring or control of the services provided over such wiring. See discussion infra at Part III; NCTA Comments at 3. Furthermore, the building owner always has the choice of allowing additional providers to install their own facilities, thus promoting facilities-based competition as contemplated by Congress in the Telecommunications Act of 1996.

[9] CATA Comments at 2.

[10] See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460, § 2(b) (1992) (statement of policy); Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (opening statement).

[11] See CATA Comments at 1-2; see also NCTA Comments at 3; GTE Comments at 4 (Liberty's proposal would also lead to individual subscribers and/or the premises owner being "held hostage" by the decision of possibly just one subscriber in an MDU. Such a

arm tactics have been used to coerce MDU residents into terminating franchised cable service and agreeing to accept Liberty's service. The Commission has condemned similar behavior in the context of "slamming" by long-distance carriers,[12] and should not now enact home wiring rules that "pit neighbor against neighbor or tenants against landlords."[13]

Amending the home wiring rules to include loop-through wiring as proposed by Liberty is also impractical, as noted by Time Warner and several other commenters. The impracticality is especially prominent in rental MDUs, where the resident turnover rate is high, and residents are not interested in having an ownership interest in home wiring when they do not even own their dwelling units.[14] Some commenters have proposed that, with regard to MDUs, the home wiring rules should apply only to condominiums, and not to rental MDUs, because individual subscriber control is simply untenable in rental MDUs.[15] The Commission should not have to engage in regulatory acrobatics with regard to enacting workable home wiring rules -- the rules enacted in 1993 are consistent with Congress' intent, fair, straightforward and workable, and should not be amended to accommodate some types of loop-through wiring (which necessarily includes significant amounts of wiring outside individual units), or some types of MDUs, but not other loop-through systems, or all types of MDUs.

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result does not promote competition).

[12] 47 C.F.R. § 64.1100.

[13] GTE Comments at 4.

[14] See Time Warner Comments at 4-5; BOMA Comments at 6-8; Charter Communications Comments at 7-8.

[15] See BOMA Comments; Charter Communications Comments.

Finally, the inclusion of even some loop-through wiring systems in the home wiring rules raises serious fifth amendment taking concerns that many commenters either overlook or brush off. The Commission cannot enact home wiring rules that result in the taking of a cable operator's property (i.e., its entire distribution system within an MDU) without ensuring that the cable operator receives just compensation.[16] If an MDU building owner were able to obtain an entire loop-through wiring system under the home wiring rules, the cable operator's entire MDU distribution system would essentially be confiscated. The existing home wiring rules provide that home wiring may be purchased at the replacement cost of such wiring (approximately six cents per foot),[17] but those rules did not envision that an entire distribution system in an MDU could be confiscated under the home wiring rules. Rather, those rules were enacted with the intent that they would apply only to that portion of cable wiring within a subscriber's actual dwelling unit and up to about twelve inches outside of where the wiring enters the individual dwelling unit. Compensation of six cents per foot is not just compensation for the taking of an entire distribution system in an MDU, which forecloses the cable operator not only from continuing to offer cable service but also cuts off the opportunity to provide other services such as telephone or data.[18] Moreover, the Commission cannot remedy the unconstitutionality of effecting a taking by

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[16] CATA Comments at 3.

[17] 47 C.F.R. § 76.802(a).

[18] See CATA Comments at 3 ("Where a cable operator's distribution facilities are being taken, the Commission cannot assume that six cents a foot for the cable is just compensation. When the distribution facilities are taken, so is the business.").

implementing a rule setting forth a compensation calculation; compensation must be determined in an adjudicatory proceeding.[19]

III. THE COMMISSION SHOULD NOT ENACT RULES THAT CONFER RIGHTS TO CABLE HOME WIRING ON PERSONS OTHER THAN THE SUBSCRIBER OR CABLE OPERATOR.

Congress did not intend to confer any benefits or opportunities on persons other than the subscriber or cable operator with regard to cable home wiring,[20] nor should the Commission do so now. The purpose of the home wiring statute is to "enable consumers to utilize the wiring with an alternative multichannel video delivery system and avoid any disruption the removal of such wiring may cause."[21] Nowhere in the 1992 Cable Act or its legislative history is there any mention of giving MDU building owners or landlords control over a cable operator's internal cable wiring so that landlords, rather than the consumers who live in MDU buildings, can use such wiring to provide alternative services of their choice to the residents of such buildings.[22]

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[19] See Florida Power Corp. v. FCC, 772 F.2d 1537, 1546 (11th Cir. 1985), rev'd on other grounds, 480 U.S. 245 (determination of just compensation is clearly a judicial function, and any rule purporting to set compensation is itself unconstitutional).

