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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-260
	)	
Cable Home Wiring	)	

COMMENTS OF GTE

GTE Service Corporation, on behalf of its affiliated domestic telecommunications and video service companies

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SUMMARY

Competition between multichannel video programmers (MVPDs) in multiple dwelling unit (MDU) buildings will not develop until alternative service providers can access potential subscribers. Access in virtually all existing MDUs presently is restricted by space limitations and economic factors that prevent competitors from placing new cable wiring or accessing the existing cable demarcation point in order to serve MDU customers. In addition, legal uncertainties surrounding the ownership and disposition of existing cable wiring substantially thwarts competitive providers' access to such wiring, even when an MDU owner seeks to terminate an incumbent operator's service. Accordingly, competitive MVPDs routinely are denied the ability to compete with incumbent cable operators in MDU buildings, thereby depriving consumers of the benefits of competition.

In GTE's view, the most effective way to promote video competition in MDUs is to adopt rules that facilitate inter-MDU competition. With the ability to compete on a building-by-building basis, alternative MVPDs will have the necessary incentives to justify the substantial initial and recurring costs associated with bringing service to MDU buildings in the first place. In contrast, focusing exclusively on individual subscriber choice can hinder competition.

GTE strongly endorses in most respects the Commission's proposed framework as a workable approach that promotes competition among MVPDs and that appropriately balances the interests of subscribers, MDU owners and service providers. These procedures will foster competition by providing alternative providers with a timely

and predictable mechanism for accessing MDU subscribers either through new or existing facilities. Consumers will benefit from increased competition and greater choices among MVPDs as alternative providers offer new services and compete with incumbent operators. The Commission has clear authority under Section 623 of the Communications Act to adopt its proposed framework for the disposition of home run wiring of incumbent cable operators not facing effective competition, and these proposals do not amount to an unconstitutional taking of property without just compensation.

To this end, GTE urges the Commission to promptly consider and adopt its proposal with the following modifications:

- The Commission should permit negotiated agreements to establish reasonable prices for cable wiring. Pricing formulas or benchmark prices are impractical and will distort market-based incentives.
- Alternative providers must be able to use conduit and molding in order to have meaningful access to subscribers. The FCC should ensure such access both in the context of service termination and where there is capacity in existing conduit and the building owner's consent has been obtained. The cable demarcation point also must be accessible to alternative providers in order to access subscribers' premises.
- The Commission should not adopt any rules mandating ownership rights in new cable installations. Attempts to regulate the contract rights of a private landowner and an MVPD subject to effective competition is neither authorized by the Communications Act nor sound policy.

Adopting these measures will facilitate the Commission's goal of promoting competition among MVPDs and ensuring reasonable access to cable wiring.

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COMMENTS OF GTE

GTE Service Corporation, on behalf of its affiliated domestic telecommunications and video service companies (collectively "GTE"),[1] hereby respectfully submits its comments in response to the *Further Notice of Proposed Rulemaking* issued in the above-captioned proceeding.[2] In general, GTE applauds the Commission's creative

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[1] GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc., GTE Communications Corporation, and GTE Media Ventures, Inc.

[2] *Telecommunications Services Inside Wiring, Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, CS Docket No. 95-184, MM Docket No. 92-260 (rel. Aug. 28, 1997) ("*Further Notice*" or "*FNPRM*").

approach to promoting competition in the video services marketplace proposed in the *Further Notice*. GTE wholeheartedly supports the proposed procedural framework. This framework will promote certainty regarding the disposition and use of cable wiring in multiple dwelling unit (MDU) buildings, thereby advancing competition and fostering choice among competing video service providers. To that end, GTE suggests only the following modifications: (1) rely on private negotiations without pricing rules to govern the sale of cable wiring; (2) ensure that new entrants may access molding and conduit; and (3) refrain from mandating that MDU owners be granted ownership in new entrants' cable wiring installations.

