

was to create incentives for advanced network deployment, and the Commission's rules must remain true to this ideal.

An overview of the 1996 Act demonstrates how important promoting advanced network deployment was to Congress. On the very first page of the conference report introducing the final version of the bill to Congress, the conference committee stated:

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . .<sup>28/</sup>

This passage demonstrates that Congress' whole point in establishing a policy of promoting competition is that competition in turn promotes the development of advanced yet affordable new services and facilities to the benefit of consumers. All people, including MDU residents, should benefit from the diversity in telecommunications options that this competition produces.

Turning to provisions of the Act itself, Congress' intent to create incentives for the development of advanced networks accessible to all consumers could not be more clear. For example, under Section 101(a) adopting a new Section 254(b) regarding universal service, Congress requires the Joint Board and the Commission to base universal service policies on principles including the promotion of universal access to advanced communications facilities:

(b) Universal Service Principles - The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles. . .

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<sup>28/</sup>H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996).

(2) Access to Advanced Services- Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in Rural and High Cost Areas- Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.<sup>29/</sup>

Further, in Section 706, the Congress explicitly requires the Commission and the States to actively develop policies that give telecommunications providers incentives to upgrade to advanced telecommunications networks:

(a) The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.<sup>30/</sup>

Under Section 706(c)(1), "advanced telecommunications" is defined to include the very same broadband infrastructure and network upgrades that cable operators such as Time Warner

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<sup>29/</sup>1996 Act at § 101(a).

<sup>30/</sup>Id. at § 706(a).

have every incentive to deploy in MDU if the current demarcation point is maintained:

For purposes of this subsection:

(1) **ADVANCED TELECOMMUNICATIONS CAPABILITY-**  
The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.<sup>31/</sup>

Finally, under Section 706(b), the Commission is required to undertake a regular inquiry to evaluate the extent to which advanced networks are being deployed, and if it finds that either they are not or deployment is lagging, the Commission is required to immediately take action:

(b). . . In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.<sup>32/</sup>

Congress could not have been more clear about what it intended -- an overriding goal of the 1996 Act is to create incentives for the private sector to deploy advanced broadband telecommunications networks and facilities.

Cable system upgrades, including upgrades within MDUs, accomplish exactly the advanced network capabilities that Congress intended to promote. Cable operators such as Time Warner are committed to providing advanced capabilities over their networks. In fact,

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<sup>31/</sup>*Id.* at § 706(c)(1).

<sup>32/</sup>*Id.* at § 706(b).

cable operators have over the past several years been engaging in expensive upgrades of their distribution networks, including those in MDUs, in order to provide their customers with telecommunications services beyond just simple multichannel video programming. Time Warner itself has invested over \$150 million in Manhattan alone to upgrade its broadband delivery infrastructure inside MDU buildings. If building owners or competing providers are given the right or ability to expropriate cable operator MDU wiring because the Commission changes the demarcation point or creates a rule that allows competitors access to such wiring, cable operators' incentives to upgrade their facilities will be extinguished. Cable operators cannot reasonably be expected to engage in any upgrades of their networks if their investment will simply subsidize their competitors. The Commission's policies, consistent with Congress' will that advanced telecommunication networks be promoted in every way possible and be available to every potential consumer, must not in any way discourage the implementation of network upgrades and deployment of advanced technology. This policy should apply no less in MDUs than in any other context.

2. **Proposals to move the broadband point of demarcation are not pro-competitive solutions, would stifle facilities-based competition, would constrain cable operators' ability to deliver new and diverse services, and would only augment the power of landlords to make the service choices for their residents.**

Among many of the commenters advocating that the Commission move the broadband point of demarcation far from its current location, many seem to believe that the most pro-competitive location is to simply relocate the broadband point of demarcation to the telephone point of demarcation.<sup>33/</sup> Time Warner believes that the telephone inside wiring rules, particularly the telephone point of demarcation location, are an inappropriate model for promoting broadband competition, and the Commission must refrain from simply superimposing the telephone inside wiring rules on MVPDs which deploy broadband networks.

Contrary to many commenters' assumption that the telephone inside wiring rules are intended to promote competition between multiple competing carriers, the telephone inside wiring rules were instead designed to promote competition for the installation and maintenance of narrowband inside wiring. The Commission's policy objectives in deregulating telephone wiring were designed to promote new entrants in the narrowband inside wiring business, not the telephone service provider business. The minimum point of entry point of demarcation simply serves to assure that property owners have access to the lowest cost source of installation and maintenance of wiring. The telephone MDU point of demarcation rule has

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<sup>33/</sup> See, e.g., GTE Comments at 7-12; BOMA Comments at 37-38; Tandy Comments at 6-7; CEMA Comments at 4-5; Wireless Cable Association at 16-18, 21-22.

absolutely nothing to do with ensuring that tenants themselves, the real consumers, have access to the service provider of their choice. In fact, when the telephone point of demarcation rule was adopted, local exchange competition was not even being considered, and thus the demarcation point was not designed to promote local exchange competition.

