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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 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 92-~~290~~ 260
	)	
Cable Home Wiring	)	

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Comments of the Community Associations Institute

SUMMARY

Pursuant to the *Further Notice of Proposed Rulemaking* ("*Further Notice*") issued August 28, 1997, in the above-captioned proceeding, the Community Associations Institute ("CAI") submits the following Comments.

This cable inside wiring proceeding is particularly significant to the nation's more than 160,000 community associations who desire increased flexibility to maximize the competitive use of inside wiring and the availability of video services. CAI applauds the FCC's revised approach to this proceeding and believes the procedures for the disposition of wiring outlined in the *Further Notice* can, with some slight modifications, serve to

beneficially augment the quality and quantity of video providers that may serve multiple dwelling unit (MDU) residents.

CAI is pleased the FCC recognizes that community associations have strong incentives to provide advanced, competitive and affordable telecommunications services to association residents. The *Further Notice* also appropriately acknowledges the vital common property interests of community associations and their rights and responsibilities to preserve, protect and maintain all association common areas. CAI believes the FCC's proposal that MDU owners have the option but not the obligation to purchase home run and cable home wiring will provide an important opportunity to increase the availability of wiring for competitive use while accommodating MDU owners who do not possess the resources, ability or interest to assume such wiring responsibilities.

CAI does regret that the *Further Notice* essentially abandons the rationale of convergence between cable and telephony inside wiring rules. Although the Proposed Rule incorporates many positive concepts, the FCC's decision to forgo increased uniformity between the varying regulatory schemes ensures that the Commission's rules continue to grow increasingly complex just as more telecommunications laypersons are being impacted by the FCC's actions.

CAI offers several specific recommendations to clarify or improve the Proposed Rule. CAI agrees that the FCC should establish the presumption that any incumbent provider does not possess an enforceable legal right to maintain its wiring on a property unless it

secures such a ruling from a court of law. CAI believes that the FCC should ensure that all types of community associations are addressed equally under the Proposed Rule. CAI recommends that the FCC modify the Proposed Rule's timetable slightly to provide community associations with ample time to make the decisions required. CAI suggests that the FCC provide a mechanism to ensure that property is properly restored if wiring is removed and to address situations where incumbent providers elect to remove wiring but fail to do so. CAI requests that the FCC allow MDU owners to require incumbent providers to remove obsolete, substandard or inoperative wiring. CAI believes the FCC should provide the MDU owner the option to own future inside wiring upon installation. CAI comments that MDU owners may allow wiring to be added to existing moldings and conduits unless they are otherwise contractually obligated, but cautions that the Proposed Rule should not interfere with an MDU owner's ability to consider exclusive contracts since such options are a right of property ownership. CAI urges the FCC to ensure that MDU owners may decide the new location of any physically inaccessible demarcation point. CAI believes the FCC should extend the MDU owner's option to purchase wiring in situations where all subscribers in a loop-through configuration elect to switch to a new provider. Finally, CAI concurs that the FCC should require that all providers cooperate during wiring and service transfers to ensure a seamless transition for cable subscribers and MDU owners.

I. ABOUT THE COMMUNITY ASSOCIATIONS INSTITUTE

Founded in 1973, CAI is the national voice for 32 million people (one out of every eight) who live in more than 160,000 community associations of all sizes and architectural types

throughout the United States. Community associations include condominium associations, cooperatives, and planned communities. CAI represents this extensive constituency on a range of issues including taxation, bankruptcy, insurance, private property rights, telecommunications, fair housing, electric utility deregulation, and community association manager credentialing.

In addition to individual homeowners, CAI's multidisciplinary membership encompasses community association managers and management firms, attorneys, accountants, engineers, builders/developers, and other providers of professional products and services for community homeowners and their associations. CAI members participate actively in the public policy process through 57 local Chapters and 24 state Legislative Action Committees.