I. INTRODUCTION

This proceeding represents the next step in the Commission's ongoing effort to establish cable wiring policies that promote competition among multichannel video programming distributors (MVPDs). Following enactment of Section 624 of the Communications Act as part of Congress' broad cable reform effort in the 1992 Cable Act, the Commission adopted cable "home wiring" rules that, upon termination of service, require an operator to offer to sell to the subscriber any wiring within the subscriber's premises.[3] Recognizing the problems with access to cable wiring, the Commission subsequently sought comment on how its wiring rules could be structured to promote competition, including proposals to relocate the demarcation point to a more

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[3] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, 8 FCC Rcd 1435 (1993) (Report and Order), *recon*, 11 FCC Rcd 4561 (1996) (First Order on Reconsideration and Further Notice of Proposed Rulemaking).

competitively-neutral location.[4] As the Commission recognizes in the *Further Notice*, the record to date reflects an underlying need for competitive access to cable wiring and the lack of effective competition in MDU buildings.[5] In response, the Commission issued the above-captioned *Further Notice* to seek comment on a procedural alternative to relocating the cable demarcation point.

The FCC's cable inside wiring rules should be modified to rectify the overwhelming competitive advantage cable operators have over competitive MVPDs in MDU buildings. Competitive providers are unable to place a second set of cable home run wiring in existing MDU buildings due to space limitations and aesthetic concerns. In addition, even where a second set of cable may be accommodated, competitive providers cannot access the wiring in a subscriber's individual dwelling unit if the cable demarcation point is embedded in a wall or conduit. Most significantly, legal uncertainties surrounding the ownership and disposition of existing cable wiring have prevented alternative providers from using such wiring, even where an MDU building owner seeks to terminate the incumbent's service. These legal uncertainties favor incumbent operators because an MDU owner is unlikely to switch MVPD operators given the substantial doubts concerning the disposition of cable wiring and the fear of litigation. As a result, competitive providers are routinely denied the opportunity to

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4 *Telecommunications Services Inside Wiring: Customer Premises Equipment*, 11 FCC Rcd 2747, 2754-57 (1996) (Notice of Proposed Rulemaking).

5 *FNPRM*, ¶¶ 25-31.

compete with incumbent providers because they cannot effectively gain access to cable wiring or cannot place new cable in existing MDUs.

Prompt action to resolve this significant competitive problem is essential. First, the benefits of competition are long overdue for MDU subscribers. While residential customers living in single unit dwellings generally may receive competitive services from a number of alternative MVPD platforms, competition in MDU buildings is woefully lacking. Indeed, the Commission has expressed significant concern regarding the lack of competitive alternatives to incumbent cable operators.[6] Second, as the Commission recognizes, there is a well-developed record regarding the need for access to cable wiring in MDU buildings in order to promote effective competition.[7] Based on this record, the Commission correctly tentatively concludes that "one of the primary competitive problems in MDUs is the difficulty for some service providers to obtain access to the property for the purpose of running additional home run wires to subscribers' units."[8]

The most effective way to promote video competition in MDUs is to establish rules that promote inter-MDU competition. The prospect of adding an entire MDU to a

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[6] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 12 FCC Rcd 4358, 4361-64, 4419, 4422-23, 4448-49 (1997) (Third Annual Report). In addition, two consumer groups recently asked the Commission to freeze cable rates and revise fee regulation and cable ownership rules. *See Petition of Consumer Union and Consumer Federation of America* (filed Sept. 23, 1997).

[7] *FNPRM*, ¶¶ 11-15, 25-31.

[8] *Id.*, ¶ 25.

new entrant's subscriber base will encourage aggressive competition, leading to lower subscriber prices and an increased quality of service. Although individual, end-user subscriber choice has some marginal impact on competition, the prospect of only one or a few subscribers within a building switching to a new entrant's video service usually will not be worth the new entrant's expense to bring the infrastructure to the building in the first place. Thus, an undue emphasis on individual subscriber choice can actually stifle competition rather than promote it. Inter-MDU competition will bring lower prices and higher quality services to an entire building, thereby improving an owner's ability to satisfy residents' needs. The established relationships between owners and residents will naturally assure that residents receive the services they want.

The Commission's proposed procedures offer an effective alternative to relocating the existing cable demarcation point by giving MDU building owners the incentive and ability to permit competition among MVPDs. These proposals offer a clear and predicable mechanism for establishing rights in cable wiring that will reduce the legal uncertainties currently limiting access to this wiring. The Commission's specific timeframes and procedures adequately balance the interests of an incumbent provider, while ensuring that consumers are not unnecessarily delayed in receiving new service. Further, the Commission's proposals to modify its cable home wiring rules to comply with this framework will ensure that alternative providers can access subscribers' premises in a timely fashion. Accordingly, these proposals should be promptly considered and adopted.