As discussed supra, the 1996 Act, on the other hand, is premised on facilities-based competition, including local exchange and broadband video service competition.<sup>34/</sup> The Commission's inside wiring rules should encourage facilities-based competition with multiple pipelines into the home, rather than a single pipeline whereby the only option is to replace one sole provider with another sole provider, typically of the landlord's choosing. Superimposing the telephone inside wiring rules on MVPDs serving MDUs does not accomplish this objective; maintaining the current broadband inside wiring rules for MDUs does.

In the comments, the Commission received diverse proposals from many different interested parties. Time Warner firmly believes that many of these proposals are ill-considered. The realities of broadband technology and service are such that moving the point of demarcation to a point far from the MDU resident's actual dwelling unit would stifle, rather than encourage, consumer choice and competition. True facilities-based competition, which exists only where each MDU resident is able to access more than one provider's wire, and more than one wire if they prefer, is best produced by rejecting proposals to move the broadband point of demarcation to any point far from each MDU dwelling unit. Each of the proposals is discussed in turn.

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<sup>34/</sup>See Section II.B.1.b.

**a. Proposals to move the point of demarcation to the minimum point of entry.**

Some commenters propose that the Commission move the cable demarcation point to the point essentially where the current telephone point of demarcation is often located, at the MDU's minimum point of entry.<sup>35/</sup> While there is some flexibility in where exactly this point is located, it is generally far from each subscriber's dwelling unit and is almost always located somewhere in the basement of the MDU. Moving the MDU point of demarcation to the minimum point of entry or to any other point not readily accessible to individual MDU residents would preclude competition, because only one broadband provider could deliver services to the entire MDU at any given time. As has been discussed, such a solution is neither pro-facilities-based competition nor pro-consumer choice. Such a change in the point of demarcation definition would empower only landlords, allowing them to make all telecommunication choices for their tenants. In addition, such a proposal would make it impossible for cable operators to provide broadband competition to an existing telephone company serving that MDU, because the cable operator must retain exclusive control over its internal broadband distribution infrastructure so that voice, video and data transmissions can be delivered to each MDU resident.<sup>36/</sup> Accordingly, the Commission should reject proposals to move the broadband point of demarcation to the minimum point of entry.

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<sup>35/</sup>See, e.g., GTE Comments at 7-12; BOMA Comments at 37-38; Tandy Comments at 6-7; CEMA Comments at 4-5; Wireless Cable Association Comments at 21-22.

<sup>36/</sup>Time Warner agrees with Pacific Bell that maintaining a broadband point of demarcation at the minimum point of entry would fail "to provide the optimal incentive" to upgrade or install advanced technologies such fiber-optics. See Pacific Bell Comments at n.3.

**b. Proposals to move the point of demarcation to the lockbox.**

Other commenters advocated moving the broadband point of demarcation to the lockbox.<sup>37/</sup> Such a proposal would ensure that a particular resident could only take service from one broadband provider at a time, and thereby facilities-based competition in MDUs would be hampered. Because the homerun, the portion of the wiring extending from the lockbox to the subscriber's dwelling unit, could be taken over by a competing MVPD under such a proposal, the cable operator who installed the homerun in the first place would be completely barred from accessing that unit for the purposes of providing other services. If this occurs, the original cable operator could no longer offer other broadband services, such as high-speed Internet access, to such MDU residents, unless the operator bears the expense of wiring the building a second time.

Under such a proposal, no consumer could take some video service from one provider, other video services from competitors, telephone from yet another source, and Internet access or pay-per-view from still another. MDU residents would be required to take all broadband service from only one provider at a time. Such a proposal is not pro-consumer choice. Real choice means that MDU residents should be able to take broadband service from their provider of choice, but also simultaneously from as many providers as may suit their needs. Accordingly, the proposal to move the MDU broadband demarcation point to the lockbox does not result in real facilities-based competition according to Congressional wishes, and must be rejected.

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<sup>37/</sup> See, e.g., Ameritech Comments at 8; AT&T Comments at 7-8; Liberty Cable Comments at 2-3; OpTel Comments at 10-11.

