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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 TELE-COMMUNICATIONS, INC.

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September 25, 1997

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COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI"), by its attorneys, hereby files its comments on the Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

As an initial matter, TCI believes that the Commission does not have jurisdiction to adopt the rules proposed in the Further

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[1] In the Matter of Telecommunications Services Inside Wiring, Customer Premises Equipment; and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, Further Notice of Proposed Rulemaking, FCC 97-304 (released August 28, 1997) ("Further Notice").

Notice. First, the proposed rules, which would regulate the disposition of MDU home run wiring, are directly inconsistent with the plain language and legislative history to section 624(i) of the Communications Act which make clear Congress' intent to prohibit the Commission from adopting rules governing the disposition of cable wiring located outside an individual MDU unit. Second, even assuming that the proposed rules were not inconsistent with the Act, they would not be within the scope of the Commission's jurisdiction under section 4(i) or 303(r), since: (1) these provisions only provide the Commission with ancillary jurisdiction; and (2) no provision of the Act confers upon the Commission the explicit grant of underlying substantive authority necessary to form the basis for an assertion of ancillary jurisdiction in this area.

At the same time, however, TCI understands the Commission's goal to transition to a more competitive MDU environment and believes that the procedures proposed in the Further Notice represent a commendable effort to balance the interests of incumbent MVPDs with the interests of new entrants in the MDU marketplace. In particular, TCI agrees with the Commission's proposal to give the MDU owner the initial option to negotiate for ownership and control of the home run wiring. This is the most efficient outcome, as it will reduce future transaction costs by eliminating the need to repeat the Commission's procedures if service is subsequently switched again. Similarly, TCI supports the Commission's proposal to adopt only procedural rules that do not affect the contractual, statutory, or common law rights of

service providers or MDU owners under state law. While TCI believes the proposed procedures go a long way towards resolving the competitive issues raised in this proceeding, it proposes the following specific modifications and clarifications which are necessary to protect and more appropriately balance the various interests and rights involved:[2]

- **Modify the Sale Option of the Proposed Procedures in the Following Two Respects**. Under the Commission's proposed procedures, MDU owners and new MVPDs will have no incentive to accept an incumbent's offer to sell the home run wiring, even at a reasonable price, because they have nothing to lose and everything to gain by forestalling negotiations until they know whether the incumbent is really willing to remove the wiring. Stated another way, by giving the MDU owner and the new MVPD the leverage and the incentive to refuse to agree on a reasonable price until they have forced the incumbent to reveal whether it will abandon its wiring at no charge or remove it, the proposed procedures unjustifiably stack the deck in favor of the buyer. To rectify this problem, TCI proposes the following modifications to the Commission's procedures:

  - Establish a Default Price. The Commission should establish a default price for the sale of the home run wiring per unit. Based on a TCI analysis of the costs to install wiring in new MDUs, TCI proposes a range of default prices for the three typical MDU wiring configurations. This set of default prices, which ranges from $72 to $184 depending on the MDU type and the number of units, is entirely reasonable particularly in light of the cost information previously submitted by several

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[2] TCI has incorporated these proposed modifications and clarifications into the Commission's proposed rules. A redlined version of these rules reflecting TCI's proposed changes is attached at Exhibit A. TCI also incorporated its proposed changes into the Commission's flow charts illustrating the operation of the proposed procedures. These modified flow charts are attached at Exhibit B.

parties, including non-cable MVPDs, some of which estimated the cost to wire an MDU as high as $600 per unit.

- Terminate the Commission's Procedures if the Default Price Is Rejected By the MDU Owner and the New MVPD. Clarify that if the incumbent MVPD offers to sell the home run wiring for a price at or below the default price, and the MDU owner (or the alternative provider) refuses to buy the wiring at that price, the remaining deadlines and procedures of the Commission's rules will automatically cease to apply and parties may pursue any state law remedies they may have regarding the disposition of the cable wiring.

- **Clarify that the Procedures Do Not Affect Riser Cable**. The Commission should clarify that the proposed procedures do not cover the riser cable in an MDU.

