Some commenters have suggested that the Commission create a rebuttable presumption that current cable subscribers have already acquired control over inside wiring.[77] The creation of such a presumption also would effect an unconstitutional taking, because ownership of the cable operator's property would just automatically shift to the consumer, and no compensation will have been paid to the cable operator. As Congress recognized in Section 252(d)(2) of the 1996 Act, the presumption should be that the cable operator owns the wiring over which it is providing service, unless or until it cedes control over such wiring.[78]

Other commenters adamantly argue that the Commission cannot mandate that either cable or its competitors have access to private property in order to provide their services, because such mandated access to private property violates the property owner's fifth amendment rights and results in an unconstitutional taking.[79] BOMA sets forth a detailed argument regarding the fifth amendment taking concerns raised by any Commission-mandated access to property rules.[80] BOMA, however, is singularly concerned with the rights of property owners, and has failed to recognize that its arguments are even more applicable to the rights of cable operators if they are forced to cede control over their property to other service providers.

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[77] See AT&T Comments at 10; DirecTV Comments at 12. DirecTV has also proposed that, in order to rebut the presumption, the cable operator would have to prove that it has not recovered the investment cost of the wiring, and it must further show that the salvage value of the wiring exceeds the unrecovered investment cost. DirecTV Comments at 12.

[78] See, e.g., New Jersey Board of Public Utility Comments at 7.

[79] See BOMA Comments at 5-10; OpTel Comments at 3-5.

[80] See BOMA Comments at 5-10.

While rules mandating that cable and/or its competitors have access to private property do effect a taking because there is a physical occupation of private property,[81] such rules do not interfere with the property owner's primary use of his property. On the other hand, rules mandating that cable operators cede control over home wiring prior to subscriber termination of service not only take from the cable operator the ability to use the wiring for its intended purpose (i.e., to provide cable service), but also interfere with the cable operator's very business in violation of the fifth amendment.[82] The Commission should not countenance such a result.

The creation of a presumption that a subscriber owns inside wiring while the cable operator is still providing service over that wiring will also have the effect of discouraging cable operators from installing inside wiring in the future. This result is contrary to Congress' intent as stated in the 1992 Cable Act:

> It is the policy of the Congress in this Act to . . . ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems.[83]

It simply will not be economically feasible for cable operators to invest time, money and resources in wiring homes and MDUs if ownership of inside wiring will vest in the subscriber upon installation, or at some other time while the cable operator is still providing its service.[84]

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[81] See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[82] See taking discussion, supra, at Section II.B.3.

[83] 1992 Cable Act, Pub. L. 102-385, 106 Stat. 1460, § 2(b)(3) (1992) (statement of policy).

[84] One commenter argues that the entity that wires an MDU should not be permitted to impede access to or use of that wiring. Tandy Corp. Comments at 7. This position

The Commission should not enact rules that discourage cable operators from wiring homes and MDUs for cable service.

Finally, Congress did not intend to hinder a cable operator's responsibility to prevent signal leakage or control signal strength and quality during the provision of cable service.[85] Congress even specifically stated that the home wiring statute should not

> be construed to create any right of a subscriber to inside wiring that would frustrate the cable operator's ability to prevent or protect against signal leakage during the period the cable operator is providing service to such subscriber.[86]

Thus, rules affecting a cable operator's ability to prevent or protect against signal leakage, or to control signal strength and quality, are in contravention of Congress' intent and should not be enacted.

B. The creation of incentives for cable operators to cede control of home wiring to consumers upon installation is the best approach for shifting control over inside wiring from cable operators to consumers.

If one of the Commission's goals is to eventually shift control over cable home wiring from the cable operator to the consumer, then the Commission should create incentives for cable operators to voluntarily cede control of such wiring to consumers prior to termination of service. If cable operators were to cede control over inside wiring voluntarily, any fifth

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completely ignores the fact that the entity that wired the MDU made that investment of time, money and resources with the expectation of not only recovering that investment, but also of retaining ownership and control over its property to allow it to provide its services to subscribers. More fundamentally, the approach advocated by Tandy Corp. is entirely inconsistent with Congressional objectives, as set forth in the 1996 Act, to promote facilities-based competition.

[85] See 47 C.F.R. §§ 76.605, 76.611.

[86] House Report at 119.

amendment taking concerns would be alleviated.