**c. Proposals to move the point of demarcation to the point where the wiring first becomes dedicated to the individual subscriber's residence.**

Some commenters advocated establishing the point of demarcation in MDUs where the broadband wire "becomes dedicated to an individual subscriber's use."<sup>38/</sup> These commenters seem to believe that such a definition would be essentially the same as the lockbox proposal discussed above. If so interpreted, such a proposal suffers from the same infirmities as the lockbox approach. However, under any a definition which seeks to locate the point at which wiring become "dedicated" to an individual subscriber, the point of demarcation actually would remain at the point where the wiring enters each individual unit. The homerun cable is never "dedicated" to an individual subscriber's use. Even after a customer discontinues cable service, the cable operator must retain its entire end-to-end distribution system in place, including the homeruns, so that other services can be marketed and delivered to that unit, such as pay-per-view, Internet access or telephone service. In addition, a homerun often serves two or more units in an MDU through splitters. Finally, even a homerun which has been formerly used to serve a single unit might be redirected to serve another unit if the original subscriber discontinues service. Thus, the only wiring which is truly "dedicated" to an individual subscriber's use is wiring installed within the premises of each MDU dwelling unit.

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<sup>38/</sup> See, e.g., AT&T Comments at 7-8; ICTA Comments at 22-24; Wireless Cable Association Comments at 10-12; MAP/CFA Comments at 10-11; OpTel Comments at 8-10.

**d. Proposals advocating any shared bandwidth over cable distribution wiring or that would create a "virtual" demarcation point where competing MVPDs could interconnect to cable distribution wiring.**

DirecTV proposes that the Commission require cable operators to share their distribution wiring with competitors.<sup>39/</sup> To accomplish this sharing, DirecTV proposes that a "virtual" demarcation point be created where competing MVPDs can interconnect for the purposes of sharing bandwidth.<sup>40/</sup> As discussed more fully in Section III.C. of these Reply comments, *infra*, such a proposal must be rejected because, as a technical and practical matter, there simply is no available capacity in most system's existing coaxial wiring to accommodate more than one provider's programming, and even if there was, such sharing would preclude MVPDs from competing to offer additional video or non-video services to MDU residents, such as voice and data, over such bandwidth. Moreover, as the Commission has correctly recognized, it is not currently technically practicable for competitors to "share" the bandwidth of internal broadband wiring.<sup>41/</sup>

**e. Proposals advocating the creation of a second point of demarcation for the entire MDU.**

Some commenters advocated the creation of two demarcation points, one located at or about the current point of demarcation or at the lockbox to delineate consumer inside wiring from so-called "common" wiring, and a second located essentially at the minimum point of

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<sup>39/</sup>See DirecTV Comments at 5-10.

<sup>40/</sup>*Id.* at 8-9.

<sup>41/</sup>First Order on Reconsideration in MM Docket 92-260, FCC 95-503, \_\_\_ FCC Rcd \_\_\_, ¶ 10 (rel. Jan. 26, 1996) ("First Order on Recon.").

entry to delineate common wiring from the MVPD's network.<sup>42/</sup> Under such a scenario, a cable operator's internal distribution infrastructure in MDUs would become the property and fall under the control of MDU management. Such a proposal must be rejected because it would ensure that landlords, and not MDU residents themselves, would make the service provider choices for the entire MDU building. If such a proposal were adopted, landlords would act as a bottleneck, offering access only to the telecommunications provider offering the best sweetheart deal or kickback. Congress' intention to ensure that all consumers have access to many different facilities-based providers would never be realized. This scenario would allow MDU landlords to extract exorbitant rents to the detriment of the residents. Such a proposal is neither pro-competition nor pro-consumer choice, and must be rejected.

**3. A change in the MDU demarcation point would result in an unconstitutional taking of a cable operator's property.**

If the Commission were to move the point of demarcation in MDUs to a point far outside the subscriber's dwelling unit (*i.e.*, the minimum point of entry or the lockbox) as suggested by several commenters, large portions, or possibly all, of the cable operator's MDU distribution system would essentially be confiscated, without just compensation having been paid to the cable operator. The Commission should not enact rules that violate the fifth amendment by effecting a taking without payment of just compensation.

To begin, moving the point of demarcation in MDUs to a point further away from the dwelling unit than the existing home wiring rules provide (at or about twelve inches outside the

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<sup>42/</sup>See, *e.g.*, Multimedia Development Corp. Comments at 14; US West Comments at 8-10; Wireless Cable Association Comments at 13-21.

subscriber's dwelling unit) necessarily means that substantial portions of the cable operator's distribution system will fall within the scope of the home wiring rules. If a cable operator's distribution system is capable of being confiscated under the home wiring rules, the cable operator essentially will be foreclosed from doing business at all.<sup>43/</sup> It was not Congress' intent to eliminate competitors from providing services to MDU residents.<sup>44/</sup> Rather, a primary goal of the 1992 Cable Act and 1996 Act is to increase competition among telecommunications service providers.