- **Clarify the Proposal Regarding the MDU Owner or the New MVPD as the Agent of the Subscriber.** The Commission is without authority to designate a particular party (such as the MDU owner or new MVPD) as the subscriber's agent. Under agency law, only the subscriber, as the principal, can designate his or her own agent. If the Commission allows MDU subscribers to designate MDU owners or new MVPDs as their agents for service termination purposes, it should require proof of agency (as it has, for example, in the long distance context) in order to avoid unauthorized changes in service.

II. THE COMMISSION HAS NO JURISDICTION TO ADOPT RULES REGULATING THE DISPOSITION OF HOME RUN WIRING.

The Communications Act does not provide the Commission with authority to establish rules governing the disposition of home run wiring.[3] The Commission's attempt to interpret sections 4(i) and

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[3] In addition, in section IV.A., infra, we discuss the limited nature of the Commission's jurisdiction over private contracts.

303(r) of the Act as providing it with such authority is overly broad and inconsistent with judicial precedent.

The Further Notice suggests that sections 4(i) and 303(r) of the Communications Act provide the Commission with the requisite authority to regulate in particular areas, as long as nothing in the Act expressly prohibits such action.[4] This interpretation creates a new legal standard that is nowhere to be found in these sections of the Act or in the judicial precedent interpreting them. The clear legal standard set out in these provisions is that the Commission may adopt rules necessary to carry out the provisions of the Communications Act, provided that such rules are "not inconsistent with" the Communications Act or other law. While the Commission cites a number of cases, none of them provides support for the untenable proposition that a regulation is "not inconsistent with" the Communications Act so long as it is not expressly prohibited by the Act.

In this case, the rules proposed in the Further Notice are inconsistent with the Communications Act. The language of section 624(i) of the Communications Act is unambiguous that the cable wiring rules should apply only to "cable installed by the cable operator within the premises of [the] subscriber."[5] The legislative history of section 624(i) further demonstrates that the

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[4] See Further Notice at ¶¶ 54-55.

[5] 47 U.S.C. § 544(i) (emphasis added).

Commission's cable wiring rules must be limited to wiring within the subscriber's home or individual dwelling unit. For example,. the House Report plainly states that the provision on home wiring:

> applies only to internal wiring contained within the home and does not apply to ... any wiring, equipment or property located outside of the home or dwelling unit .... In the case of multiple dwelling units, [section 624(i)] is not intended to cover common wiring within the building, but only the wiring within the dwelling unit of individual subscribers.[6]

Since the rules proposed in the Further Notice are inconsistent with section 624(i) in that they would regulate the disposition of cable wiring outside the MDU unit, the Commission has no jurisdiction under section 4(i) or 303(r) to promulgate these rules.

Moreover, even assuming that the proposed rules were not inconsistent with the Act, they would not be within the scope of the Commission's jurisdiction under section 4(i) or 303(r). As the courts have made clear, sections 4(i) and 303(r) only provide the Commission with ancillary authority to adopt rules that are necessary to meet obligations specified in other sections of the

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[6] House Comm. on Energy and Commerce, Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 118-19 (1992). See also id. at 118 ("The Committee is concerned especially about the potential for theft of service within apartment buildings. Therefore, this section limits the right to acquire home wiring to the cable installed within the interior premises of a subscriber's dwelling unit.") (emphasis added); Senate Comm. on Commerce, Science, and Transportation, Cable Television Consumer Protection Act of 1991, Sen. Rep. 102-92, 102d Cong. 1st Sess. 23 (1991) ("[Section 624(i)] shall not apply to any wiring outside the home.").

