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

APR 17 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

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April 17, 1996

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REPLY COMMENTS

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby submits its reply to the comments submitted with respect to both the *Notice of Proposed Rulemaking* ("*NPRM*") in CS Docket No. 95-184[1] and the *Further Notice of Proposed Rulemaking* ("*FNPRM*") portion of the *First Order on Reconsideration and Further Notice of Proposed Rulemaking* in MM Docket No. 92-260.[2]

I. EXECUTIVE SUMMARY.

The Commission has recognized that "[t]he purpose of the cable home wiring rules is to . . . allow subscribers to utilize the wires with competing MVPDs, thereby facilitating competition

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[1] *Telecommunications Services: Inside Wiring; Customer Services Equipment*, CS Docket No. 95-184, FCC 95-504 (rel. Jan. 26, 1996).

[2] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-260, FCC 95-503 (rel. Jan. 26, 1996).

from these entities."[3] The comments submitted by those that compete with cable demonstrate beyond peradventure that the current cable home wiring rules are not achieving that objective in the multiple dwelling unit ("MDU") environment.[4] Although those comments do not always agree precisely on the specific relief necessary to achieve the Commission's pro-competitive objective, they are virtually unanimous that the single most effective step the FCC can take to address this problem is to divest the cable operator of control over that inside wiring which is dedicated solely to serving an individual subscriber's dwelling unit.

As noted by WCA and most other non-cable parties to this proceeding, the unavoidable reality of the marketplace is that structural limitations, fear of property damage and aesthetic considerations often discourage the MDU property owner from allowing multiple video programming distributors access to residents. This is true most often where existing wiring, particularly the so-called "separate wiring" devoted exclusively to serving a particular residence, is owned by the cable operator and can not be re-used by the alternative service provider.[5]

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[3] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 95-61, FCC 95-491, at 97 n.553 (1995).

[4] *See, e.g.*, Comments of Liberty Cable Company, Inc., CS Docket No. 95-184, at 6-10 (filed March 18, 1996)["Liberty Comments"]; Comments of OpTel, Inc., CS Docket No. 95-184, at 10 (filed March 18, 1996)["OpTel Comments"]; Comments of the Independent Cable & Telecommunications Association, CS Docket No. 95-184, at 20 (filed March 18, 1996)["ICTA Comments"]; Comments of the Wireless Cable Association International, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 4-5 (filed March 18, 1996)["WCA Comments"]

[5] *See, e.g.*, WCA Comments at 12-15; Comments of DIRECTV, Inc., CS Docket No. 95-184, at 2 (filed March 18, 1996)["DIRECTV Comments"]; Comments of GTE, CS Docket No. 95-184, at 9 (filed March 18, 1996)["GTE Comments"]; Joint Comments of the Building Owners and Managers Association International, et al., MM Docket No. 92-260, at 12 (filed March 18, 1996).

Hence, by divesting the cable operator of control over separate wiring, the Commission can remove the single largest obstacle faced by cable's competitors in MDUs -- the property owner's distaste for postwiring. Moreover, the Commission can do so in a manner that is perfectly consistent with the requirements of Section 16(d) of the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").[6]

Specifically, WCA now proposes the following:

- The existing demarcation point for purposes of Section 16(d) should be moved to the wall plate of the particular unit. Thus, a resident in an MDU environment would be permitted to purchase, upon termination of service, any wiring that is within his or her particular unit, but not wiring within the walls or common areas.

- All wiring devoted to serving an individual unit between the junction with common wiring and the new Section 16(d) demarcation point would immediately upon adoption of new rules become subject to the control of the MDU property owner and could be purchased at replacement cost immediately.

Not surprisingly, the initial comments of the cable industry generally reject any notion that modifications to the FCC's inside wiring rules are necessary. Rather, those comments argue strenuously in favor of preserving a *status quo* that has served cable quite well, albeit to the

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[6]For purposes of this pleading, WCA will focus on those situations in which individual residents of an MDU enter into individual service agreements with video providers and are separately billed. In those situations where a cable operator provides service on a bulk basis (*i.e.*, the service is provided to all residents at all individual charge and a single bill is issued to the landlord, condominium association, etc.), the entity being billed should be deemed the "subscriber" for purposes of Section 16(d) of the 1992 Cable Act and the Commission's implementing rules. Thus, upon termination of the bulk billed service, the property owner, condominium association, etc., must be afforded the opportunity to acquire all of the inside wiring on its side of the demarcation point, which should be either the "minimum point of entry" or the point twelve inches outside of where the wiring first enters the building. *See* WCA Comments at 5 n.10.

detriment of competing multichannel video programming distributors and consumers.[7] Yet, as will be demonstrated below, neither the facts nor the law support cable's efforts to retain the Commission's current approach to inside wiring. Clearly, the better alternative is for the Commission to continue down the path started with the *NPRM* and adopt the proposal suggested by WCA to assure consumers residing in MDUs the benefits of competition in the video marketplace.