II. GTE SUPPORTS THE COMMISSION'S FRAMEWORK GOVERNING THE DISPOSITION OF CABLE HOME RUN WIRING AND CABLE HOME WIRING

A. The FCC's Proposed Procedures Offer a Workable Approach That Creates a Reasonable Balance Among the Interests of Subscribers, MDU Owners and Service Providers

In the *Further Notice*, the Commission seeks comment on proposed procedures to govern the disposition of existing cable wiring in MDU buildings upon termination of service by the MDU owner. In particular, the *Further Notice* proposes rules that would apply in the following two situations: (1) where the MDU building owner decides to convert the entire building to a new video service provider; and (2) where the MDU owner seeks to permit two or more MVPDs to compete for subscribers on a unit-by-unit basis.[9] In both contexts, the Commission's rules would apply to the disposition of cable "home run" wiring (*i.e.*, wiring from the demarcation point to the point at which cable wiring becomes dedicated to an individual subscriber) and cable "home" wiring (*i.e.*, the internal wiring within the premises of the subscriber up to the demarcation point) upon termination of service.[10]

GTE strongly endorses the Commission's specific mechanisms to facilitate the disposition of cable home run wiring in MDU buildings in order to promote access to MDU subscribers. First, GTE supports the proposed procedures and timeframes associated with the disposition of cable home run wiring when the MDU owner is terminating service either throughout an entire building or on a unit-by-unit basis.

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[9] *Id.*, ¶¶ 35-43, 75-82.

[10] *See id.*, ¶¶ 32-34, 73-74.

These timeframes are appropriate because they give an incumbent adequate opportunity to evaluate its options and protect its rights, while not unnecessarily delaying the changeover to a new service provider.[11] These procedures also impose clear rules on the transition process, eliminating the "uncertainty" element to the workings of the marketplace. Similarly, GTE endorses the Commission's proposed modifications to its existing cable home wiring rules in order to harmonize these rules with the proposed home run wiring procedures.[12]

GTE, however, believes that the Commission's proposed framework should only apply when a service provider does not have a legally enforceable right to remain on the MDU property. As the Commission acknowledges, such a right might arise as a result of a private, contractual agreement between the MVPD and the MDU building owner.[13] GTE agrees with the Commission when it notes that its rules will not override a bulk service contract agreement that provides for the disposition of wiring upon

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[11] For example, when an MDU owner notifies an incumbent provider that it seeks to terminate service, GTE agrees that the incumbent provider should elect to either remove, sell or abandon its cable home run wiring within 30 days and complete negotiations for sale of the cable home run wire within 30 days after that election. If an agreement is not reached within this time period, GTE supports the FCC's proposal to give an incumbent provider an additional 30-day period where service is terminated throughout the MDU. *See id.*, ¶¶ 35-40. In the context of a unit-by-unit disposition, GTE supports the Commission's proposal to require an incumbent, who has elected to remove its wire, do so within seven days after being notified either orally or in writing that an individual subscriber wishes to terminate service. *See id.*, ¶ 41.

[12] *See id.*, ¶¶ 73-82.

[13] *See id.*, ¶ 34.

termination of service.[14] The Commission's proposed framework rightly maintains the benefits to MDU owners and new entrants of private contractual arrangements. There simply is no adequate legal or policy basis to justify interference with these private rights.[15]

Further, the Commission's proposed framework correctly empowers the MDU building owner to act on behalf of subscribers to trigger the disposition of cable home run wiring. The property owner is responsible for managing building facilities, ensuring compliance with safety and electrical codes, maintaining the aesthetics of the building, and controlling use of the common areas, including for example, access to conduit and molding throughout the building. As such, under long-established state law principles, the building owner is responsible to building residents for meeting lease and other legal

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[14] *See id.*, ¶ 76.

[15] However, GTE continues to maintain that the Commission does have legal authority and a sound policy justification to adopt a "fresh look" policy with regard to perpetual, exclusive contracts executed between incumbent cable operators and MDU building owners in the absence of competition.

obligations.[16] Thus, the MDU owner is a logical choice to negotiate with the incumbent provider over the disposition of cable throughout the building.[17]

In the situation where a building owner has terminated service, but does not wish to purchase the cable wiring, GTE supports the Commission's proposal to give an alternative provider the right to purchase the wiring.[18] First, permitting an alternative provider to own the cable wiring will benefit consumers because the new provider will have a strong incentive to ensure that there is no disruption in service. Second, this proposal benefits incumbent operators by giving them an additional opportunity to sell their wiring to an interested purchaser if the MDU building owner opts not to purchase the wiring. Third, this proposal benefits MDU owners who do not want to be responsible for maintaining or spending money purchasing home run wiring.