Act. For example, earlier this year, in Iowa Utilities Board v. FCC, the court held that sections 4(i) and 303(r):

> merely supply the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute. Neither subsection confers additional substantive authority on the FCC.[7]

While the Commission strains in ¶¶ 54-69 of the Further Notice to find an explicit mandate in the Communications Act which could give rise to its ancillary jurisdiction under sections 4(i) and 303(r), none of these provisions provide such a mandate.[8]

Thus, it is clear that Congress intended the Commission to regulate only the wiring within an MDU unit, and neither sections 4(i) and 303(r), nor any other provision of the Communications Act cited in the Further Notice, can be read to overcome this express

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[7] Iowa Utilities Board v. FCC, 120 F.3d 753, 795 (8th Cir. 1997) (emphasis added). See also California v. FCC, 1997 U.S. App. LEXIS 22343, *11 (8th Cir. 1997) ("[S]ubsections 154(i) and 303(r) merely provide the FCC with ancillary authority to promulgate additional regulations that might be required in order for the Commission to meet its principal obligations contained in other provisions of the statute."); California v. FCC, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) ("Title I [of the Communications Act] is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities."); United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968) (FCC's authority under Title I "is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.").

[8] TCI fully supports the more detailed jurisdictional analysis that will be submitted by NCTA in its comments on the Further Notice. Since NCTA's comments will specifically address each of the Commission's asserted statutory bases for its ancillary jurisdiction in this area, TCI will not do so here.

congressional limitation.[9] Although TCI continues to doubt the Commission's jurisdiction to adopt the proposals in the Further Notice, in the interest of helping the Commission to forge workable and fair solutions in this difficult area, TCI offers below specific modifications and clarifications to the Commission's proposed procedures.

III. TCI SUPPORTS THE COMMISSION'S PROPOSAL TO GIVE MDU OWNERS THE INITIAL OPTION TO NEGOTIATE FOR OWNERSHIP AND CONTROL OF THE HOME RUN WIRING.

The Commission proposes that in both the building-by-building and unit-by-unit scenarios the MDU owner shall have the initial option to negotiate for ownership and control of the home run wiring.[10] The Commission reasons that the MDU owner is the appropriate party to have control and ownership since the MDU owner "is responsible for the common areas of a building, including safety and security concerns, compliance with building and electrical codes, maintaining the aesthetics of the building and balancing the concerns of all of the residents."[11]

TCI supports the Commission's proposal. In addition to the benefits cited by the Commission, MDU ownership and control of the

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[9] For this reason, TCI believes the Commission is without authority to implement its proposal to move the MDU demarcation point in instances where it is "physically inaccessible." See Further Notice at ¶ 84.

[10] See Further Notice at ¶ 44.

[11] Id.

home run wiring will foster the most efficient outcome because it will reduce future transaction costs by eliminating the need to repeat the Commission's procedures if service is subsequently switched to another provider. This efficiency is particularly significant in the unit-by-unit context since under this scenario it is possible that the home run wiring will switch back and forth many times between the two providers, and in some cases there may actually be more than two providers (such as two DBS providers and a cable operator) competing within the building. TCI strongly believes that under such circumstances it would become an administrative nightmare to try and keep track of which entity owns and controls the wiring. MDU ownership of the wiring solves this problem and streamlines the transition to the new provider.[12]

Finally, under the Commission's proposal, the MDU owner and MVPD will not have to expend time, costs, and energy debating who owns or controls the wiring and can instead focus on serving the interests of the MDU tenants. The result will benefit MVPD subscribers by reducing or eliminating any disruption in service when service providers change.

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[12] Of course, the fact that the MDU owner purchases the incumbent's wiring does not mean that the MDU owner is precluded from seeking to recoup its investment in the wiring from the new MVPD. Indeed, MDU owners will typically seek such recoupment through various contract provisions with the new MVPD.

IV. THE COMMISSION SHOULD ADHERE TO ITS PROPOSAL TO ADOPT ONLY PROCEDURAL RULES THAT DO NOT ALTER THE CONTRACTUAL, STATUTORY, OR COMMON LAW RIGHTS OF SERVICE PROVIDERS OR MDU OWNERS.

TCI supports the Commission's proposal that nothing in the adopted rules will affect or "preempt an incumbent's ability to rely upon any rights it may have under state law."[13] TCI makes the following recommendations which it believes will clarify this principle.

A. The Commission's Proposed Procedures Should Not Apply Where the Contract Between the MDU Owner and the MVPD Clearly Establishes the Rights of the Parties.