Cable operators could be encouraged to cede control over inside wiring in a number of ways, including: (1) through the negotiation of "social contracts" between the cable operator and the Commission; (2) relaxing regulations regarding the price of installation and maintenance of inside wiring;[87] and (3) relaxing technical regulations regarding signal quality.[88]

C. The shared wiring approach is not feasible and would be anticompetitive.

One commenter seeks to resuscitate the concept of "sharing" by new competitors of the broadband wiring installed in MDUs by the incumbent MVPD.[89] Simultaneous use of broadband wiring is currently technically and economically implausible, and has previously been rejected by the Commission for this reason.[90] Moreover, the concept of bandwidth "sharing" is totally antithetical to the development of facilities-based competition and the creation of marketplace incentives for companies like Time Warner to invest vast amounts of capital to construct broadband facilities capable of delivery of a multiplicity of services to consumers. In addition, a "sharing" approach would face the same fifth ammendment taking infirmities addressed in Section II.B.3, supra, and also would interfere with a cable operator's first ammendment right to retain bandwidth capacity for future programming services and

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[87] See CEMA Comments at 7; Compaq Comments at 39.

[88] See Time Warner Comments at 29-31 for more detailed discussion on the issue of incentives for cable operators to voluntarily cede control over inside wiring prior to termination of service.

[89] See DirecTV Comments at 8-10.

[90] See First Order on Recon. at ¶ 10.

other speech-related activities. Finally, a "sharing" policy would create the same problems as a change in the point of demarcation in restricting the ability of the entity who installed the wiring from competing in the provision of a full panolopy of services to consumers.

The Commission has acknowledged the present infeasibility of simultaneous use of coaxial wiring by multiple multichannel video service providers, and has determined that it is premature to design rules addressing this issue.[91] The Commission should adhere to this initial determination.[92]

IV. SERVICE PROVIDER ACCESS TO PROPERTY

A. Service provider access to property varies widely.

In response to the Commission's request for information and comment on the rights of various service providers to access private property,[93] more than half of the parties submitting initial comments in this proceeding addressed this issue in some fashion. As might be expected, the comments represent a divergence of views as to the existing state of the law with respect to service provider access to property, particularly for MDUs and commercial office buildings. Telephone companies generally assert that cable companies have been quite successful in gaining access to private property as evidenced by their cable market penetration.[94] Cable companies, conversely, indicate that access is frequently denied to them

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[91] Id. at ¶ 10.

[92] Furthermore, forced sharing of wiring is an unprecedented proposition that is not adopted from any rules regarding telephone wiring. The Commission should not entertain such a novel proposition, especially when it is so premature.

[93] See NPRM at ¶ 61.

[94] See, e.g., Ameritech Comments at 19-20.

by property owners or landlords of buildings.[95] Cable companies cite state statutes which grant telephone companies easements and eminent domain rights to access property which cable operators do not enjoy,[96] yet telephone companies claim these statutes do little to help them gain access in MDUs and commercial office buildings. Competing MVPDs cite state mandatory cable access laws which purport to give franchised cable companies unfettered access to property,[97] yet cable companies claim these statutes do not aid in getting around the "gatekeeper" landlord.[98]

This disparity in views notwithstanding, the comments do substantiate the fact that certain legal and practical impediments to access are, in fact, faced by both narrowband and broadband (*i.e.*, telephony and video) service providers in gaining access to MDU tenants. Furthermore, the comments confirm that access rights do, indeed, differ among various service providers for the provision of telephone and video programming services in MDUs and commercial buildings. Finally, the one issue upon which consensus does appear to exist is that property owners (landlords) can, and often do, restrict access to certain service providers in MDUs and office buildings. Accordingly, the Commission must ensure that in ultimately adopting any rules in this or other related proceedings, a landlord's ability to restrict access is not enhanced as a result thereof.

Incumbent telephone service providers traditionally have not faced restricted access to

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[95] See, e.g., Cox Comments at 27; Marcus Cable et al. Comments at 9.

[96] See, e.g., Charter/Comcast Comments at 5.

[97] See, e.g., Liberty Cable Comments at 13-14.