Lastly, GTE believes that existing complaint procedures will adequately address disputes that may arise concerning the disposition of wiring, though clear rules are necessary to decrease the likelihood of such disputes. For example, the Commission should address the situation where an incumbent operator elects to remove its cable

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[16] In the context of a condominium or cooperative apartment building, the building residents themselves own and/or control the common areas of an MDU building. In these contexts, the representative association of residents responsible for managing the building represents the residents' interest.

[17] Along similar lines, GTE concurs with the Commission's proposal to permit an MDU owner to act on behalf of subscribers regarding the disposition of cable home wiring when an MDU owner terminates service for an entire building. *See id* ¶ 6. Under the Commission's proposal, an incumbent provider would have to offer to sell the MDU owner any home wiring owned by the operator and provide a total per-foot replacement cost of such wiring. *See id.* ¶ 77.

[18] *See id.*, ¶¶ 35, 39 n.104, 44.

wiring and then fails to do so. GTE shares the Commission's concern that an alternative provider might incur the expense and burden of installing a second set of home run wiring based on the incumbent's assertion that it will remove its wire, only to have the incumbent subsequently abandon the wire. To deter this conduct, GTE proposes that the Commission adopt a rule that requires an incumbent to compensate fully an alternative provider for all costs incurred in placing duplicative cable wiring where it relied on the incumbent's election to remove the wiring. This simple approach ensures not only that an incumbent will carefully consider the consequences of such anticompetitive conduct, but also that an alternative provider is "made whole" and not discouraged from investing in new facilities.

B. Private Negotiations Over Disposition of Home Run Wiring Will Ensure Reasonable, Market-Based Cable Wiring Prices

The Commission seeks comment on whether it needs to adopt measures to ensure that parties reach a reasonable price for cable wiring.[19] While noting a "preference" for letting the parties negotiate the price of wiring, the Commission asks whether it should establish either general guidelines, a default price, or a general formula for determining a reasonable price.[20] In GTE's view, private negotiations, without FCC-set default pricing, are the optimal solution for determining the reasonable price for cable wiring where an incumbent elects to sell the home run wiring. Individual circumstances surrounding a changeover in video providers -- such as the number of

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[19] *See id.*, ¶ 37.

[20] *Id.*

end-users, configuration of the property, the degree of competition, and the ability of the incumbent to provide other forms of services -- will all dictate what is a reasonable price in the circumstances. No Commission rule can possibly take into account these various factors. Market forces will allow parties to establish a mutually-agreed, reasonable price, while an incumbent will be able to assess the value of its wire based on its replacement or removal costs and the extent to which the costs of the wiring have already been recovered. The ability of an incumbent cable operator to remove or abandon the wiring provides the correct mix of incentives to ensure that, absent a price agreement, prompt disposition of the wiring can take place.

On the other hand, the Commission's suggested mechanisms for determining "reasonable" cable wiring prices are inappropriate for several reasons. First, any general guideline that establishes a default price will eliminate the possibility of market-based, negotiated pricing. With an FCC-set default price, the parties will have little incentive to offer or accept a price that differs from the default price. Second, as indicated previously, establishing a pricing formula or default price for home run wiring will not work due to the unique nature of each MDU circumstance. The factors noted above are not easily quantified and make it impossible to establish a "one-size-fits all" rule. Third, pricing formulae or general benchmarks will add administrative cost to the disposition of the cable wiring by requiring the Commission to carefully administer, update and resolve disputes concerning pricing. Accordingly, private negotiations, rather than Commission rules, should determine reasonable home run wiring prices.

C. The Commission's Proposals Will Foster Competition and Reasonable Access to MDUs

The Commission has correctly identified the fundamental problem currently limiting competition in MDU buildings -- alternative service providers are regularly denied access to MDU subscribers. In virtually all existing MDU buildings, building owners are unable or reluctant to permit an alternative provider to run a second set of home run wire to subscribers' units for a number of reasons, including legal uncertainties regarding the ownership of cable wiring and conduit, aesthetic considerations, and space limitations. Further, the Commission correctly recognizes that an incumbent provider can effectively "chill the competitive environment" by invoking a variety of strategies to avoid selling the wiring to an alternative provider where either an MDU owner or subscriber seeks to use a competitive service.[21] Therefore, the Commission must promptly adopt its procedural framework in order to establish clear and predictable rules to govern the disposition of such wiring.