The Commission should clarify that its proposed procedures regarding cable wiring will not come into play where the contract between the MDU owner and the MVPD clearly establishes the rights of the parties. There is no need or basis for the Commission to intervene between the freely negotiated and arms-length agreements between MDU owners and MVPDs. The Commission is required to respect these private contractual rights.[14] In this regard, TCI

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[13] Further Notice at ¶ 34.

[14] See Western Union Tel. Co. v. F.C.C., 815 F.2d 1495 (D.C. Cir. 1987) (recognizing that the Sierra-Mobile doctrine restricts the Commission's authority to modify contract terms under the Communications Act); ACC Long Distance Corp. v. Yankee Microwave, Inc., 10 F.C.C.R. 653, ¶¶ 15-17 (1995) (same). Under the Sierra-Mobile doctrine, a regulatory agency may only abrogate private contracts where it is clear that Congress contemplated such authority and then only where such abrogation is necessary to serve the public interest. See United Gas Pipeline v. Mobile Gas Service Corp., 350 U.S. 332 (1956) (reversing the agency's determination that its authority to set rates allowed it to abrogate private contracts); Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956) (finding that the ability of an agency to

(continued . . .)

supports the Commission's proposal that nothing in the adopted rules will override a bulk service contract that specifically provides for the disposition of the cable wiring upon termination of the contract.[15]

TCI is concerned, however, with certain statements and proposals in the Further Notice that could be interpreted as inconsistent with the principle of contract sanctity. Specifically, TCI recommends the following:

- In footnote 97, the Further Notice appears to give the MDU owner the option of terminating the incumbent MVPD under either the provisions of the contract or the Commission's procedures.[16] The Commission needs to clarify that where a contract exists, the contract determines the rights of the parties, and the Commission's cable wiring rules have no effect.

- In addition, in order to respect the contractual rights of the parties, the Commission should not adopt its proposal to allow alternative providers to use moldings or conduits where such use is

(. . . continued)

abrogate private contracts is strictly confined to that delineated in the agency's organic statute).

[15] See Further Notice at ¶ 76.

[16] Id. at n. 97 ("An MDU owner may, of course, choose to terminate the incumbent provider's access rights pursuant to the terms of a contractual agreement between the parties, rather than pursuant to the procedures we propose herein.").

inconsistent with an existing contract between the MDU owner and the incumbent MVPD.[17]

Finally, for similar reasons, the Commission should not adopt the proposal to require the sale of cable wiring in new MDU installations to the MDU owner, or otherwise dictate the terms to be adopted in future contracts regarding the disposition of home run wiring. Rather, these matters should be determined by marketplace negotiations.[18]

B. The Commission Should Make It Clear That State Law Will Determine Whether an Incumbent MVPD Has a Legally Enforceable Right To Remain on the Premises Over the Will of the MDU Owner.

TCI supports the Commission's conclusion that its proposed procedures apply only where the incumbent has no legally enforceable right to remain on the premises.[19] The contractual, statutory, and property law issues surrounding cable wiring in MDUs can only be properly addressed and adjudicated by the courts. This is especially true given that the question of an incumbent's legal right to maintain its cable wiring in an MDU often turns on arcane and complicated points of state law and the fact that the approach to and resolution of these issues often differ from state to

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[17] Id. at ¶ 83.

[18] Id. at ¶ 85. Such a mandatory sale provision is especially problematic because it would afford the MDU owner unfair bargaining power over the MVPD and would provide the MDU owner with little incentive to offer any compensation, much less just compensation, as a purchase price for the new wiring.

[19] Id. at ¶ 46.

state.[20] The Commission has neither the expertise nor the resources to adjudicate such matters in a way that accurately applies the appropriate legal standards and state precedents. Thus, the Commission should clarify that it will not attempt to adjudicate the substantive rights of the parties, but rather will look to judicial interpretations of state law for such a determination.