The D.C. Circuit has already held that the Commission lacks authority to impose a taking of private property.<sup>45/</sup> In Bell Atlantic, the court ruled that the Commission's order requiring local telephone exchange companies to set aside a portion of their central offices for occupation and use by competitive access providers constituted an unconstitutional taking, and the Commission had no authority under the Communications Act to impose a regulation that effected a taking.<sup>46/</sup> Similarly, the Commission lacks authority to enact rules that effect a taking of large portions of a cable operator's MDU distribution system.<sup>47/</sup>

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<sup>43/</sup>See CATA Comments at 6-7.

<sup>44/</sup>See id. at 7.

<sup>45/</sup>See Bell Atlantic Telephone Cos. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994); accord Cox Comments at 16-17; BOMA Comments at 9; ICTA Comments at 38.

<sup>46/</sup>Bell Atlantic, 24 F.3d at 1443.

<sup>47/</sup>Some commenters have argued that the fifth amendment applies only to real property, and not to personalty. E.g., NYNEX Comments at 11. Such arguments are meritless. The plain language of the fifth amendment itself states, "nor shall private property be taken for public use without just compensation." U.S. Const. amend. V. Thus, the fifth amendment itself does not distinguish between real property and personalty for purposes of a taking.

Second, even if the Commission could enact rules that resulted in a taking, there must be just compensation paid to the entity whose property is taken. In the context of moving the demarcation point further away from the individual dwelling units in MDUs, several commenters argue that a ‘taking’ can be avoided by requiring the cable operator to sell possibly hundreds of feet of home wiring to subscribers for approximately six cents per foot, the replacement cost of the wiring.<sup>48/</sup> The existing home wiring rules that set compensation at the replacement cost per foot of such wiring did not envision that possibly all of the cable operator's 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.<sup>49/</sup> Compensation of six cents per foot is not just compensation for the taking of large portions, or possibly all, of a cable operator's distribution system in an MDU.<sup>50/</sup> The Commission cannot enact rules that deprive one competitor of the ability to offer its services over wiring that it installed and intends to use, in favor of allowing another competitor to use that wiring without justly compensating the owner for it.<sup>51/</sup>

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<sup>48/</sup> See 47 C.F.R. § 76.802(a).

<sup>49/</sup> See 47 C.F.R. § 76.5(mm).

<sup>50/</sup> E.g., CATA Comments at 6-8. ICTA's proposition that, not only should the cable operator not receive compensation for the complete usurpation of its internal wiring, but also should have to pay to install a competitor's wiring is outrageous, and contrary to reason and fifth amendment law.

<sup>51/</sup> Similarly, certain parties have asked the Commission to adopt policies or rules which would abrogate valid contracts between MVPDs and property owners with respect to the

The majority of the expense in wiring an MDU is in labor, not in the materials.<sup>52/</sup> Moreover, a determination of "just compensation" is based on market value, and must include a consideration of the "highest and best use" of the property.<sup>53/</sup> The fair market value of property may also include an "assessment of the property's capacity to produce future income if a reasonable buyer would consider that capacity in negotiating a fair price for the property."<sup>54/</sup> A determination of fair market value of a cable distribution system must, therefore, include an assessment of lost future income resulting from the cable operator's inability to compete in providing video and advanced telecommunications services due to loss of its inside wiring.<sup>55/</sup> The Commission, however, cannot remedy the unconstitutionality of the taking simply by creating a rule establishing a compensation calculation; rather,

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provision of video service. See, e.g., ICTA Comments at 55-57; GTE Comments at 22. Valid contracts constitute property rights and any interference with or diminution of such contractual rights would constitute a taking for which just compensation, determined through an adjudicatory proceeding, would also be due.

<sup>52/</sup>See Pacific Bell Comments at 13.

<sup>53/</sup>See CATA Comments at 7 (citing United States v. L.E. Cooke Co., 991 F.2d 336, 341 (6th Cir. 1993); United States v. Land, 62.50 Acres of Land More or Less, 953 F.2d 886, 890 (5th Cir. 1992)).

<sup>54/</sup>Yancy v. United States, 915 F.2d 1534, 1542 (Fed. Cir. 1990); accord CATA Comments at 7-8; OpTel Comments at 4; BOMA Comments at 8 (Commission cannot prescribe a nominal amount as compensation -- property owner is constitutionally entitled to compensation measured against fair market value); see also NRG Co. v. United States, 31 Cl. Ct. 659 (1994) (property owners should be compensated for economic harm suffered as a result of government's action); Nixon v. United States, 978 F.2d 1269, 1286 (D.C. Cir. 1992) ("The test [for a taking] must be whether the access rights preserve for the former owner the essential economic use of the surrendered property. That is, has the former owner been deprived of a definable unit of economic interests. If so, then it is no answer that he may still stand in some relation to the property.").