GTE agrees with the Commission's conclusion that the proposed framework will not prevent an incumbent provider from competing in the market for telecommunications and other services.[22] Because the FCC's proposed rules only apply upon termination of service, an incumbent remains free to sell both video and telecommunications services in direct competition with an alternative service provider.

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[21] *See id.*, ¶¶ 30-31.

[22] *See id.*, ¶ 46.

The Commission's framework, however, is necessary to remove an incumbent provider's ability to retain MDU subscribers as captive customers for their services.

In addition, an incumbent operator can preserve its right to offer additional services by obtaining the MDU building owner's consent to keep multiple providers in the building. The FCC's rules do not limit MDU owners' ability to permit such an arrangement, although GTE maintains that it would inhibit robust competition if the Commission were to mandate such a result. Attempts to force this result would impede competition because new entrants will be unlikely to compete if they cannot be guaranteed a minimum number of subscribers in order to justify startup and installation costs. Thus, it follows that the Commission's proposed rules do not reduce competition, but rather create an opportunity for competition to flourish among MVPDs.

D. Section 623 of the Act Grants the Commission Authority to Ensure Reasonable Cable Service and Equipment Rates

GTE submits that the Commission has authority to adopt its proposed framework for the disposition of home run wiring of incumbent cable operators not facing effective competition. Under Section 623 of the Communications Act, the Commission is required to adopt rules to ensure "reasonable" rates for basic cable service and prescribe standards to establish the price or rate for "installation and lease of the equipment used by subscribers," which the Commission has defined to include inside wiring.[23] Where effective competition does not exist, Congress specifically granted the FCC broad authority to regulate cable equipment rates "to protect the interests of

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[23] 47 U.S.C. § 543(b) & (b)(3); 47 C.F.R. § 76.923(a).

consumers" and gave the Commission flexibility to chose the "best method" for achieving the goals of Section 623.[24] Finally, Section 623 plainly indicates Congress' "[p]reference for competition" over regulation as a means of ensuring the reasonableness of cable rates.[25] All of these provisions together give the Commission ample authority to adopt the proposed procedural framework to assure reasonable rates for video services and increased choices among competing MVPDs.

E. The FCC's Proposals Do Not Amount To an Unconstitutional Taking of Property Without Just Compensation

GTE fully supports the Commission's tentative conclusion that the procedural mechanisms proposed in the *Further Notice* more than adequately protect the property interests of incumbent cable operators under the Takings Clause of the Fifth Amendment.[26] As noted above, the Commission has ample authority to adopt its proposed framework under Congress' clear statutory directive in Section 623 of the Act. Congress has the regulatory authority to "impose new regulatory constraints on the way in which [vested property rights] are used, or to condition their continued retention on performance of certain affirmative duties."[27] As long as the duty is a reasonable

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[24] H.R. Rep. No. 102-862, at 63-64 (1992).

[25] 47 U.S.C. § 543(a)(2).

[26] *FNPRM*, ¶ 72.

[27] *United States v. Locke*, 471 U.S. 84, 104 (1985).

restriction designed to further legitimate legislative objectives (here competition), the government has the power to impose such new constraints or duties.[28]

In this case, no property will be deemed abandoned, or as some have argued be "taken," unless the incumbent provider fails to act within a reasonable time to remove or sell its property. Yet the Supreme Court has never required Congress to "compensate the owner for the consequences of his own neglect."[29] Moreover, there is little doubt that the Commission through this rulemaking has provided incumbent carriers with constitutionally adequate process in developing these regulations.[30] Indeed, the Commission's proposed actions are consistent with its previous cable home wiring rules that have not been overturned on constitutional grounds. Accordingly, the proposed regulatory framework correctly balances the rights of incumbent property owners with the needs of competition and does not amount to an unconstitutional taking.