Moreover, to incorporate this clarification into its procedures, the Commission should include a provision stating that upon receiving the 90-days' notice from the MDU owner of termination of service (or 60-days' notice in a unit-by-unit scenario), the incumbent MVPD shall have the option of notifying the MDU owner, within the initial 30-day period, of its belief that it has an enforceable legal right to remain on the premises and of its intention to initiate a judicial proceeding for such a

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[20] See, e.g., Power v. Cablevision Investor's, Inc., 929 S.W.2d 15 (Tex App. 1983) (affirming permanent injunction enjoining the MDU owner from interfering with incumbent MVPD's service based on the fact that incumbent had acquired an irrevocable license to remain on the premises through the incumbent's expenditures in reliance on the MDU owner's permission and the MDU owner's acceptance of the benefits of cable service on the premises); Multi-Channel TV Cable Company, d/b/a Adelphia Cable Communications et al. v. Charlottesville Quality Cable Corp., 65 F.3d 1113 (4th Cir. 1995) (analyzing claims of implied easement, implied license, conversion, tortious interference with existing and prospective contractual relationships, unjust enrichments, and violation of the Virginia Residential Landlord and Tenant Act in connection with an attempted use of an incumbent's wiring by a new MVPD in an MDU); Country Manors Assoc., Inc. et al. v. Master Antenna Systems, Inc., 534 So.2d 1187 (Fla. App. 1988) (analyzing conversion and tortious interference with contract claims with respect to the attempted use of the incumbent provider's MDU wiring).

determination under state law. The rule should further state that until the incumbent MVPD's case is finally resolved, including any appeals, all further timetables and procedural requirements of the Commission's cable wiring rules are stayed.[21]

Finally, the Commission should decline to adopt any presumption or other mechanism regarding the rights of the parties if the incumbent MVPD's right to maintain its home run wiring on the premises is in dispute.[22] Due to the significant complexity and diversity of the state laws in this area and the variety of contractual arrangements between cable operators and MDU owners, there simply is no basis for any such presumption. Moreover, a federal presumption that purported to affect the outcome of court adjudications would be at odds with the Commission's commitment not to interfere with the incumbent MVPD's existing rights under state law.

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[21] See Exhibits A and B for an illustration of this proposal as incorporated into the Commission's proposed rules and procedural flow charts.

[22] See Further Notice at ¶ 34.

V. PROPOSED MODIFICATIONS TO THE FURTHER NOTICE'S PROCEDURES.

A. Modifications to the Sale Option.

1. Problem With the Sale Option: The MDU Owner and the New MVPD Have the Leverage and the Incentive to Refuse to Agree on a Reasonable Sales Price Until They Have Forced the Incumbent to Reveal Whether it Will Abandon the Wiring at No Charge or Remove It.

The Commission proposes that if the incumbent MVPD elects to sell its home run wiring but a price cannot be negotiated within 30 days, the incumbent must then choose one of the two remaining options, i.e., removal or abandonment.[23] There is a significant problem with this proposal: If, after the parties have failed to agree on a price, the incumbent elects abandonment, the new MVPD will be able to use the incumbent's wiring free of charge. If, instead, the incumbent elects to remove the wiring, the MDU owner or new MVPD will still be able to offer to buy the wiring at that time, after having forced the incumbent to commit to remove rather than abandon the wiring. Faced with this set of dynamics, MDU owners and new MVPDs will have no incentive to accept an incumbent's offer to sell the home run wiring, even at a reasonable price, because they have nothing to lose and everything to gain by forestalling negotiations until they know whether the incumbent is willing to remove or abandon the wiring. Stated another way, by giving the MDU owner and the new MVPD the leverage and the incentive to refuse to agree on a reasonable price until they have

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[23] See id. at ¶¶ 38, 40.

forced the incumbent to reveal whether it will abandon the wiring at no charge or remove it, the proposed procedures unjustifiably stack the deck in favor of the buyer.

Moreover, even if an incumbent whose proposed sale price is rejected follows through on its election to remove the wiring, the Commission must seriously question the wisdom of a set of procedures that would drive this outcome particularly where the incumbent's proposed sale price was entirely reasonable. Nobody wins if the incumbent is forced to remove its home run wiring. The incumbent must incur significant expense for the removal of the wiring and restoration of the building and receives nothing in return for this effort and expense. The new MVPD will then have to install its own home run wiring which will take time and expense. And the tenants of the building will be deprived of video service while this disruptive and protracted transition is taking place.