<sup>55/</sup>See CATA Comments at 8.

compensation must be subject to determination in an adjudicatory proceeding.<sup>56/</sup>

If the point of demarcation were to be moved in MDUs such that subscribers could obtain large portions of the cable operator's distribution system, then the cable operator would be completely deprived of the ability to use its wiring for the provision of its own services. A deprivation of economic use of property due to government action constitutes a taking.<sup>57/</sup> Also, the complete loss of its wiring obviously means that the cable operator will not be able to run a profitable business, which it fully expected to do when it paid to install the wiring.

DirecTV proposes that a cable operator essentially be penalized for having recovered the investment cost of the wiring by creating a "presumption" in such a situation that the subscriber then owns the wiring.<sup>58/</sup> Under this ludicrous theory, DirecTV should be required to return its satellite slot for auction by the Commission after it has recovered its investment. Similarly, building owners, such as those represented by BOMA, should be required to turn their buildings into public housing once they have recovered building costs! Clearly, this is not how business is conducted in a capitalist society, and the Commission should not be condemning businesses for striving to make a profit after they have recovered their investment costs. Making a profit is how companies stay in business, and the Commission should not

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<sup>56/</sup>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).

<sup>57/</sup>See Nixon, 978 F.2d at 1286; see also Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (when property owner has been called upon to sacrifice all economically beneficial uses of his property in the name of the common good, he has suffered a taking).

<sup>58/</sup>DirecTV Comments at 12.

enact far-reaching rules that unnecessarily thwart companies from running profitable operations, and that violate the constitution.

In sum, it is evident that any change in the broadband demarcation point in MDUs would effect an unconstitutional taking of a cable operator's property. Even if the Commission could ensure that a cable operator would receive "just compensation," such a solution would not promote competition. Cable operators have invested massive sums to deploy broadband distribution networks so they will be able to compete, not so they can sell out and thus foreclose competition. Moreover, if a competitor is willing to pay just compensation for internal MDU distribution facilities, that competitor should be willing to invest a similar amount to construct its own separate distribution network in the MDU, thereby making facilities-based competition possible.

- 4. The Commission should retain its existing cable inside wiring rules, thus providing incentives for competing providers to build their own facilities to serve MDU residents.**

The Commission's current MDU point of demarcation for broadband facilities is fair, pro-competitive, and pro-consumer. The current rules promote facilities-based competition because each competitor is required to construct and maintain its own internal broadband distribution infrastructure in the MDU building, including separate homeruns or accessible loop-through wiring to each unit installed by each competing provider. This policy enhances consumer choice, because MDU residents have absolute freedom to select among multiple services offered by competing providers omerun, a critical portion of its distribution network, would result in fewer wires reaching consumers, directly contrary to Congress' mandate. The Commission must adopt policies espoused by Congress in the 1996 Act which are designed to

allow facilities-based competition to flourish. Any proposal which requires cable operators to cede control over their MDU distribution facilities does not promote such a result.

There are many reasons why consumer access to multiple broadband networks is good public policy. Access to more networks brings more service options to consumers, empowers consumers to be efficient telecommunications customers, and encourages providers to innovate and develop new services. Contrary to the assertions of some, multiple sets of broadband wiring extending to a particular MDU unit are never "redundant."<sup>59/</sup> Multiple wires allow consumers to pick and choose from any number of providers for the simultaneous provision of services, video or otherwise. Such an approach also allows the MDU resident the maximum flexibility in choosing the mix of services that best suits his/her needs.

For example, a consumer may be satisfied with the price and quality of "plain old telephone service" provided by the incumbent telco, but may desire a high-speed computer connection for Internet access, which may be better provided by a cable operator's broadband plant.<sup>60/</sup> Another consumer may want to obtain basic cable service from the incumbent cable

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<sup>59/</sup> See MAP/CFA Comments at 5.

<sup>60/</sup> As CEMA noted in its Comments:

The Commission should not allow restrictions on the use of CPE to diminish the important role which cable systems can play in the National Information Infrastructure. Cable systems, for example, can download the same amount of information from the Internet in 20 seconds that it takes 46 minutes to download using the public switched telephone network. Although cable operators are only beginning to upgrade their systems to accommodate such interactive communications services, the Commission should use this rulemaking to ensure that consumers can take full advantage of new cable services. . .