II. DISCUSSION.

A. The Commission Must Divest Cable Operators Of Control Over Separate Wiring If There Is To Be Any Possibility Of Widespread Competition Among Multichannel Video Service Distributors In MDUs.

The initial comments of the National Cable Television Association, the Cable Telecommunications Association, various state cable associations and the larger cable MSOs echo a common refrain: (1) the telephone inside wiring rules are not an appropriate model for regulation of cable inside wiring; (2) the FCC must not move the current demarcation point for cable home wiring in MDU properties; and (3) under no circumstances should tenants or property owners be allowed to obtain additional rights to ownership and/or control over any of the cable wiring in MDU properties.[8] Instead, the cable industry argues in favor of leaving the cable home

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[7]Indeed, the nation's largest cable operator, Tele-Communications, Inc., has even requested that the Commission postpone this entire proceeding until it completes its rulemakings implementing the Telecommunications Act of 1996, notwithstanding the fact that none of those rulemakings are directed at inside wiring. Comments of Tele-Communications, Inc., CS Docket No. CS 95-184, at 1-2 (filed March 18, 1996).

[8]*See, e.g.*, Comments of the National Cable Television Association, CS Docket No. 95-184, at 15-29 (filed March 18, 1996)["NCTA Comments"]; Comments of the Cable Telecommunications Association, CS Docket No. 95-184, at 2-6, 12-14 (filed March 18,

wiring demarcation point where it is and requiring alternative providers to overbuild with a second wire right up to the subscriber's individual dwelling unit.[9] Adoption of that approach will yield an obvious result -- just as is the case today, there will be only limited competition among multichannel video programming distributors in the MDU marketplace because property owners loathe postwiring like Dracula loathes the sun.

Notwithstanding the cable industry's demand for indefinite preservation of the current state of affairs, it is indisputable that the Commission's adoption of the *NPRM* and the *FNPRM* would not have been necessary if current regulations governing inside wiring and access to property were sufficient to ensure that residents of MDUs enjoy the benefits of competition in the multichannel video distribution marketplace. For additional evidence that changes to the current regulatory framework are necessary, the FCC need look no further than the initial comments on the *NPRM* and the *FNPRM*: virtually every industry group that seeks to compete directly with

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1996)["CATA Comments"}; Comments of Time Warner Cable and Time Warner Communications, CS Docket No.95-184, at 6-26 (filed March 18, 1996)["Time Warner Comments"]; Comments of Adelphia Communications Corporation, CS Docket No. 95-184, at 1-2 (filed March 18, 1996)["Adelphia Comments"]; Comments of Marcus Cable, *et al.*, CS Docket No. 95-184, at 3-7 (filed March 18, 1996)["Marcus Cable Comments"]; Comments of Continental Cablevision and Cablevision Systems Development, CS Docket No. 95-184, at 6-27 (filed March 18, 1996)["Continental/Cablevision Systems Comments"].

[9] *See, e.g.*, Comments of Cox Communications, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 19-22 (filed March 18, 1996)["Cox Comments"]; Time Warner Comments at 6-11. Indeed, two cable MSOs have gone so far as to suggest that the FCC move the cable home wiring demarcation point in MDU properties to the wall plate of the individual unit, and that *any* wiring buried in the walls of the individual unit should still be owned and controlled by the cable operator. Comments of Charter Communications, Inc. And Comcast Cable Communications, Inc., CS Docket No. 95-184, at 15 (filed March 18, 1996)["Charter/Comcast Comments"].

cable, as well as equipment manufacturers, public interest groups, and even one subsidiary of a cable MSO, support a sea change in the Commission's regulatory approach to inside wiring.[10] As noted above, those comments emphasize two unescapable facts -- competitors cannot serve MDUs unless the property owner gives them access, and MDU property owners are reluctant to grant access to a second multichannel video provider unless, at a minimum, existing separate wiring can be re-used.[11] Predictably, the cable industry does not acknowledge, must less adequately address, the substantial practical disincentives that deter property owners from permitting alternative providers to post-wire their properties. Nor does the cable industry highlight the fact that the current regulatory scheme for inside wiring and access to property works largely to the advantage of the incumbent provider serving the property, which in most cases is a cable system.[12]