[20] See House Report at 118 ("subscribers who terminate cable service should have the right to acquire wiring that has been installed by the cable operator in their dwelling unit" (emphasis added)).

[21] House Report at 118 (emphasis added).

[22] See Guam Cable TV Comments at 5 ("The country's future framework should not allow the landlord to be any citizen's telecommunications decision maker. When a tenant rents an apartment, he or she is not renting a guardian: the landlord does not become a parent, controlling what a tenant can or cannot see, hear, or use."). The Independent Cable & Telecommunications Association's ("ICTA") arguments that the Commission has authority to allow the building owner to purchase home wiring if the individual subscriber chooses not to do so are meritless. See ICTA Comments at 5. The home wiring statute was enacted to promote consumer choice in the multichannel video programming marketplace, not to simply give an interested party, such as an MDU building owner, an option to purchase wiring for

One commenter has reasoned that, since control of a loop-through system cannot be realistically "apportioned" among individual tenants, control of such wiring should revert to the MDU owner.[23] Such reasoning should be disregarded for two reasons: (1) control of loop-through wiring cannot "revert" to the MDU owner when control of such wiring did not lie with the MDU owner in the first place -- control of loop-through wiring installed by a cable operator lies with the cable operator unless or until the cable operator yields such control; and (2) the fact that control of a loop-through system cannot be "apportioned" among individual subscribers is one of the reasons to exclude loop-through wiring from the home wiring rules entirely; it is not a reason to create rights in such wiring for the MDU owner in the absence of any authority to do so.

IV. THE COMMISSION SHOULD NOT PROHIBIT FUTURE INSTALLATIONS OF LOOP-THROUGH CONFIGURATIONS.

As Time Warner has stated previously, the Commission's authority under the home wiring statute is limited to the promulgation of rules concerning the disposition of cable home wiring after subscriber termination of service.[24] The Commission cannot stretch this authority to engage in rulemaking that covers issues other than the disposition of cable home wiring. Thus, the Commission should not enact rules prohibiting the installation of loop-through wiring in the future.[25]

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the sole purpose of avoiding any inconveniences associated with the possible removal of such wiring from the premises.

[23] GTE Comments at 6.

[24] See 47 U.S.C. § 544(i).

[25] Accord BOMA Comments at n.3 (Commission's authority to ban further installations of loop-through wiring is questionable); CATA Comments at 4 (neither the 1992 Cable Act nor the 1996 Telecommunications Act gave Commission authority to dictate how a building

Some commenters have suggested that, if the Commission were to continue to exclude loop-through wiring from the home wiring rules, but not prohibit future installations of such configurations, use of loop-through systems may actually increase as a way to escape the Commission's home wiring rules.[26] Time Warner does not believe that installation of loop-through systems will be encouraged if not prohibited by the Commission. In fact, prohibition of future loop-through systems would be unwise and would not promote the Commission's goal of promoting competition.[27] Rather, prohibition of future loop-through configurations will only limit the options available to both multichannel video programming distributors and MDU building owners.[28] Even though loop-through configurations are not often used in new cable installations,[29] they are still a viable option for certain MDUs where the loop is installed in an accessible area. The use of such a configuration can facilitate a number of broadband providers in an MDU building, thereby facilitating greater consumer choice. In fact, loop-through wiring is used more often by competitors to franchised cable service than it is by cable operators,[30] because it is an efficient way to

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is to be wired); NCTA Comments at 5 (cable operators should retain flexibility to wire buildings with loop-through configurations in the future).

[26]GTE Comments at 6; see also MAP/CFA Comments at 13 (incumbent providers may use loop-through systems more frequently in new installations in order to prevent subscribers from switching to competitors).

[27]See BOMA Comments at 5; CATA Comments at 4.

[28]BOMA Comments at 5.

[29]See Charter Communications Comments at n.3.

[30]For example, in New York City, it is far more common for Liberty to deploy a modified loop-through architecture for its MDU installations than it is for Time Warner to do so.

build plant and is, therefore, often more feasible for competitors seeking to enter the MVPD marketplace than use of other types of configurations. Thus, a ban on future loop-through installations would actually hurt competing MVPDs more than it would hurt cable operators.

V. CONCLUSION

For all of the reasons set forth herein, and for the reasons set forth in Time Warner's previous Comments, Reply Comments and Response to Petitions for Reconsideration in MM Docket 92-260, the Commission should not: (1) amend its home wiring rules to include loop-through configurations under any circumstances; or (2) grant cable home wiring rights to persons other than the subscriber or cable operator.

Respectfully submitted,

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