CEMA Comments at 10-11. See also Compaq Comments at 7, n.10.

operator, while obtaining satellite programming services from a competing provider, such as DBS, OVS, SMATV or wireless cable. A third subscriber may decide to discontinue cable service from the incumbent provider in favor of a competing MVPD, such as a telephone company or SMATV service, but may wish to obtain competitive telephone service from the former cable company, or the consumer may wish the option to order different pay-per-view events which might be available only from the former cable service provider, even if that subscriber is now receiving monthly cable service from another provider. Only by maintaining the current point of demarcation will cable operators and other MVPDs be able to provide completely new services such as cable modems and Internet access, even after a customer discontinues the receipt of video programming services from that MVPD.

In sum, competition can be enhanced only if consumers are able to mix and match their choices from a wide variety of services offered by numerous competitors simultaneously. Any change in the current MDU point of demarcation will negate the benefits of such competition by taking away a critical portion of the broadband distribution infrastructure in the MDU from the MVPD who bore the cost of such installation.

Further, if the point of demarcation is moved, the landlord will be inserted as a bottleneck between the service providers and the MDU consumers. Landlords will undoubtedly end up making the telecommunications choices for all MDU residents, thereby stifling consumer choice and facilities-based competition.<sup>61/</sup> Time Warner believes that

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<sup>61/</sup>Time Warner takes issue with the suggestion of ICTA that landlords and condominium/homeowners associations are in the best position to decide which broadband service best serves the interest of all of a particular MDUs residents. Under this theory, why not provide only for exclusive cable franchises serving communities because franchising

empowering residents, not MDU owners and landlords, is the most pro-competitive solution and should be the Commission's baseline policy when establishing the point of demarcation. The Commission must not adopt any home wiring rules which allow landlords, building owners or other third parties to seize *de facto* control over internal wiring. Only when the ultimate end user, the MDU resident, has ready access to services offered over multiple sets of broadband and narrowband MDU distribution facilities is the consumer empowered to choose among all available service providers, and even to obtain various services from multiple providers (e.g., a telephone company and a cable television company) simultaneously.

- C. There is a consensus that any distinctions in the inside wiring rules should be based on the delivery technology (broadband vs. narrowband) rather than the services provided, and that competing MVPDs should be subject to the same inside wiring rules as cable operators.**

A broad overview of the comments reveals that there is a consensus among affected parties that the Commission should modify its inside wiring rules from service specific rules (i.e., cable vs. telephony) to technology specific rules (i.e., broadband vs. narrowband).<sup>62/</sup> The only significant proposal to adopt rules based on the nature of the service provided was submitted by NYNEX, which stated that "[b]ecause the technology that will be used to provide video and telephony is still evolving, we do not believe it to be feasible to determine the exact

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authorities would best be in the position to represent all subscribers within their franchise area. Such is obviously not the case, collective entities do not always make the best choices to serve the interests of all their members. Further, Congress expressly prohibited such exclusivity in the 1992 Cable Act. ICTA's real motivation is to preclude real MDU competition, the type brought on by MDU resident access to multiple broadband service providers.

<sup>62/</sup>See, e.g., Pacific Bell Comments at 2-3; Charter/Comcast Comments at 15-16; Marcus Cable, *et al.* Comments at 6-7; DirecTV Comments at 4; Tandy Comments at 6-7; New Jersey Board of Public Utility Comments; US West Comments at 3.

location of the demarcation point for integrated facilities at this time."<sup>63/</sup>

While Time Warner agrees that the capabilities of the respective technologies are still in flux, it disagrees that this fact in any way supports NYNEX's suggestion for the Commission to apply its rules on a service-specific basis. To the contrary, as narrowband and broadband technologies continue to evolve to allow delivery of a multiplicity of services, any service-specific regulations are destined to obsolescence. On the other hand, the distribution networks of broadband providers are for the most part identical, regardless of whether they are carrying data, voice, or video, and they should be treated in a like manner. Furthermore, there would be an obvious difficulty if MDU broadband wiring had different demarcation points for different services provided over the very same wiring. NYNEX wishes to reduce consumer confusion, but fails to address how having multiple demarcation points for a single wire in any way alleviates such confusion. The best solution is to make the rules technology specific, not service specific.

On a practical level, adoption of such changes would bring all competing wire-based MVPDs within the ambit of the same inside wiring rules as cable operators. There is simply no rational reason not to subject competing broadband providers to the same point of demarcation, signal quality and signal leakage rules. Time Warner wholeheartedly agrees with such a proposal, but once again asserts that the Commission must not lose sight of important differences between broadband and narrowband wiring that necessitate separate demarcation points for each.

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<sup>63/</sup>NYNEX Comments at 8.