The Commission should not encourage such unattractive public policy outcomes. Rather, the Commission's goal should be to facilitate the orderly transition of service to the new MVPD, while still protecting the rights of the incumbent and affording just compensation for the incumbent's property. Below, TCI proposes a two-part modification to the Commission's procedures that will achieve this goal.

2. Proposed Solution: (a) Establish a Default Price for the Home Run; and (b) Terminate the Federal Procedures if Both the MDU Owner and the New MVPD Refuse to Purchase the Wiring for a Price at or Below this Default Price.

The best way to avoid the problem discussed above is for the Commission to establish a default price for the home run wiring and to provide an incentive for the MDU owner and the new MVPD to pay this price should the incumbent elect the sale option. As demonstrated below, TCI believes that the proper incentive will be created if the MDU owner and the new MVPD know that failure to pay the default price will result in termination of the cable wiring procedures established in this proceeding.

a) Default Price for the Home Run Wiring

The Commission asks what it should do to establish a reasonable price for the sale of the incumbent's home run wiring if market forces are insufficient to generate a sale at such a price.[24] TCI believes that the second option proposed by the Commission -- establishment of a default price -- is the most straightforward and easily implemented option to facilitate an equitable transition to a new MVPD competitor.

To assist the Commission in this regard, TCI conducted an internal analysis of the costs it incurs to install home run wiring in new MDUs across the country. These costs vary based on size of the MDU, labor, and location. Based on the results of this cost

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[24] See id. at ¶ 37.

analysis -- the details of which are set forth in Exhibit C to these comments -- TCI proposes that the Commission establish a range of default prices for the home run wiring. Specifically, TCI proposes the following default prices per unit for the three typical MDU categories: $72, $115, and $184.

This range of default prices is entirely reasonable for two principal reasons. First, the figures previously entered into the record by other MVPDs, including non-cable MVPDs, regarding the cost to wire MDUs significantly exceed the per-unit default prices proposed by TCI. For example, the Independent Cable Television Association has repeatedly stated that it costs $500 to wire each MDU unit,[25] and Optel has said it costs $400-$600 per unit.[26] In light of these sizable cost estimates submitted by the very parties that are the principal proponents of the transition procedures proposed in the Further Notice, TCI's range of default prices is extremely reasonable and should be adopted.

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[25] See, e.g., Ex Parte Letter of Independent Cable & Telecommunications Association (ICTA), filed on February 6, 1997 in CS Docket No. 95-184, at 2 (providing detailed cost figures illustrating that the fixed costs of installing a complete wiring system in an MDU is approximately $500 per passing or $150,000 total for 300 units); Ex Parte Letter of ICTA, filed on February 27, 1997 in CS Docket No. 95-184, at 2 (same).

[26] See Ex Parte Letter of Henry Goldberg, filed on February 7, 1997 in CS Docket No. 95-184, at 3, 4 & Attachment A (the costs of wiring an MDU can run from $400-$500 per unit, which translates to $600-$800 per subscriber). See also Ex Parte Letter of Cox Enterprises, Inc., filed on February 14, 1997 in CS Docket No. 95-184, at 3 (estimated cost of $150 to wire each MDU unit).

Equally important, since TCI's default prices are based on the labor and material costs for home run installations in new buildings, they are necessarily lower than the costs that would be incurred by a new MVPD to retrofit an existing building. This is because retrofitting involves higher labor costs to place the wiring into and behind existing structures that often have to be removed and then replaced.

b) Termination of Federal Procedures Upon Refusal to Pay Default Price.