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[10] *See, e.g.*, Comments of NYNEX, CS Docket No. 95-184, at 7-8 and 9-12 (filed March 18, 1996)["NYNEX Comments"]; Comments of Pacific Bell and Pacific Telesis Video Services, CS Docket No. 95-184, at 3-6 and 12-14 (filed March 18, 1996)["PacTel Comments"]; GTE Comments at 9-11 and 16-19 (filed March 18, 1996); Comments of Heartland Wireless Communications, Inc., CS Docket No. 95-184 and MM Docket No. 92-260 (filed March 18, 1996); Comments of CAI Wireless Systems, Inc., CS Docket No. 95-184 and MM Docket No. 92-260 (filed March 18, 1996); Comments of Multimedia Development Corp., CS Docket No. 95-184 and MM Docket No. 92-260, at 9-16 (filed March 18, 1996); Liberty Comments at 2-10; OpTel Comments at 9-11; DIRECTV Comments at 8; Comments of the Consumer Electronics Manufacturers Association, CS Docket No. 95-184, at 6-7 (filed March 18, 1996); Comments of Media Access Project and Consumer Federation of America, CS Docket No. 95-184 and MM Docket No. 92-260, at 6-17 (filed March 18, 1996); Comments of Residential Communications Network, Inc., CS Docket No. 95-184, at 3-6 (filed March 18, 1996).

[11] *See supra* note 5.

[12] Time Warner contends that "Because landlords typically receive handsome compensation from unfranchised MVPDs based on a percentage of their revenues from the building, most landlords have a strong incentive to allow another MVPD to install cable in

Accordingly, WCA and others have recommended approaches to the Commission that would empower MDU property owners to provide access to wireless cable operators and other alternative providers in response to resident demand, without forcing the property owner to undertake the burdens of postwiring. As noted above, WCA is in support of a concept espoused by many parties to this proceeding: property owners should be entitled to acquire ownership of separate wiring upon installation or, as in the case of telephone inside wiring, at least have the right to utilize, replace, rearrange or maintain that wiring, regardless of ownership.[13] Where WCA parts company, at least in part, is with its suggestion that the Commission establish the

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hallway moldings, or on the outside of the building." Time Warner Comments at 19. Apparently landlords have yet to recognize this opportunity, since Time Warner does not cite a single example where this has actually occurred. Indeed, the experience of Time Warner's chief competitor in New York City, Liberty Cable Company, indicates that in fact the opposite is the case, and that Time Warner itself has blocked Liberty's efforts even where landlord consent is not an issue. Liberty Comments at 6-10.

[13] *See, e.g.*, PacTel Comments at 3-4, 12-13; Comments of Ameritech, CS Docket No. 95-184, at 5 (filed March 18, 1996)[recommending that control of all premises wiring be vested with the subscriber or the building owner, and that ownership of new premises wire should vest with the subscriber or building owner at the time of installation]; Multimedia Development Corp. Comments at 16-19; Heartland Wireless Comments at 1-2; CAI Wireless Comments at 1-2. WCA also supports those commenting parties who have recommended that the FCC allow a subscriber to have pretermination access and control over any inside wiring on his side of the demarcation point. *See, e.g.*, Comments of AT&T, CS Docket No. 95-184, at 9-10 (filed March 18, 1996)[recommending that the Commission establish a rebuttable presumption that all cable subscribers have acquired title to (or at a minimum access to and control over) their inside wiring)]; NYNEX Comments at 9-12; PacTel Comments at 12-13; GTE Comments at 16-19; Comments of the Consumer Electronics Manufacturers Association, CS Docket No. 95-184, at 6-7 (filed March 18, 1996). Clearly, neither the language of nor the legislative history to Section 16(d) of the 1992 Cable Act prohibits the FCC from adopting such a rule, and, as noted by the commenting parties cited above, allowing a subscriber to exercise pretermination control over inside wiring would ensure that subscribers have maximum flexibility in choosing among multichannel video service providers. *See, e.g.*, NYNEX Comments at 10.

demarcation point for purposes of Section 16(d) at the wall plate within a given unit, and permit individual subscribers to acquire any wiring on their side of this demarcation point following termination of cable service. As a trade association representing property owners stated directly and forcefully on the practical rationale for a rule affording property owners such control in common areas:

> Because apartment residents are more transient and do not have a long-term financial interest in either their apartments or common areas, it is essential for the owner of the building to have full control over the property. Not only has the owner made a very large investment to acquire the property, but the "problem of the commons" means that apartment residents may be less concerned with maintaining common areas (and even their units) in good condition. The building owner is the only person with an interest in the long-term well-being of the entire building and all its residents as a group.[14]

WCA's approach has the benefit of serving the legitimate interest of property owners in controlling their common areas, while conforming to the language of Section 16(d).

B. The Arguments Advanced By Cable Against Relief Of The Sort Proposed By WCA Are Devoid Of Merit.

The cable industry raises essentially four arguments against any effort to divest cable operators of control over separate wiring. First, cable argues that the Commission has no authority under Section 16(d) of the 1992 Cable Act to do so.[15] Second, the cable industry argues that such an approach is specifically prohibited by Section 652(d) of the Telecommunications Act

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[14] Joint Comments of Building Owners and Managers Association International, et al. at 7-8.

