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EX PARTE OR LATE FILED

February 7, 1997

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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W. Room 222
Washington, D.C. 20554

EX PARTE: Telecommunications Services Inside Wiring
CS Docket No. 95-184

Dear Mr. Caton:

Attached is a letter to Meredith Jones, Chief of the Cable Services Bureau, detailing GTE's position on inside wiring. Please associate this letter with the captioned docket. In accordance with Section 1.1206(a)(1) of the Commission's Rules, two copies of this notice are being filed with the Secretary of the FCC. Please feel free to call me if you have any questions regarding this matter.

Sincerely,

Whitney Hatch

Attachment

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February 7, 1997

Ms. Meredith Jones
Chief, Cable Services Bureau
Federal Communications Commission
2033 M Street, N.W.
Washington, D.C. 20554

Re: CS Docket No. 95-184 - Telecommunications Services Inside Wiring

Dear Ms. Jones:

GTE submits this response to several of the arguments raised by cable companies in recent *ex parte* comments with respect to exclusive cable service contracts and "fresh look" and "neutral lockbox" policies. As set forth below, the Commission should not prohibit exclusive contracts between video providers and MDU owners and should reject any cable company proposals, such as the "neutral lockbox," that would allow an incumbent to impose barriers to entry at a newly established demarcation point. Furthermore, the Commission has ample legal authority and significant policy bases on which to adopt a "fresh look" policy.

Time Warner and others have urged the Commission to prohibit all *future* exclusive contracts between MDU owners and video service providers. *See* Letter from Paul Glist, *on behalf of Jones Communications Inc.*, to William F. Caton, Acting Secretary, *Federal Communications Commission* 2 (Jan. 8, 1997) ("Jones Communications *ex parte*"); Letter from Craig A. Gilley, *on behalf of Time Warner,* to William F. Caton, Acting Secretary, *Federal Communications Commission* 4 (Jan. 16, 1997) ("Time Warner *ex parte*"). This argument should be rejected on the basis that it ignores the economic and competitive benefits of exclusive arrangements and seeks Commission intervention in an area expressly deregulated by the 1992 Cable Act. First, an exclusive arrangement between a competitive video service provider and an MDU owner produces significant economic benefits in an increasingly competitive video distribution market. For example, a MDU owner may seek an exclusive arrangement in return for particular pricing discounts or service options, or an owner may only be able to practically allow a single provider to offer service because of physical limitations in the MDU building. On the other hand, a competitive provider may wish to enter into an exclusive arrangement in order to ensure that it can recover the substantial costs in providing new facilities and securing programming sources under the potentially low rates that it must offer to win the business. Our financial data demonstrate that a minimum of eight years is required to recoup our investment in MDU contexts. The Commission itself has recognized the procompetitive benefits of permitting exclusive video distribution arrangements in related contexts. *See, e.g., Development of Competition and Diversity in Video Programming Distribution and Carriage*, 10 FCC Rcd 3105, 3126 (1994) (noting that a DBS distributor's exclusive contract for programming may "foster DBS as a significant competitor to cable"). Unlike the perpetual contracts signed by cable incumbents in a monopoly environment, exclusive contracts entered into by new entrants in today's increasingly competitive market will allow them to compete against entrenched monopolists.[1]

Further, the Commission lacks statutory authority to prohibit future contracts between competitive providers and MDU owners. Although the Commission may regulate the rates for service and equipment provided by cable system operators under Section 623 of the Act, it may not regulate rates of providers who do not offer service over a "cable system" as defined by the Act, *see* 47 U.S.C. § 522(7), and those MVPDs with less than a 15% market share. *See* 47 U.S.C. § 543(a)(2), (l)(1). The Commission thus cannot prohibit exclusive contracts between such providers and MDU owners because the Act does not authorize regulation of these operators' offerings. In addition, Section 4(i) of the Communications Act does not support regulation of exclusive contracts because such action would be directly inconsistent with the deregulatory provisions of the Title VI of the Act. *See* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts . . . *not inconsistent with this chapter*, as may be necessary in the execution of its functions") (emphasis added); *American Telephone and Telegraph Co. v. F.C.C.*, 487 F.2d 865 (2d Cir. 1973); *North American Telecommunications Ass'n v. F.C.C.*, 772 F.2d 1282, 1292 (7th Cir. 1985) (explaining that Section 4(i) "could not properly be used to regulate an activity[,] . . . as its language makes clear, *to contravene another provision of the Act*") (emphasis added).