III. THE FCC SHOULD ENSURE THAT NEW ENTRANTS GAIN ACCESS TO CONDUIT AND MOLDING AND THAT THE HOME WIRING DEMARCATION POINT IS ACCESSIBLE

In GTE's view, access to conduit and molding also presents a serious barrier to competitive entry in MDU buildings. Access to cable wiring, and the Commission's proposed procedural framework, is meaningless without access to the associated

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[28] *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Turner v. New York*, 168 U.S. 90 (1897).

[29] *Texaco, Inc. v. Short*, 454 U.S. 516 (1982); *see also Hawkins v. Barney's Lessee*, 30 U.S. 457, 464 (1831) ("What right has any one to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights?").

[30] *See United States v. Locke*, 471 U.S. at 108.

physical structures -- such as conduit and molding -- that are necessary to effectively use the cable wiring. The Commission therefore must clarify that incumbent providers are required to transfer or relinquish all rights in conduit and molding when they either sell, remove, or abandon their wiring under the Commission's proposed procedures.

Similarly, GTE supports the Commission's proposal to permit an alternative service provider to install its wiring in existing conduit or molding where there is adequate physical space and the MDU owner consents.[31] As in the context of adopting procedural rules governing the disposition of cable wiring, Section 623 of the Act authorizes the Commission to adopt similar procedures regarding the use of conduit or molding given the clear statutory directive to ensure reasonable cable service and equipment rates for consumers.[32] This proposal also is appropriate as a policy matter because it would give MDU owners, incumbent providers and alternative providers much needed flexibility to ensure that existing conduit space is used efficiently and that providers may install new facilities where disposition of existing cabling is not required.

Finally, GTE concurs with the Commission's proposal to move the demarcation point for an individual dwelling unit when that point is physically inaccessible to an alternative provider.[33] The demarcation point is a critical access point to the subscriber's cable home wiring, and access to this point is necessary to connect a subscriber to an alternative provider's network. Where the demarcation point is

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[31] *See FNPRM*, ¶ 83.

[32] *See supra* Section II.D.

[33] *See FNPRM*, ¶ 84.

inaccessible because it is embedded either in a wall or conduit, an alternative provider cannot effectively gain access to that subscriber and may be precluded from offering service. In these circumstances, the only way to access the subscriber's wiring is to either cause damage to the MDU building or the subscriber's unit. Therefore, GTE urges the Commission to adopt its proposal to relocate the demarcation point to the point where it first becomes "physically accessible" in order to ensure that subscribers may receive access to competitive services under the Commission's proposed framework.[34]

IV. THE COMMISSION HAS NO JURISDICTION TO MANDATE OWNERSHIP RIGHTS IN NEW CABLE WIRING INSTALLATIONS FOR MVPDS SUBJECT TO EFFECTIVE COMPETITION

In the *Further Notice*, the Commission seeks comment on whether it should adopt a rule requiring video service providers to transfer ownership of new cable wiring installations to MDU building owners upon completion.[35] In particular, the Commission explains that such a rule might promote competition and consumer choice in the future because the MDU building owner would be able to "control access to the home run wiring from the start."[36] GTE respectfully submits that the Commission has no statutory authority to adopt a rule that would regulate the private, contractual relationship between an MVPD subject to effective competition and an MDU building owner.

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[34] *See id*, ¶ 84.

[35] *Id.*, ¶ 85.

[36] *Id.*

The Communications Act does not authorize the FCC to regulate the private agreements between a competitive MVPD and an MDU building owner regarding the ownership rights in cable wiring. Any attempt to regulate such agreements between landowners and alternative service providers would be inconsistent with Commission and judicial precedent on the scope of the FCC's authority.[37] Indeed, the Commission has consistently rejected arguments that it has jurisdiction over building owners or private property owners -- even where their actions affect telecommunications services to the public.[38]

In addition, attempts to regulate agreements between competitive MVPDs and private landowners would be inconsistent with the Commission's limited regulatory

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[37] *See, e.g., Complaint of Illinois Citizens Comm. for Broadcasting*, 35 F.C.C. 2d 237, *aff'd sub nom., Illinois Citizens Comm. for Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972) (upholding the FCC's refusal to exercise jurisdiction over the construction of the Sears tower).