[15] *See, e.g.*, NCTA Comments at 12-15; Time Warner Comments at 11-13; Adelphia Comments at 1-2; Continental/Cablevision Systems at 27-29; Cox Comments at 13-17; Comments of TKR Cable, CS Docket No. 95-184, at 10-11 (filed March 18, 1996).

of 1996 (the "1996 Act").[16] Third, the cable industry argues that adoption of such an approach would cause cable operators irreparable economic harm by empowering landlords to deter the cable industry's access to MDU properties and prevent cable operators from offering non-video services to any subscriber who switches to another video provider.[17] Finally, the cable industry argues that adoption of the proposed approach would effect a taking of property in violation of the Fifth Amendment.[18] As demonstrated below, none of these arguments have sufficient merit to override the well documented legal foundation for and marketplace benefits of divesting cable operators of their ability to control inside wiring to the detriment of competing multichannel video service providers and consumers as proposed by WCA.

1. SECTION 16(D) OF THE 1992 CABLE ACT DOES NOT PROHIBIT THE FCC FROM PROVIDING MDU PROPERTY OWNERS WITH CONTROL OVER SEPARATE WIRING BETWEEN THE POINT WHERE SUCH WIRING MEETS THE COMMON WIRING AND THE POINT THE WIRING IS SUBJECT TO SUBSCRIBER PURCHASE PURSUANT TO SECTION 16(D).

As noted above, those that compete against cable are unanimous in their support for the proposition that the cable operator should be divested of control over separate wiring used to

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[16] *See, e.g.*, Marcus Cable Comments at 3-4; NCTA Comments at 6-15. Much of the cable industry's emphasis on requiring the installation of multiple wires in MDU buildings rests in its assumption that it is not technically feasible for multiple providers to share a single wire. *See, e.g.*, Cox Comments at 5; Continental/Cablevision Systems Comments at 9 n.13. However, at least one prominent alternative provider of multichannel service has suggested that this is not the case. DIRECTV Comments at 3.

[17] *See, e.g.*, Comments of Continental/Cablevision Systems at 13-24; Time Warner Comments at 7-8; NCTA Comments at 15-21.

[18] *See, e.g.*, NCTA Comments at 36-38; Continental/Cablevision Systems Comments at 12 n.19.

serve individual units in an MDU environment. In considering the comments submitted by those that compete against cable, the one significant point of contention involves which party -- the MDU property owner or the subscriber -- should be permitted to own and control the separate wiring that serves an individual subscriber's unit. MDU property owners and private cable interests point out, quite rightly, that the property owner is best situated to secure ownership and control of the separate wiring, particularly to the extent that wiring is located in common areas. Cable points out, however, that under the specific language of Section 16(d), it is the subscriber, not the property owner, that has the right to acquire ownership of inside wiring after terminating service, but that the only wiring it can acquire is within the subscriber's own unit.

WCA believes, however, that the Commission can chart a course that addresses both arguments in a manner that is fair and lawful. WCA's proposal is fully consistent both with the language of Section 16(d) and Congressional intent. Section 16(d) states that:

> Within 120 days after the date of enactment of this subsection, the Commission shall prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber.[19]

By providing the individual resident with the right to acquire inside wiring on its side of the wall plate, WCA's proposal clearly satisfies both the language and the spirit of Section 16(d).

In arguing that Section 16(d) forecloses the Commission from addressing inside wiring in common areas of MDU properties, the cable industry relies heavily on the following language from the House Report to the 1992 Act:

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[19] Pub. L. No. 102-385, 102 Stat. 1460 (1992).

> This provision applies only to internal wiring contained within the home and does not apply to . . . any wiring, equipment or property located outside of the home or dwelling unit.
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> . . . In the case of multiple dwelling units, [Section 16(d)] is not intended to cover common wiring within the building, but only the wiring within the dwelling unit.[20]

From this, the cable industry concludes that since any inside wiring beyond the current demarcation point is located in common areas of the building, it must be "common wiring" as that term was used by Congress above, and therefore cannot be purchased by the subscriber upon termination of service.[21]

WCA believes that the cable industry's conclusion here reads far too much into Section 16(d). WCA believes the Commission can, if it so chooses, extend the demarcation point for Section 16(d) purposes to the point at which the wiring devoted to an individual unit joins common wiring. The cable industry has skipped a logical step in concluding that because any wiring beyond the current demarcation point is located in common areas, it must be "common wiring" as that term was used by Congress in the House Report. The fact that Congress specifically used the term "common wiring" rather than "common area wiring" reflects Congress's recognition that the most important factor is not the *location* of the wiring but its *use*.[22] In other words, the relevant distinction is not between wiring in the tenant's individual

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[20] 1992 House Report at 118-119.

[21] *See, e.g.*, NCTA Comments at 12-13; Cox Comments at 13-14.