[98] See, e.g., CATA Comments at 9.

the degree that cable and other video programming distribution providers have. This is largely due to the historical monopoly provision of local telephone service and the fact that landlords were forced to grant access to telephone companies in order to provide essential telephone service to tenants and to prevent loss of tenants and rental income.[99] Such is not the case with cable programming services where competing wireline video programming services generally have been available in many areas for a number of years and landlords have exercised the ability to pick and choose which video provider serves its tenants,[100] or to elect no such provider given the discretionary nature of cable service.

That landlords exercise control over access by certain service providers is evidenced by the comments submitted in this proceeding by property owners and real estate companies which advocate a position of non-government intervention into property access policy for service providers in order to protect the landlord's ability to choose the service providers for their buildings.[101] These commenters assert that as building owners they must maintain control over who gains access to their property to ensure compliance with safety and building codes; to maximize space availability; and to ensure tenant security. Moreover, they argue that government-mandated access is unnecessary because marketplace pressures exist in order to retain and/or attract tenants which give landlords the incentive, absent the need for government intervention, to provide tenants access to the service providers they desire.

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[99] See, e.g., NYNEX Comments at 13; CATA Comments at 9.

[100] See, e.g., Charter/Comcast Comments at 6; Marcus Cable Company et al. Comments at 10.

[101] See, e.g., National Association of Real Estate Investment Trusts Comments at 1-12; HMB Property Service, Inc. Comments at 1-2; MIT Real Estate Office Comments at 2.

Despite these claims, however, many MDU buildings are owned by arbitrary or idiosyncratic persons who refuse to allow the installation of any cable facilities. Such buildings may be too small to attract an alternative MVPD, or the landlord may not want any video service installed at all. In large cities where affordable housing remains in relatively short supply, and rent control/stabilization laws operate as a deterrent against moving, these landlords manage to maintain full occupancy in some buildings even without allowing tenants to have cable service (particularly where a large percentage of the building's occupants are elderly). Furthermore, since some landlords often wish to encourage turnover (to obtain vacancy decontrol or to permit a higher rental to be charged than would be permitted under a rent-stabilized renewal lease), the landlord may find it personally advantageous to deprive tenants of amenities such as cable television that would induce them to stay. Some landlords even require tenants to execute lease riders disclaiming any request for cable service. (See attached Exhibit A). Thus, while marketplace incentives may exist which encourage property owners to provide tenants access to cable services, incentives also exist which cause landlords to deny access altogether if they choose to do so.

For a multitude of reasons, landlords currently possess a great deal of control over service provider access to tenants in their buildings, particularly video services providers, and Time Warner urges the Commission to exercise caution in changing the current cable demarcation rules in a way that would give landlords even greater control over a tenants' choice of video services provider. Commenters such as Continental Cablevision and Cablevision Systems agree that the Commission has incorrectly assumed that changing the

cable demarcation point may alleviate the problem of landlord control over access to premises:

> Because extending the cable demarcation point will create a broadband bottleneck within MDUs, such a step will simply enhance the power of landlords to impose their choice of broadband services providers on tenants.[102]

Because a change in the cable demarcation point is likely to result in at least a substantial portion of the broadband wiring running to the tenant's unit falling under the control of the landlord rather than the broadband service provider, it would give the landlord complete control over the service provider for that facility. Since broadband facilities are capable of providing a number of service offerings, i.e., video distribution, telephony, Internet access, etc., the broadband facilities provider who constructed the facility would be precluded from offering *any* service over that facility should the landlord gain control over the broadband internal distribution network through a change in the MDU demarcation point.

B. The Commission should not interfere with state efforts to guarantee consumers' rights to receive franchised cable service.

In spite of property owner arguments to the contrary, several states have determined that marketplace incentives alone are not sufficient to ensure consumer access to quality video programming services.[103] As a result, as the Commission[104] and numerous commenting

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[102] See, e.g., Continental Cablevision Comments at 22-23.