It is not sufficient simply to establish a default price for the home run, because the MDU owner and new MVPD still will have the same unwholesome incentive described above to refuse to pay this default price until after the incumbent is forced to reveal whether it will abandon or remove the wiring. To neutralize this incentive, TCI proposes the following additional modification to the Commission's procedures:

> If an incumbent MVPD elects to sell its home run wiring for a price at or below the default price, but both the MDU owner and the new MVPD refuse to pay this price, any remaining timetables and procedures established by this proceeding (for both the building-by-building and unit-by-unit scenarios) shall automatically cease to apply. The disposition of the wiring would then be governed by whatever state law remedies may be available to the parties. While the incumbent may still offer the wiring for sale at a price above the default price, if the MDU owner and new MVPD refuse to pay such a higher price, TCI proposes that the Commission's procedures would continue to run their course

(i.e., the incumbent would then have to remove or abandon the wiring within 30 days).

This proposal is reasonable for several reasons.

First, there is no reason for the MDU owner or the new MVPD to obtain the benefits of the Commission's cable wiring rules when they refuse to pay a price that the record demonstrates is, and the Commission has found to be, reasonable.

Second, this proposed modification equalizes the balance of interests, incentives, and rights of the incumbent and the buyer. Thus, it is a more equitable approach than the proposal in the Further Notice, which stacks the deck unjustifiably in favor of the buyer.

Third, because this modification will likely reduce the instances in which the incumbent's wiring is removed, it will facilitate a smooth, efficient transition to the new MVPD and avoid disruption in service to subscribers.

Finally, this approach will likely reduce the number of instances where the incumbent initiates a court case to determine if it has a right to be in the building. This is because the incumbent may instead prefer that the procedures be triggered at the outset in the hope that it will obtain the just compensation represented by the default price.

In short, TCI's proposal will result in less litigation, fairer compensation for the incumbent, a smoother transition to the new competitor, and minimal disruption to subscriber service. For all these reasons, TCI strongly urges the Commission to implement its proposals regarding default price and termination of procedures

as discussed above and as reflected in the revised versions of the proposed rules and flow charts attached at Exhibits A and B.

B. The Commission Should Clarify that the Proposed Procedures Do Not Affect the Riser Cable.

The Further Notice is largely silent on the issue of the disposition of the riser cable under the Commission's proposed procedures. In the lone reference to riser cable, the Commission states, "parties could also negotiate to purchase additional wiring (e.g., riser cables) at their option."[27] However, the Commission does not say what happens to the incumbent's riser cable if such a sale is not negotiated.

The Commission should clarify that nothing in its proposed procedures will affect the disposition of the incumbent's riser cable.[28] Since there is no evidence in the record that new MVPD providers face difficulty in running additional riser cable in MDUs (the controversy has always been about an additional home run down the MDU hallway[29]), there is no basis for applying the Commission's

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[27] Further Notice at ¶ 38.

[28] In particular, under no circumstances should anything in the Commission's rules presume or deem the incumbent to have abandoned its riser cable.

[29] See, e.g., Further Notice at ¶ 25 ("Based on the record evidence, we believe 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.").

procedures to the incumbent's riser cable.[30] Of course, there is nothing to prevent the parties from negotiating a sale of the riser cable.

C. The Commission Should: (1) Clarify That Only the Subscriber (and Not the Commission) Can Appoint the MDU Owner or the New MVPD As the Subscriber's Agent; and (2) Require Proof of Agency to Avoid Unauthorized Changes in Service.

The Commission tentatively concludes that in the unit-by-unit context, it will "permit the alternative service provider or the MDU owner to act as the subscriber's agent in providing notice of a subscriber's desire to change services."[31] However, it is unclear whether by this statement the Commission is proposing to allow the subscriber to designate the MDU owner or the new MVPD as his or her agent for service termination purposes, or whether it is suggesting that the Commission would, as part of this proceeding, authorize all MDU owners and new MVPDs to act as agents of MDU subscribers for such purposes.[32]

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[30] As discussed in section II, supra, TCI believes that adoption of any rules/procedures regarding the disposition of any wiring outside the MDU unit, such as the riser cable, is expressly precluded by the plain language and legislative history of section 624(i).

[31] Further Notice at ¶ 39.

[32] The draft rule is equally ambiguous. See Commission's proposed rule 47 C.F.R. § 76.804(b)(3) ("The alternative provider or the MDU owner may act as the subscriber's agent in providing notice of a subscriber's desire to change services.").