[22] Indeed, at no point in the portion of House Report cited by the cable industry does Congress use the term "common area." 1992 House Report at 118-119.

unit and wiring in common areas, but between wiring devoted specifically to providing service to the tenant's individual unit and wiring used to provide service to *all* units. Were it otherwise, the FCC's *current* demarcation point would be in violation of the statute, since any wiring even an inch outside of a tenant's individual dwelling unit would fall within common areas and thus, in the cable industry's view, fall within its interpretation of the term "common wiring." Not even the cable industry seriously contends that this is the case, and thus there similarly is no solid foundation for arguing that the Commission would violate the statute by simply extending the demarcation point to the location where unit-specific wiring meets the building's common wiring.[23]

Yet, that does not necessarily mean that, as a matter of policy, the Commission should extend the demarcation point for purposes of Section 16(d). ICTA, for example, has demonstrated a variety of practical and legal problems associated with affording residents of MDUs the opportunity to acquire ownership of separate wiring that is located within common

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[23]Time Warner argues that extending the demarcation point to the location where the wiring becomes dedicated to an individual subscriber's use would still leave the demarcation at the point where the wiring enters each individual unit. Specifically, Time Warner theorizes that such unit-specific or "homerun" wiring is never "dedicated" to an individual subscriber's use to the extent that the wiring must remain in place to allow the cable operator to provide non-video services. In addition, Time Warner notes that such wiring may be "split" to serve more than unit, and may be reused to serve other units when the subscriber terminates service. Time Warner Comments at 10-11. The fact remains, however, that in most non-loop through wiring configurations an individual dwelling unit is served by a single wire, which connects to a common trunk line that is the source of video programming for all residents in the building. WCA Comments at 13-14. That wiring, and no other, is "dedicated" to providing service to the subscriber who lives in that particular dwelling unit; the fact that the wiring may eventually be non-video services or may be split into other units does not change the analysis.

areas.[24] ICTA proposes that the Commission move the Section 16(d) demarcation point to where the wiring devoted to an individual unit meets common wiring, but limit the right of purchase to the property owner, rather than the subscriber.[25] While WCA agrees that ICTA's approach represents sound policy and appears consistent with the underlying purposes of Section 16(d), it is difficult to square ICTA's approach with the language of Section 16(d) affording "the subscriber" the right to purchase inside wiring upon termination of service.

WCA's recommended approach has the benefit of consistency with the language of Section 16(d), since the subscriber will have the right to purchase the wiring on its side of the demarcation point upon termination of service. Moreover, there is absolutely nothing in Section 16(d) or its legislative history to suggest that the Commission lacks authority to vest property owners with control over inside wiring that is not subject to Section 16(d) acquisition by the subscriber.

2. THE 1996 ACT DOES NOT PROHIBIT ADOPTION OF WCA'S PROPOSAL.

The cable industry would have the Commission believe that new Section 652(b)(2) of the Communications Act, as added by Section 302 of the Telecommunications Act of 1996 (the "1996 Act"), prohibits the Commission from affording competitors access to wiring beyond the 12 inch mark outside the tenant's individual unit.[26] However, Section 652(b)(s) is inapplicable.

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[24] *See* ICTA Comments, at 7-19.

[25] *See id.* at 22-25.

[26] *See, e.g.*, NCTA Comments at 9-12; Time Warner Comments at 16-17; Marcus Cable Comments at 4-6.

Again, the FCC must begin with the language of the statute:

> [A] local exchange carrier may obtain, with the concurrence of the cable operator on 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.[27]

Hence, the language of the statute is very limited in scope: it only requires the FCC to regulate consensual arrangements for shared use of cable drops by telephone companies and cable operators. Attempting to extend Section 652(d)(2) to inside wiring misconstrues its scope -- that section does not address inside wiring at all, but merely addresses the exterior cable drop running from a pole or pedestal to the outside of the individual single family home or MDU building.

Moreover, the cable industry's Section 652(d)(2) argument is an obvious smokescreen: the issue here is the extent to which *subscribers and MDU property owners*, not local exchange carriers, may obtain ownership and control over cable inside wiring. This highlights the fundamentally different objectives of Section 16(d) and Section 652(d)(2). As set forth in the legislative history to the 1992 Cable Act, the purpose of Section 16(d) is to "enable consumers to utilize [inside wiring] with an alternative multichannel video delivery system . . .."[28] By contrast, Section 652(d)(2) is not directed at the issue of subscriber choice; it is simply a narrow exception to the general prohibition in the 1996 Act against telephone companies and cable

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[27] Pub.L 104-104, 110 Stat. 120 (1996).

[28] 1992 House Report at 118.

operators acquiring interests in each other's facilities in the same market.[29] Hence, Section 652(d)(2) has no bearing on whether a cable subscriber or the MDU property owner should be accorded greater control over inside wiring to facilitate greater access to competing providers of multichannel service.