[103] Similar activity on the state level has occurred with respect to telephone service. Even before the adoption of the 1996 Act which contains explicit language prohibiting any state or local law, regulation or requirement prohibiting the ability of any entity to provide interstate or intrastate telecommunications service, (see, e.g., Section 253(a) of the 1996 Act), states have undertaken to adopt rules or interpret existing statutes in a manner which will ensure that alternative telephone and related service providers are able to serve any customer desiring their service. For example, New York State's Competition II proceeding together with the New York telco eminent domain statute, NY CLS Trans Corp § 27 (1994) are examples of state efforts to create parity in access for alternative telco providers vis-a-vis the incumbent LEC.

parties have noted,[105] these states have adopted mandatory access statues which ensure access to premises, in varying forms, to franchised cable operators.[106]

State mandatory access statutes are excellent examples of state efforts to address the issue of access to property for consumers desiring video programming services in a fair and equitable manner, balancing the interests of service providers, property owners and consumers. As noted by the State of New Jersey, Board of Public Utilities, in discussing its cable right of access statute:

> Under New Jersey statutes access agreements must provide reasonable access to the franchised cable operators and just compensation to the building owner.[107]

Other state access statutes contain similar provisions. Regardless of the specific state cable access statutory provisions, however, the goals are ultimately the same, to afford end users access to the diverse benefits of franchised cable television services which, absent such statutes, may not otherwise be available to them without interference or imposition of unreasonable terms and conditions by landlords. In spite of the success of these statutes in ensuring the availability of quality, affordable video entertainment, news and educational programming to consumers, certain parties submitting comments in this proceeding, e.g., non-

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Ohio is another example of a state where its state eminent domain statutes have been interpreted to apply to alternative telephone service providers.

[104] See NPRM at ¶ 60.

[105] See, e.g., CATA Comments at 9; Continental/Cablevision Comments at 22; NYNEX Comments at 14; State of New Jersey Board of Public Utilities Comments at 15.

[106] See, e.g., Conn. Gen. Stat. § 16-333a; NY Exec. Law § 828.

[107] State of New Jersey Board of Public Utilities Comments at 15 (emphasis added).

franchised video service providers and competing telco providers, urge the Commission to preempt state cable mandatory access laws which do not apply equally to franchised and non-franchised video programming providers.[108]

In so doing, they suggest that cable access statutes restrict their ability to negotiate and contract with property owners to provide their non-franchised service. Moreover, they suggest that these statutes may be barriers to entry to competing service providers.[109] These suggestions are disingenuous as Time Warner will explain below. Finally, parties asserting

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[108]See, e.g., Liberty Cable Comments at 13; Multimedia Development Co. Comments at 7; Wireless Cable Association Comments at 5. In support of its argument for preemption of state mandatory access laws because they allegedly "hurt" non-franchised MVPDs, Liberty Cable uses its comments to avail itself of yet another opportunity to cite various legal actions involving itself and Time Warner with respect to providing video service to MDUs in an attempt to suggest that franchised cable operators unfairly use litigation as an anti-competitive tactic to keep out non-franchised operators. Time Warner has specifically and sufficiently addressed these legal actions before the Commission in a letter dated December 5, 1994 to Mr. William F. Caton from Arthur H. Harding, Esq. Re: Ex Parte Notice -- MM Docket No. 92-260 and RM-8380 at Section VI incorporated by reference herein. Furthermore, to bolster its asserted position that franchised cable operators have greater access to property than non-franchised operators, Liberty Cable uses its comments to introduce to the Commission to yet another dispute it is currently involved in with Time Warner at property located at 11 Riverside Drive. Liberty cites this dispute to support its groundless assertions that franchised cable companies, in conjunction with property owners, prevent access to buildings by competing non-franchised MVPDs. While Time Warner believes that this proceeding is an inappropriate forum for addressing individualized factual disputes between competing video service providers, Time Warner is compelled to briefly clarify the "facts" as set forth by Liberty with respect to 11 Riverside Drive. Contrary to the assertions of Liberty, Time Warner has attempted to cooperate with Liberty in negotiating a joint use arrangement regarding the moldings inside the building. It is Liberty, not Time Warner, that has failed to come to the table at 11 Riverside Drive. Time Warner has allowed Liberty to share Time Warner's molding installed in the building's hallways. As of today, however, Liberty has failed to agree to any arrangement compensating either Time Warner or the building owner for its use of these facilities. Nevertheless, Liberty has been and continues to use Time Warner's molding to deliver its service to 11 Riverside Drive residents without disruption from Time Warner.

[109]MFS Comments at 4.

discrimination between franchised and non-franchised operators under cable access statutes quite intentionally and irresponsibly fail to discuss the substantial differences between franchised cable operators and non-franchised MVPDs which warrant different treatment under existing law.