Time Warner believes that the most important difference between the broadband and narrowband distribution technology is that broadband cables are capable of simultaneous delivery of numerous services, (e.g., broadcast television signals, audio signals, premium movie channels, pay-per-view, Internet access and telephone). Thus, consumers might well desire access to numerous broadband distributors simultaneously. On the other hand, telephone dialtone, as delivered by narrowband facilities, is essentially a single service, no matter how many add-on features (e.g., call waiting, three-way calling, ect.) A customer chooses. Therefore, it is highly unlikely that there would be any demand for multiple narrowband providers in either single family homes or MDUs. Therefore, even as telephone competition emerges, it is highly unlikely that any new entrant will be motivated to install a second set of narrowband facilities in an MDU. Rather, given the tremendous advantages of broadband plant in terms of service capacity, any wire-based entrants, including incumbent LECs, are likely to deploy broadband facilities.

Moreover, the Commission's current narrowband point of demarcation for MDUs does not preclude competition as would an alteration in the broadband demarcation point. For example, even if an MDU resident discontinues service from telephone company A in favor of telephone company B, telephone company A can continue to market services to that customer, such as dial-up information services, and can continue to derive revenue from that customer. However, if the same MDU resident discontinues cable service from company C in favor of company D, and company C's internal MDU homerun to that resident's unit is turned over to company D, company C can no longer deliver broadband services to that resident, such as pay-per-view movies and Internet access, and competition is foreclosed.

Therefore, Time Warner believes that if the Commission's goal is to induce regulatory parity, while at the same time promote facilities-based competition, then the best approach is to apply the existing cable point of demarcation to all broadband wiring. Time Warner joins others in advocating that any changes in the Commission's rules relating to the technical aspects of wire-based distribution technology, such as the point of demarcation, subscriber access or signal leakage rules, should be based solely on the nature of the technology (narrowband vs. broadband), rather than the nature of the service (voice vs. video/voice/data) provided by such narrowband or broadband facilities.

### **III. CONSUMER ACCESS TO INSIDE WIRING**

The Commission has asked for comment on whether consumers should be granted access to broadband inside wiring prior to termination of cable television service. Time Warner firmly believes that expanding the home wiring rules to apply prior to subscriber termination of service would be in direct contravention of the plain language of the home wiring statute, and would, furthermore, result in an unconstitutional taking of the cable operator's property. Moreover, those commenters who suggest that broadband and narrowband wiring be treated identically with regard to consumer access<sup>64/</sup> simply fail to recognize crucial differences between the two types of wiring.<sup>65/</sup>

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<sup>64/</sup>See, e.g., AT&T Comments at 26-29; GTE Comments at 17; NYNEX Comments at 9; USTA Comments at 6; Information Technology Industry Council Comments at 11-13; UTC Comments at 3-4; Compaq Computer Comments at 35.

<sup>65/</sup>Accord NCTA Comments at 26-29 (telephone inside wiring rules were not developed in the context of multiple competing facilities-based providers and, therefore, are an inappropriate model for cable inside wiring); New York City Comments at 1 (Commission should take into account the distinct characteristics of wiring in different communities before adopting rules designed to harmonize the treatment of cable and telephone wiring).

- A. It is contrary to Congress' intent and beyond the scope of the Commission's statutory authority to implement rules mandating that cable operators cede control over inside wiring prior to subscriber termination of cable service.**

The language of the 1992 Cable Act could not be more clear with regard to when rules regarding the disposition of cable home wiring are to apply:

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.<sup>66/</sup>

The legislative history is equally clear on this issue.<sup>67/</sup> While some competitors to cable service have acknowledged that the Commission has no authority to require cable operators to sell inside wiring to consumers prior to termination of cable service,<sup>68/</sup> other commenters claim that the Commission does have such authority.<sup>69/</sup>

Specifically, Time Warner contests NYNEX's assertion that the Commission can enact pre-termination home wiring rules under the broad, general authority of the Communications

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<sup>66/</sup>47 U.S.C. § 544(I) (emphasis added).

<sup>67/</sup>See House Report at 118; Senate Report at 23; see also Time Warner Comments at 27. While the Senate Report states that, at one time, the Senate thought that the telephone inside wiring rules, which gave consumers access to wiring prior to termination of service, should be applied to cable home wiring (see Senate Report at 23), this approach was abandoned in the final bill, which clearly states that home wiring rules are to apply only upon subscriber termination of service. See 47 U.S.C. § 544(I). The fact that Congress considered allowing pre-termination subscriber access rights, but ultimately rejected the idea is indicative of Congress' express intent that subscribers not have access to home wiring prior to termination of service; it is not indicative of Congress' support of pre-termination access rights. See ICTA Comments at 39; but see MAP/CFA Comments at 9 & n.11.

<sup>68/</sup>E.g., ICTA Comments at 33.