3. THE CABLE INDUSTRY'S CLAIMS OF POTENTIAL ECONOMIC HARM ARE MERITLESS.

The cable industry claims that any granting of rights to cable home wiring beyond the current demarcation point in the MDU environment will give property owners the power to act as "gatekeepers," and that property owners will use this power to keep cable operators out of MDU buildings even where tenants demand otherwise.[30] The cable industry also claims that any grant of such right will inhibit its ability to provide non-video services over inside wiring.[31]

Before the Commission gives any credit to the cable industry's claims of economic harm, some history is in order. In its 1995 assessment of the status of competition in the market for delivery of video programming, the Commission made the following findings:

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[29] Section 652(a) generally prohibits a local exchange carrier from purchasing more than a 10% financial interest, or any management interest, in any cable operator providing cable service within the local exchange carrier's telephone service area. Section 652(b) prohibits a cable operator from purchasing more than a 10% financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within the cable operator's franchise area. Section 652(c) prohibits a local exchange carrier and a cable operator in the same market from entering into any joint venture or partnership to provide video programming directly to subscribers or to provide telecommunications services within such market.

[30] *See, e.g.*, NCTA Comments at 15-21; Continental/Cablevision Systems Comments at 21-24.

[31] *See, e.g.*, Time Warner Comments at 7-8; Continental/Cablevision Systems Comments at 13-21.

> [C]able television systems remain the primary distributors of video programming. Although competitive pressures from alternative video distributors are increasing, the Commission concludes that markets for the distribution of video programming are not yet competitive. Most video distribution markets continue to be highly concentrated, and incumbent cable operators face direct competition from overbuilders in only a few markets. . . [T]he number of subscribers to alternative video distributors remains extremely low relative to the number of subscribers to cable systems.[32]

The Commission further found that:

> An incumbent [cable operator] may . . . attempt to disadvantage its rivals by strategic non-uniform pricing. In this regard, the Commission has observed that cable systems often offer bulk discounts to subscribers in MDUs, and has expressed a desire that bulk discounts not be used as a means of displacing competition from alternative MVPDs . . . .[33]

Viewed in this context, the cable industry's attempt to portray itself as an endangered species in the MDU environment is very hard to accept.

The cable industry nonetheless argues that the Commission must not give property owners greater control over wiring, alleging that property owners will use this control to keep cable operators out of MDU properties.[34] WCA submits that what the cable industry is actually complaining about is the inescapable fact that, since a multichannel service provider cannot serve

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[32] *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 95-61, FCC 95-491, para. 194 (1995).

[33] *Id.* at para. 208. *See also* Liberty Comments at 6-10 (describing Time Warner's refusal to allow Liberty access to hallway moldings and conduits); Comments of the Wireless Cable Association International, Inc., MM Docket No. 92-260 at 3-4 (filed Dec. 1, 1992)[noting that franchised cable operators were attempting to harass subscribers who opt for an alternative service provider by precluding them from using the coaxial cable left behind in their homes].

[34] *See, e.g.*, NCTA Comments at 15-21.

MDU subscribers without placing their facilities in the building's common areas, an MDU property owner *must* enjoy some degree of control over which providers will have access to the MDU property. Again, the comments of the property owners are instructive:

> [T]he [property] owner's interest in reducing turnover and attracting new residents give him or her an incentive to provide residents with whatever benefits or amenities the property can afford. In many cases, or course, those benefits may be limited because the income generated by the property cannot justify additional expense. Many factors, such as the age, size, design and construction of the building may affect whether it is economically feasible to provide a particular service. A forty-year-old, three-story garden apartment, for instance, is not likely to be retrofitted with an elevator, no matter how much the residents might want it.[35]

Moreover, even if the Commission were to accept the cable industry's unspecific allegation that property owners will use their control over inside wiring to exclude cable operators even where their tenants demand otherwise, WCA submits that the best remedy for this problem is the marketplace, not regulation. Over time, as tenants become aware for the first time that they actually have a choice of multichannel video service providers, tenants will come to demand that property owners allow them to make that choice. In turn, to attract new tenants and minimize tenant turnover, property owners will be less inclined to pursue an exclusionary strategy and instead will tailor their access policies to accommodate whichever service providers are demanded by the tenants. As noted by ICTA:

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[35] Joint Comments of Building Owners and Managers Association International, et al., at 8.