State cable mandatory access laws do not restrict the ability of non-franchised video programming providers to access property and to negotiate with property owners to provide service in competition with the franchised operator. This is evidenced most notably by the heavy penetration of Liberty Cable and other non-franchised MVPDs in hundreds of MDUs in states like New York and New Jersey where cable mandatory access statutes are in effect. These non-franchised MVPDs readily obtain access agreements by offering substantial revenue sharing arrangements with property owners, bulk rate discounts or other inducements which the franchised cable operator generally is not permitted to offer under the mandatory access statute. If cable mandatory access laws restrict the ability to negotiate or contract with property owners to any degree, these restrictions apply only to the franchised cable operator. They clearly do not restrict the ability to negotiate of the non-franchised MVPDs.

The factual reality is that non-franchised MVPDs do not desire access to all MDUs or private property in a particular area, i.e., a political subdivision covered by a franchise agreement. They desire access only to the most lucrative buildings where they can extract substantial profit for minimal capital investment. Otherwise they would and certainly could seek to obtain a cable franchise which would give them access rights to all property. These video service providers do not seek to obtain such a franchise because they have no desire to be subject to the requirements and obligations which go hand-in-hand with mandatory access

rights. It is these requirements and obligations, set forth in greater detail below, which unequivocally distinguish franchised cable operators from non-franchised operators and eliminate any potential for a finding that adverse discriminatory treatment exists with respect to the non-franchised operators.

Franchised cable operators are subject to exacting service obligations and related requirements as a result of Title VI of the Communications Act, the rules of the FCC and their local franchise agreements, which distinguish them, quite clearly, from non-franchised video service providers. These requirements include the following:

- Franchise fees based on gross annual revenues[110]
- Customer service requirements
- Retransmission consent[111]
- Cable technical standards[112]
- Universal service and anti-redlining restrictions[113]
- Construction and maintenance of institutional networks[114]
- Equal Employment Opportunity[115]

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[110]47 U.S.C. § 542. These franchise fees are typically as much as 5% of the cable operator's annual gross revenues.

[111]47 U.S.C. § 325(b)(1).

[112]47 U.S.C. § 544(e); 47 C.F.R. §§ 76.601-76.617.

[113]47 U.S.C. § 541(a)(3).

[114]This is a requirement that often appears in local cable franchises.

[115]47 U.S.C. § 554(a).

In addition, as confirmed by the State of New Jersey in its comments, franchised cable operators often pay just compensation to the property owners for the right to access their property.[116] Moreover, if consumers are dissatisfied with franchised cable service, they have resort to state and federal regulatory agencies and franchising authorities having jurisdiction over their service. Consumers receiving unregulated non-franchised services have no such avenue of relief.

In arguing for preemption of cable mandatory access laws, ICTA incorrectly states that mandatory access laws do not ensure "that residents of MDUs actually have the right to receive cable television services."[117] Under the Section 621(a)(3) of the Communications Act[118] and the Commission's rules, franchised cable operators have a statutory obligation to provide universal service in their service areas upon request, a requirement which would extend to MDUs in their service area regardless of whether the state mandatory cable access law failed to specifically include such a provision.

Mandatory access laws ensure that entire communities will be served by cable and that the franchised cable operator charged with this unique public responsibility has the legal means to accomplish this. Non-franchised MVPDs who do not gain access through mandatory access laws have no such universal service obligation to construct facilities to serve an entire community. Consequently, they serve only the most profitable areas, i.e., cream skim,

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[116] See also Loretto v. Teleprompter Manhattan CATV Corp. 58 N.Y. 2d 143, 150-53 (1983).

[117] See, e.g., ICTA Comments at 51.

[118] 47 U.S.C. § 541(a)(3).

thereby reducing the revenues which the franchised operators obtain to recover the capital expenditures they are required, by law, to outlay to serve all areas in the community, even those not profitable and difficult to serve. Mandatory access laws mitigate this revenue loss.