[38] Indeed, the FCC has explained that its "powers cannot be extended beyond the terms and necessary implications of the Act" to regulate pole attachment agreements between cable companies and other utilities. *See California Water and Tel. Co., et al.*, 64 F.C.C. 2d 753, 758-60 (1977) (finding no jurisdiction to regulate pole attachment agreements between cable companies and utilities [before enactment of the Pole Attachment Act] because such agreements do not constitute "communication by wire or radio" and "pole owners are not themselves involved in cable transmission at all"); *see also Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities*, 101 F.C.C. 2d 952, 954 (1985) (restrictive covenants limiting amateur radio operators' ability to erect antennas "are contractual agreements between private parties [and] are not generally a matter of concern to the Commission"); *Investigation of Television Interference to be Caused by the Construction of the World Trade Center by the Port of New York Authority*, 10 R.R. 2d 1769, 1773 (1967) (informal views of Commissioner Lee noting that the "Commission has no authority to control or regulate the construction" of the World Trade Center in New York City).

authority over competitive multichannel video programming distributors.[39] Although Title VI of the Act provides the Commission with some limited authority over competitive cable operators in specific situations, none of these provisions even arguably allows the Commission to assert the power to regulate private agreements entered into by competitive MVPDs.[40]

Moreover, mandating ownership in cable wire installations would be flatly inconsistent with the deregulatory purpose and structure of the Telecommunications Act of 1996. The 1996 Act sets forth a regulatory framework that encourages competitive entry and seeks to end the monopoly provision of video services by incumbent cable operators.[41] Congress explained that the purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory, national policy framework designed to accelerate rapidly

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[39] The Communications Act's history clearly underscores this proposition. In adopting the 1984 Cable Act, Congress expressly rejected a mandatory access right, noting that cable systems' access to MDUs will be governed by "negotiated agreement between the cable operator and the property owner, and not by legislative fiat as this legislation had provided." 130 Cong. Rec. H10444 (daily ed. Oct. 1, 1984) (statement of Rep. Fields, noting with approval the deletion of Section 633, which would have provided mandatory access); *see also Cable Investments, Inc. v. Woolley*, 867 F.2d 151, 159 (3d Cir. 1989) ("Our holding that the statute does not mandate giving the cable company access to the building leaves [the] selection [of video programming distributor] to the owner of the property.").

[40] Indeed, the D.C. Circuit Court of Appeals has rebuked Commission attempts to broaden its authority over competitive MVPDs. *See Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 190 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996) (concluding that the FCC's "uniform rate structure" and "tier buy-through" regulations as applied to cable operators facing "effective competition" contradict the "plain language, structure and legislative purpose" of the 1992 Cable Act).

[41] *See, e.g.,* Telecommunications Act of 1996, Pub. L. 104-104, § 302 (codified at 47 U.S.C. § 573) (open video systems).

private sector deployment of advanced telecommunications . . . by opening all telecommunications markets to competition."[42] To this end, the Commission should seek to eliminate new regulations on competitive providers where possible, rather than imposing new restrictions that will ultimately impair their ability to compete effectively.

Lastly, allowing private negotiations by new entrants and MDU owners to determine the ownership of new wiring installations is consistent with the objectives of promoting competition and facilitating access to cable wiring. First, in contrast to mandated ownership, private negotiations give MDU building owners the ability to enter into leasing arrangements and other beneficial types of agreements in order to provide service to MDU subscribers. In many cases, building owners simply do not wish to own the cable wiring. Requiring building owners to assume ownership may discourage investment in new facilities because they may not wish to make the substantial investment in cable wiring, such as the costly facilities necessary to bring advanced, two-way interactive services to subscribers. Second, mandating ownership will disproportionately burden alternative MVPDs since most incumbents' installations have already taken place and will not be affected by the proposed rule. In contrast, virtually all new entrants' installations would be subject to the forced ownership transfer rule because they are just now beginning to provide service. Accordingly, GTE urges the Commission to leave ownership in new cable wiring installations of cable operators subject to effective competition to negotiations between the landowner and the cable wiring provider.

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[42] H.R. Conf. Rep. No. 104-458, at 1 (1996).

V. CONCLUSION

GTE applauds the Commission's effort to reexamine its current cable wiring rules in order to create incentives for increased competition among MVPDs. The Commission's proposals facilitate competition by lifting the cloud of legal uncertainty that surrounds access to an incumbent provider's existing cable wiring where an MDU owner seeks to terminate service. GTE recommends that, in light of its foregoing recommendations, the Commission's proposed changes to its cable wiring rules should be adopted, except as otherwise indicated in this pleading.

Respectfully submitted,

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