> Property owners' primary concern is to have high occupancy rates and therefore, left to their own devices, they will choose the cable provider(s) that they believe will best serve their tenants' needs, after a consideration of all relevant criteria. As the Third Circuit in Wooley, 867 F.2d at 157, correctly found: it may be assumed that the property owner's selection of the cable provider "will be based on the realities of the marketplace and that the wishes of the tenants will not go unheeded since cable television may be one of the services that prospective tenants consider in their selection of a building."[36]

Further, WCA submits that the cable industry's argument regarding non-video services is a red herring. The cable industry posits that where a cable operator is providing cable service and telephony through to a subscriber's individual dwelling unit through a single dedicated wire, the operator will be unable to provide telephony service to that subscriber if he or she terminates cable service, purchases the dedicated wiring and uses it to receive broadband service from an alternative provider. WCA submits that this is a business issue, not a legal one.

Assuming that the subscriber is aware that the cable operator may eventually provide telephone service through the cable wire, he or she will do what all consumers do when they choose among providers of broadband video and telephony services: evaluate the options and determine which one will provide the highest quality service at the lowest price. If the subscriber places a high value on receiving telephone service from the cable operator, then he or she will require the alternative broadband provider to make whatever arrangements are necessary to

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[36] ICTA Comments at 24. In isolated instances where the marketplace does not function properly, the Commission should simply leave the matter to the states and or local municipalities, who have more precise information about the extent of the problem in their own jurisdictions and in some cases have already adopted statutes to minimize property owner abuses in this area. *See, e.g.*, Conn. Gen. Stat. Section 16-333A(a) and Va. Code Ann. Section 55-248.13:2 (Connecticut and Virginia statutes forbidding landlords from accepting any form of payment in exchange for granting access to premises)

ensure that its connection to the subscriber's unit allows the subscriber to receive the cable operator's telephone service. Conversely, if the subscriber does not place a high value on receiving telephone service from the cable operator, then the subscriber will simply elect to take that service from the local exchange carrier (if he or she is not doing so already). In either case, the Commission should allow the marketplace to determine the final result. Otherwise, the subscriber will in effect be held hostage to the cable operator's cable service simply because the cable operator may offer local telephone service or other non-video services at some point in the future, at a price and/or quality level that may or may not be desirable to the subscriber.[37]

4. ADOPTION OF WCA'S PROPOSAL WILL NOT EFFECT A TAKING UNDER THE FIFTH AMENDMENT.

The cable industry would have the FCC believe that relief of the sort proposed by WCA and others will effect an uncompensated taking of a cable operator's property and thus would violate the Fifth Amendment.[38] This argument is difficult to understand. Regardless of where the demarcation point is located, the cable operator is entitled to receive an amount equal to replacement cost if the wiring is purchased.[39] Equally difficult to understand is the cable

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[37]It should be remembered that even by the cable industry's own admission, due to the technical challenges associated with delivering telephone service through cable plant, widescale cable telephony appears to be at least several years off. *See, e.g.*, "Is Cable Telephony Here Yet?", *Cable World*, p.37 (March 25, 1996); Continental/Cablevision Systems Comments at 20 (noting that neither MSO is presently offering video and telephony over a single wire). Thus, as a practical matter, the cable industry is asking the Commission to structure its inside wiring rules to the detriment of existing alternative broadband technologies in favor of cable-delivered non-video services which will not be available to many subscribers for the foreseeable future.

[38]*See, e.g.*, NCTA Comments at 36-38.

[39]47 C.F.R. § 76.802.

industry's suggestion that the replacement cost per square foot formula is insufficient compensation for its "opportunity costs" vis-a-vis non-video services if the demarcation point is moved to where dedicated wiring joins with common wiring.[40] To the extent that a cable operator suffers any "opportunity cost" from having to sell its separate wiring,[41] that cost arises from the subscriber's independent decision to terminate the cable operator's service, and as such is not compensable under the Fifth Amendment.[42]

Finally, there is no merit to the cable industry's suggestion that allowing the property owner to acquire and/or exercise control over common wiring prior to termination of service is a taking in violation of the Fifth Amendment.[43] In rejecting this argument with respect to telephone inside wiring, the Commission stated:

> We do not agree that the Fifth Amendment prohibits us from ordering a relinquishment of ownership claims. The Fifth Amendment permits a taking or property so long as the person from whom the property is taken receives "just compensation" and so long as the taking is for a valid "public use."[44]

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[40] *See, e.g.*, NCTA Comments at 36-38; Time Warner Comments at 21-22.

[41] *Id.* at 37-38.

[42] Of course, where the cable operator does not currently offer telephone service and does not intend to do so for the foreseeable future, there is no opportunity to be lost. Moreover, where the cable operator is in fact capable of offering telephone service, the alleged "opportunity cost" would exist regardless of how much dedicated wiring the subscriber is entitled to purchase at termination of service, since the cable operator will be disconnected from the subscriber's unit in any case.

[43] NCTA Comments at 36-38.

[44] *Telephone Inside Wiring Second Report and Order*, ¶ 48.