Similarly, ICTA's argument that mandatory access laws defeat a property owner's ability to "protect residents from inferior services delivered at exorbitant rates" is baseless. Again, various consumer protection provisions imposed by the Communications Act and the franchise agreement upon a franchised cable company are more than adequate to protect MDU residents. Such protection is not available when service is provided by unregulated video service providers. In fact, in the absence of mandatory access statutes, non-franchised MVPDs can enter into long-term exclusive contracts with a landlord or property owner based solely upon such factors as the amount of money the MVPD is willing to pay the property owner rather than the service provider's technical proficiency, program diversity, innovativeness, service quality, service price or other factors that are of primary concern to the tenants.[119] In the absence of mandatory access statutes, tenants have no ability to receive service from a franchised cable operator, service which embodies the statutory obligations of such service enacted specifically for the tenant's benefit.

In short, franchised cable operators face mandatory requirements and obligations not similarly imposed on non-franchised MVPDs, nor do such non-franchised service providers

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[119]Contrary to Liberty's claims, Time Warner has demonstrated that Liberty and other unfranchised MVPDs often pay handsome compensation to landlords in return for access to MDUs. See Letter to William F. Caton from Arthur H. Harding dated Feburary 21, 1995, MM Docket No. 92-260, at 2-3.

desire that they be imposed.[120] All that unregulated providers seek are the benefits of a franchise, i.e., mandatory access to only the most economically advantageous properties, without the concurrent obligations.

If they serve no other purpose, the comments submitted in this proceeding on access to property are testimony to the fact that the property access issue is fraught with a multitude of conflicting interests among incumbent telco and cable service providers, alternative service providers, real estate development associations, property owners, and state governments. As such, the adoption of a federal uniform access to property policy, which carefully and responsibly weighs the valid concerns of each divergent group of interests, may be premature. In deciding to forego the adoption of such a uniform policy at this time, however, the Commission need not fear that the access issue will remain unaddressed. Efforts are, or have been underway, as mentioned above, on the state level to grant access to property to various providers of communications services. The states are cognizant of their role in ensuring that the access provisions of the 1996 Act are carried out and the Commission should not interfere with the efforts of various state legislatures to craft access policies designed to respond to unique local needs.

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[120]The relentless efforts by unfranchised MVPDs such a Liberty first to mount legal challenges against the imposition of the statutory franchise requirement and, when unsuccessful, to lobby Congress to change the law, serves to prove that such entities want all the benefits associated with holding a cable franchise, but are unwilling to assume any of the public interest burdens.

V. SIGNAL LEAKAGE AND QUALITY

The comments filed in this proceeding overwhelmingly supported the Commission's proposal to apply the existing cable television signal leakage rules to all broadband services.[121] Although supporting the application of cable signal leakage standards to all broadband service providers, ICTA and OpTel have raised two arguments concerning the implementation of such rules which Time Warner wishes to address. First, ICTA and OpTel argue that a transition period, as long as five years, should be established during which private cable operators would be allowed to bring all existing systems into full compliance with signal leakage rules. Second, these parties argue that the Commission should develop measurement techniques which are tailored to private cable operators servings MDUs. Specifically, these operators argue that each MDU should be considered a separate system for signal leakage measurement purposes and that systems interconnected via 18 GHz microwave should not be considered a single cable system.[122] Each of these points will be discussed in turn.

While Time Warner does not oppose a reasonable transition period for broadband service providers to comply with the Commission's existing cable signal leakage requirements, the five-year transition period requested by ICTA is simply too long. When the Commission

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[121]The notable exceptions are the Comments filed by MAP/CFA (claiming concerns about leakage have been exaggerated); Telecommunications Industry Association (arguing that leakage hazards can be diminished through minimum cable performance specifications and detailed customer installation guides); USTA (stating that existing Part 15 leakage standards are sufficient to address signal leakage by broadband service providers other than cable operators); Circuit City and Tandy Corporation (both arguing that signal leakage concerns can be addressed through mandatory labelling requirements and installation instructions for broadband wiring and connectors).

[122]ICTA Comments at 57-59; OpTel Comments at 16-18.

adopted its cable signal leakage requirements in 1984, there were a number of factors, which are no longer present, which justified the establishment of a five-year transition period.[123]

The 1984 rules provided a five-year transition period in order to allow all cable systems to replace existing modulators and/or signal processors in every system utilizing frequencies in the restricted aeronautical communications and navigation bands in order to meet the new mandatory frequency offset and frequency tolerance requirements.[124] The magnitude of this task was greatly exacerbated by the fact that the properly offset replacement equipment was not being manufactured at the time and was not available off the shelf. Cable operators often had to send individual modulators and processors to equipment manufacturers to be re-tuned piece by piece. This is not the situation facing the private cable industry today. Most private cable systems have been constructed in the last five to ten years utilizing off-the-shelf equipment developed for the cable industry. As such, this equipment already complies with FCC mandatory off-set and frequency tolerance requirements. Accordingly, broadband service providers seeking to comply with the Commission's signal leakage requirements today face neither the problem of equipment unavailability nor the universal and massive equipment replacement obligations faced by the cable industry in 1984.