Several cable companies have similarly urged the Commission to take no action with respect to demarcation issues or the problems with perpetual contracts because they claim that the benefits of any rule changes will inure solely to building owners, as opposed to building occupants. *See, e.g.,* Letter from Robert L. James and Maria T. Browne, *on behalf of TCA Cable TV, Inc., Marcus Cable Operating Company, Multimedia Cablevision, Inc. and Benchmark Communications (hereinafter TCA Cable et al.)*, to Ms. Meredith Jones, *Chief, Cable Services Bureau, Federal Communications Commission* 2-3 (Dec. 31, 1996) ("TCA Cable et al. *ex parte*"); Jones Communications *ex parte* at 1-2. As an initial matter, this argument wholly ignores the vast number of situations where occupants control access and where the interests of

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[1] No further record is necessary to explore this issue. Indeed, leaving the issue open, even without a tentative conclusion, will profoundly undermine the ability of new entrants to compete.

occupants and owners interests are aligned, as is the case in cooperative dwellings and condominiums. Moreover, such an argument would in fact favor adopting a "fresh look" policy in order to increase competition where possible by giving building owners an opportunity to reevaluate long-term arrangements they now have with existing cable monopolists. Thus, both building owners and occupants will benefit from competition as new providers compete with different service and pricing options that are currently foreclosed by existing contracts.

In addition, if the Commission decides to establish a second demarcation point, it should reject any attempts to constrain a new entrant's use of existing cable facilities or the demarcation point. Any cable company proposals to establish a "homerun lease" fee or a "neutral lockbox" are thinly veiled attempts to retain control over access to subscribers and to place alternative providers at a competitive disadvantage. *See, e.g.,* Time Warner *ex parte* at 4-5. For example, nothing in the proposed "homerun lease" policy would limit the fees that an incumbent might charge for such access or the discretion of the incumbent to terminate the new entrant's use of the facilities. Similarly, the proposed "neutral lockbox" policy would give incumbents unlimited discretion to place the costs of constructing new, unnecessary equipment on the alternative provider and to impede service through delays associated with rearranging cable wiring and installing equipment.

Moreover, these proposals are unnecessary to enforce signal leakage or theft of service rules because new entrants will be under the obligation to comply with such rules at the demarcation point, as is the case today. *See* 47 C.F.R. § 76.610 et seq.; 47 U.S.C. § 553. Effective competition in the video distribution marketplace will flourish only if a second demarcation point is located at a more competitively neutral location -- such as the point at which facilities become dedicated to an individual subscriber -- and incumbent providers cannot otherwise limit access to wiring. Any proposals that impose additional burdens on new entrants will impede competition and are nothing more than obvious attempts by cable monopolists to retain control of wiring to thwart competition. It is past the time to consider such insignificant policy changes. Accordingly, the Commission should without haste adopt changes to the demarcation point rules that will promote competition as Congress intended when it passed the 1992 Cable Act.

Time Warner and TCA Cable et al. have also asserted that the Commission lacks the legal authority to establish a "fresh look" policy in the context of cable television services, noting that such a policy has been used primarily in a common carrier context and is not within the Commission's Title VI authority. TCA Cable et al. *ex parte* at 3-5; Time Warner *ex parte* at 1. Further, these companies argue that a "fresh look" policy cannot be justified as a matter of policy because existing contracts were signed in a competitive environment. *See, e.g.,* Jones Communications *ex parte* at 2. Contrary to these arguments, the Commission may establish a "fresh look" policy pursuant to its broad authority to ensure that cable rates are reasonable and to protect the interests of cable subscribers under Title VI of the Communications Act. Section 623 of the Communications Act authorizes the Commission to ensure "reasonable" rates for cable services and equipment and that any regulations protect the interests of cable subscribers where "effective competition" is not present. *See* 47 U.S.C. § 543(b). Congress has expressed a clear preference for competition over regulation in establishing cable equipment rates under Section

623 and gave the Commission flexibility to choose the "best method" for fulfilling the goals of that section. *See* H.R. Rep. No. 862, 102d Cong., 2d Sess. 63 (1992). In addition, Section 1 of the Communications Act requires the FCC to promote the availability of affordable communications services to all consumers. Because a "fresh look" policy will allow market forces to bring increased competition and downward pressure on cable rates, thereby promoting the competitive availability of video and other services at reasonable rates to MDU customers, such a policy would clearly further the purposes of Section 623.

A "fresh look" policy is also justified on several policy grounds. First, contrary to the assertions made by Jones Cable and others, *see, e.g.,* Jones Communications *ex parte* at 2; TCA Cable et al. *ex parte* at 5-6, the video distribution market was not effectively competitive when MDU owners signed contracts with incumbent cable operators. S*ee Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 96-496, ¶ 4 (rel. Jan. 2, 1997) ("[l]ocal markets for the delivery of video programming generally remain highly concentrated, and structural conditions remain in place that could permit the exercise of market power by incumbent cable systems"). Rather, the perpetual term of most existing contracts reflects the fact that cable incumbents were monopoly providers who did not face an imminent threat of competition. As a business matter, such long-term contracts are not likely to continue to be a rational economic choice in a competitive market that offers alternative service options. Second, a "fresh look" policy is in the public interest because it will allow consumers to benefit from increased competition as new entrants are given a meaningful opportunity to compete for subscribers. As noted above, this competition will exert pressure on existing cable rates and encourage new services that have been limited by an incumbent's control over the cable wiring in MDU buildings.

Accordingly, we urge the Commission to adopt a "fresh look" policy as a means to ensure competition in the market for video distribution services and reject any proposals that would restrict access to a new, competitively neutral demarcation point.

Very truly yours,

Whitney Hatch
Vice President Regulatory Affairs
GTE Service Corporation