<sup>69/</sup>See NYNEX Comments at 10 (Commission has broad regulatory authority over all interstate communications by wire or radio under the Communications Act); Pacific Bell Comments at 14 (Commission should rely on same authority that it relied on in deregulating telephone inside wiring); MAP/CFA Comments at 9 (1992 Cable Act does not demonstrate that Congress intended to preclude pre-termination access).

Act of 1934.<sup>70/</sup> Under an established canon of statutory interpretation, a more specific provision governs over a broad, general provision.<sup>71/</sup> Moreover, a more recent, more specific statute controls over an older statute that does not specifically address the issue.<sup>72/</sup> Thus, the more recent, more specific home wiring statute, which expressly states that home wiring rules are to apply after a subscriber terminates cable service, governs over the older, more general provision of the Communications Act of 1934.<sup>73/</sup> Those commenters who suggest that rules should be enacted that give customers control over home wiring upon installation of such wiring, or at some other time prior to termination of cable service, are asking the Commission

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<sup>70/</sup>NYNEX relies on United States v. Southwestern Cable Co., 392 U.S. 157 (1968), for the proposition that the Commission has broad ancillary jurisdiction to regulate cable television under a general provision of the Communications Act of 1934. However, when Southwestern Cable was decided in 1968, statutes specifically addressing the regulation of cable television did not exist. Thus, the premise under which the Court granted the Commission ancillary jurisdiction over cable television was based on entirely different facts than exist now. Both the 1992 Cable Act and the 1984 Cable Act are directed specifically at cable television. The ancillary jurisdiction derived from the Communications Act of 1934 is, therefore, no longer applicable to cable television, and the Commission cannot rely on it for authority to regulate beyond the scope of the specific provisions contained in the 1992 Cable Act. See Meyerson, "The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires," 19 Ga. L. Rev. 543, 547-51, 606-08 (1985) (instead of broad authority derived from grants of regulatory authority over other media, the Commission, under the 1984 Cable Act now has a sharply limited regulatory role over cable television).

<sup>71/</sup>See Eskridge and Frickey, Cases and Materials on Legislation -- Statutes and the Creation of Public Policy at 616-17 (1988) ("Eskridge") (discussion of dynamic theory of statutory interpretation); see also Sunstein, C., "Interpreting Statutes in the Regulatory State," 103 Harv. L. Rev. 405, 452-53 (1989) (canons of construction continue to be a prominent feature in the federal and state courts, and use of the principles contained therein can be found in all areas of modern law).

<sup>72/</sup>See Eskridge at 616-17.

<sup>73/</sup>See 47 U.S.C. §§ 151, 152(a).

to act in direct contravention of Congress' intent.<sup>74/</sup> The Commission simply should not entertain thoughts of expressly defying Congress' mandate with regard to pre-termination consumer access to inside wiring.

If the Commission were to enact home wiring rules that forced a cable operator to cede ownership of all or part of its home wiring prior to subscriber termination of cable service, the result would be to effect a taking of the cable operator's property in violation of the fifth amendment.<sup>75/</sup> Congress certainly did not intend for the home wiring rules to effect an unconstitutional taking of a cable operator's property. Even if the Commission were to attempt to resolve the fifth amendment taking concerns associated with forcing a cable operator to yield control over its home wiring while it is providing service over such wiring (and Time Warner does not concede that this is possible),<sup>76/</sup> the 1992 Cable Act still does not permit the promulgation of rules mandating that a cable operator yield control of its home wiring prior to termination of service, even if just compensation is paid.

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<sup>74/</sup> See, e.g., Ameritech Comments at 13; AT&T Comments at 9-10; GTE Comments at 16-17; NYNEX Comments at 9; Pacific Bell Comments at 12; DirecTV Comments at 12; UTC Comments at 3-4; Wireless Industry Assoc. Comments at 15; Compaq Computer Comments at 39; Consumer Electronics Manufacturers Assoc. Comments at 6; Information Technology Industry Council Comments at 12-13; Telecommunications Industry Assoc. Comments at 5; MAP/CFA Comments at 9.

<sup>75/</sup> NYNEX's assertion that rules giving subscribers control of home wiring prior to termination of service would not result in an unconstitutional taking is simply erroneous. NYNEX Comments at 11. Forcing a cable operator to cede ownership of its property is a complete usurpation of the cable operator's property rights. The cable operator no longer has the right to exclude, sell or even use what was its property. For NYNEX to argue that there is no taking involved, and that a regulation effecting a total loss of property is permissible, is wholly disingenuous. See, e.g., Nixon, 978 F.2d at 1286.

<sup>76/</sup> See taking discussion, supra, at Section II.B.3.