Likewise, in order to meet the newly imposed cumulative leakage standards which were part of the FCC's 1984 regulatory regime, the cable industry faced the difficult task of having to upgrade or recondition thousands of miles of cable distribution plant which had been in

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[123] Second Report and Order, Docket No. 21006, 99 FCC 2d 512 (1984).

[124] In contrast, any new frequencies placed in operation after the effective date of the new rules were required to comply with the offset and tolerance requirements ab initio.

operation for as long as ten, twenty or even thirty years. Plant built with older technologies which subsequently proved prone to leakage, such as fused disk cable and pressure taps, had to be totally replaced. Given the fact that in 1984, approximately 6,200 separate cable systems provided service to over 37 million customers, or almost 44% of all television households, a five-year transition period was not only warranted but necessary.[125] In contrast, a relatively smaller subscriber base is served by private cable systems. Because these systems, by definition, do not use the public rights-of-way, they are relatively contained and have far less distribution plant subject to leakage. Additionally, the fact that these systems have been, for the most part, constructed relatively recently suggests that there will be a greatly diminished need for any plant rebuild or conditioning as the incidence of signal leakage can be correlated with the age of the plant. Recently constructed systems also would have utilized materials and technologies which are less prone to signal leakage.

ICTA and OpTel also urge the Commission to develop measurement techniques appropriate to private cable operators serving MDUs. These parties argue that cable strand in separate private cable systems which are interconnected via 18 GHz microwave should not be considered a single cable system for measurement purposes. While Time Warner recognizes that different technologies and architecture may warrant differences in regulatory treatment, the mere fact that two or more private cable systems are interconnected via 18 GHz microwave rather than by hardwire should not automatically allow separate signal leakage measurements to be taken for those systems.

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[125] Source: National Cable Television Association, Cable Television Developments, Fall, 1995 at 2, 4.

Under the Commission's existing cable rules, the existence of a microwave interconnection is irrelevant for determining whether or not a single CLI measurement is taken or whether multiple measurements are required. The determining factor is the proximity of commonly owned distribution plant. Where two separate commonly owned systems are in such proximity that the cumulative leakage from each system can affect the CLI calculations of the other, the Commission requires that single CLI measurement be undertaken. Time Warner believes that the Commission's current practice, which requires a single CLI measurement to be taken for commonly owned cable systems which are located in close proximity to one another, can be readily applied to the private cable industry.[126] To this end, Time Warner suggests that the Commission adopt fixed distance criteria to provide guidance for all broadband providers, including cable operators, as to when consolidated measurements must be taken and reported.

Based on the foregoing, the Commission should extend the cable signal leakage rules to all broadband service providers. Furthermore, to the extent that a reasonable transition period is warranted, it should not exceed one year in duration. Finally, the Commission should promulgate fixed distance criteria to enable all broadband service providers to determine the circumstances under which distribution plant proximity requires that a single CLI measurement be taken for physically separate systems.

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[126] Although ICTA suggests that 18 GHz microwave is used to interconnect separate cable plant located in "geographically distant parts of a metropolitan area," it is not uncommon for separate clusters of MDUs separated by narrow public rights-of-way to be served from the same microwave facility. See ICTA Comments at 58.

VI. CUSTOMER PREMISES EQUIPMENT

Any rules governing equipment which the Commission ultimately adopts must take into account the different network architecture and topologies utilized by existing broadband and narrowband communications systems. Unlike the centrally switched local telephone system, the distributed switching platform utilized by broadband systems requires that some of the network security functions be performed by equipment located on the subscriber premises. Such equipment is not analogous to telephone customer premises equipment, and issues regarding the commercial availability of equipment performing descrambling and decryption functions are beyond the scope of this proceeding.