Certainly, where the property owner merely has control but not ownership of common wiring, there is no physical intrusion or permanent physical occupation of the cable company's real property, and hence no compensable taking under the Fifth Amendment.[45] Further, where the property owner elects to acquire ownership of the wiring, WCA has never proposed that cable operators not be compensated for the cost of the wiring (if the cable operator has not recovered that cost already).[46] Accordingly, the cable industry's taking argument should be rejected.

C. *The Commission Should Not Require Property Owners To Provide Access To Any Minimum Number of Service Providers.*

There is substantial debate in this proceeding over whether the Commission should permit property owners to enter into exclusive contracts with multichannel video service providers. The cable industry, for example, argues that such contracts are abusive and provide private cable operators an unfair advantage in obtaining access to MDU properties.[47] Conversely, cable's competitors argue that exclusive contracts benefit all multichannel providers and consumers alike, and thus argue that exclusive contracts should be preserved so long as they are not perpetual or

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[45] *See, e.g.*, NYNEX Comments at 11, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) and *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987).

[46] WCA Comments at 20 (recommending that the Commission allow cable operators to recover all of their inside wiring costs through their basic service rates or through separate agreements with building owners); GTE Comments in MM Docket No. 92-260 at 5 and CS 95-184 at 19 (filed March 18, 1996)[recommending that cable operators be allowed to recover the costs of inside wiring through basic service rates].

[47] *See, e.g.*, TKR Cable Comments at 12; NCTA Comments at 21.

otherwise excessive in length.[48]

WCA submits that the Commission can easily resolve this issue by acknowledging the one basic fact which overrides the entire debate over exclusive contracts: *the physical burdens each multichannel service provider imposes in the MDU environment preclude absolute freedom of subscriber choice.*[49] As a result, regardless of the relative benefits and drawbacks of exclusive contracts, any Commission regulation prohibiting exclusive contracts will never promote unlimited competition in the MDU environment, since such competition is physically impossible. Moreover, since some or perhaps many multichannel providers will always be denied access to an MDU property even in the absence of an exclusive contract, the Commission would invariably be required to answer the impossible question of exactly how many providers will constitute sufficient competition on a single MDU property. Obviously, because of the various physical differences between MDU buildings, the Commission cannot make a blanket determination on this issue, and case-by-case resolution of the problem would be administratively unworkable. Accordingly, WCA recommends that the most feasible solution available to the Commission is to eschew any regulation of exclusive contracts and allow the marketplace to determine whether

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[48] *See, e.g.*, OpTel Comments at 8; ICTA Comments at 45-46, 55-57; Comments of GTE, CS Docket No. 95-184, at 22.

[49] WCA Comments at 13. For instance, space limitations in the basements, attics and conduits of MDUs place a *de facto* cap on the number of competing providers who may serve an MDU property. Similarly, limitation on rooftop space effectively restrict the number of satellite and/or microwave-based multichannel providers who may be given access to a single MDU property. Id. Also, structural limitations and related aesthetic considerations preclude installation of an unlimited number of wires to accommodate all service providers. Id. at 14-15.

those contracts are in the best interests of consumers.[50]

D. The Commission Should Pre-empt Discriminatory State Mandatory Access Laws.

WCA, the private cable industry and others have urged the FCC to level the playing field vis-a-vis competition within MDU properties by preempting state mandatory access laws which discriminate in favor of franchised cable operators.[51] In particular, Liberty Cable Company, which operates in two mandatory access states (New York and New Jersey), has provided compelling evidence as to why such statutes are completely outmoded and ultimately thwart competition. Specifically, Liberty notes that the New York and New Jersey cable access laws were enacted over 25 years ago when franchised cable operators were the only source of multichannel video programming; that there are dozens of building owners throughout the New York metropolitan area who refuse to consider taking service from Liberty because they already receive cable from the franchised cable operator; and that MDU owners are hesitant to give

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[50]As discussed above, once tenants become aware that they now have a choice of multichannel video service providers, property owners are likely to respond to tenant preferences in order to attract new tenants and minimize turnover of existing ones. This type of marketplace dynamic will render it entirely uneconomical for a property owner to limit access to one provider unless the exclusivity produces the services tenants want at a price they are willing to pay. Moreover, given the sheer number of MDU properties in the United States, it is unlikely that permitting exclusive contracts will enable a disproportionately small number of providers to corner the market on multichannel service in the MDU environment. *See* Liberty Comments at 4-5 (noting that MDUs accounted for nearly one-third of the entire U.S. housing market in 1990; that the number of dwelling units in MDUs in the United States increased by 51% between 1980 and 1990; and that MDUs make up between 32% and 84% of the housing market in certain U.S. cities which have the greatest number of cable households).

[51]WCA Comments at 6-10; Liberty Comments at 13-23; OpTel Comments at 9; ICTA Comments at 48-55. *See also* PacTel Comments at 15.