Some commenters advocated treating cable CPE the same as telephone CPE, and even expanding the Commission's Part 68 equipment registration regulations to the provision of broadband services.[127] These commenters fail to recognize that the rules adopted for the telephone industry are simply not appropriate to the delivery of broadband services. Differences in network architectures and topology require that equipment utilized in connection with narrowband twisted pair telephony be treated in a different manner than equipment used to deliver broadband video services. The main difference is that the existing telephone network architecture is based on a centralized switching design whereby security is accomplished through a combination of off-premises switching and dedicated lines to each home.

In contrast, the broadband bus architecture employed by cable systems and other

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[127] See, e.g., MAP/CFA Comments at 19-20; Compaq Computer Corporation Comments at 26-27.

broadband video delivery services utilizes common lines to deliver information to individual customers. The communications provided over those lines is secured through a combination of trapping and intelligent premises equipment that allows conditional access to the particular services which each individual customer has ordered. Significantly, application of Part 68 equipment registration procedures to cable CPE was opposed not only by the cable industry but also by the telephone industry.[128] Indeed, it would appear that most commenters agree with Time Warner that the rapidly evolving nature of broadband telecommunications and the transition to digital delivery technologies warrants minimal government intrusion in the development of customer premises equipment that are emerging to support these new services and technologies.[129]

Although most parties recognize that the delivery of broadband services raises questions of signal security and theft of service which are not present with regard to telephony and other switched narrowband services, several commenters suggested that the Commission should not take theft of service concerns into account in adopting CPE rules.[130] Specifically, those commenters suggest that the best method for combating signal piracy is to strengthen and enforce existing theft of service laws. These arguments must be rejected by the Commission.

The parties who downplay signal security concerns entirely ignore the fact that both the 1992 Cable Act and 1996 Act direct the Commission to take theft of service and signal security

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[128] See, e.g., USTA Comments at 7; NYNEX Comments at 18; Ameritech Comments at 22; GTE Comments at 23.

[129] USTA Comments at 7; NYNEX Comments at 18; Ameritech Comments at 22; GTE Comments at 23.

[130] DirecTV Comments at 15; NYNEX Comments at 20.

into account in promulgating rules governing both customer equipment compatibility and customer equipment availability.[131] Not only would sound policy dictate that the Commission take into account security concerns in promulgating rules governing cable CPE, but it is under the express statutory obligation to do so. While Time Warner certainly supports increasing penalties for theft of service and a more vigorous enforcement of existing theft of service laws, such an approach is reactive in nature and only serves to punish individual offenders once they are caught and convicted of signal piracy. A more effective and productive approach to combating signal piracy is one which incorporates not only punishment for offenders but proactive prevention elements to make it more difficult for the signal piracy to occur in the first place. Simply put, it is not enough merely to punish those who have been caught engaging in signal theft. An effective anti-theft program also requires regulatory schemes which do not even unwittingly facilitate theft of service by making it easier for signal pirates to break the law.

Finally, a few commenters have advocated that all security functions be separated from non-security functions in home terminal equipment and that integrated terminals which incorporate both security and non-security functions be phased out. These comments raise issues that go far beyond the scope of the present proceeding.[132] Comments addressing these issues have already been filed by Time Warner and others in the Commission's ongoing equipment compatibility rulemaking to implement Section 624(A) of the 1992 Cable Act.

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[131] See §§ 624A(b) and (c) of the Communications Act (added by the 1992 Cable Act and revised by the 1996 Telecommunications Act) and § 629(b) of the Communications Act (added by the 1996 Telecommunications Act).

[132] Circuit City Stores Comments at 7-12; Compaq Computer Corporation Comments at 13.

Furthermore, it is anticipated that these issues will again be before the Commission in any rulemaking undertaken to implement Section 629 of the Communications Act which was recently added by Section 304 of the 1996 Telecommunications Act. Clearly, until such time as the Commission adopts a decoder interface standard to be incorporated into newly manufactured consumer electronics equipment, any attempt to limit the incorporation of security and encryption functions into existing broadband home terminal equipment would be both unwise and premature.

VII. CONCLUSION

Accordingly, the Commission's rules and policies relating to the broadband and narrowband inside wiring should conform to the principles set forth in the foregoing comments.

Respectfully submitted,

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Dated: April 17, 1996

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EXHIBIT A