II. THE PROPOSED RULE PROMOTES COMPETITION AND PROTECTS COMMUNITY ASSOCIATION COMMON PROPERTY

CAI applauds the Commission's enlightened progress in this proceeding. The proposed mechanisms for the disposition of home run and cable home wiring outlined in the *Further Notice* will provide many community associations and their residents with increased access to alternative telecommunications providers and enhanced choices for competitive video services. Compared to the initial January 1996 *Notice of Proposed Rulemaking* ("*Notice*") and many of the issues it raised, this *Further Notice* represents a much broader understanding of the concerns of MDU owners and the importance of preserving and protecting common property.

Specifically, CAI is pleased that the FCC recognizes that community associations must retain control over common property, which they maintain and protect. This *Further Notice* appropriately dismisses earlier suggestions by some parties that cable inside wiring rules should grant telecommunications providers rights of forced access to common property. CAI appreciates that the FCC understands the rights and responsibilities of community associations to manage common property, and those that seek to use such property, for the maximum benefit and enjoyment of all association residents. CAI is also encouraged that the *Further Notice* reflects the FCC's increasing awareness of and respect for the constitutional takings issues encompassing any attempt to require that community association common property be available for the installation or location of telecommunications wiring or equipment of any type.[1] The Final Rule must maintain these protections and not impact the rights of community associations to control access to common property.

III. COMMUNITY ASSOCIATIONS HAVE STRONG INCENTIVES TO MAXIMIZE THE AVAILABILITY OF ADVANCED, COMPETITIVE & AFFORDABLE TELECOMMUNICATIONS SERVICES

CAI is pleased that the Commission acknowledges in this *Further Notice* that MDU owners have strong incentives to provide their residents with advanced, competitive and affordable telecommunications services.[2] The FCC is correct in this regard, especially in relation to community associations, which are operated *by* residents *on behalf of* residents.

[1] See, Loretto v. Manhattan Teleprompter, 458 U.S. 419 (1982).
[2] *Further Notice*, paragraph 47.

By virtue of their property interest, community association owners[3] are members of the association's voting body. As such, they are responsible for electing a board of directors to govern the association and provide for the health, safety and welfare of association residents while maintaining, protecting and preserving the common areas, the value of the community or building and all individually-owned property within the development. Owners in a community association who are not on the board may participate in governing sessions by attending board meetings and joining various committees. Directly or indirectly, owners have control over the activities that occur in their association.

Contrary to the assertions of some cable providers, [4] associations as MDU owners have a strong incentive to promote and serve the interests of the residents since board members must regularly seek the votes of their neighbors to remain in office. Community associations are particularly sensitive to the needs and demands of the individuals within their communities and are working diligently and effectively to secure the telecommunications services requested by residents.

IV. OPTION TO PURCHASE WIRING IS APPROPRIATE

The *Further Notice* appropriately provides community associations, as MDU owners, the option but not the obligation to purchase home run and cable home wiring in

[3] In each type of community association, different terms apply to residents who have an ownership interest in the association: unit owner in a condominium, resident or apartment owner in a cooperative, and homeowner in a planned community. For convenience, all three types will be referred to as "owners." The term "resident" applies to owners and tenants collectively.
[4] *Further Notice*, paragraph 21 and n. 59.

circumstances where the incumbent provider elects to sell its wiring.[5] Such flexibility is important for the incumbent provider, the MDU owner and all alternative providers interested in serving the property since a successful negotiation and sale provides for minimal disruption in service to residents and to the property itself. Associations should have the option to purchase wiring. However, the FCC is correct in not mandating such a transfer of ownership or sale since any such requirement would impose a hardship on many associations, which are unprepared and unable to assume the expense and managerial responsibilities associated with the sale or transfer of wiring.[6] In such cases, the *Further Notice* appropriately allows the alternative provider to purchase the wiring. The purchase options proposed in the *Further Notice* should be included in the Final Rule.

V. CONVERGENCE CONCERNS REMAIN

It is unfortunate that the *Further Notice* essentially abandons the rationale of convergence on which this proceeding was largely based. In its January 1996 *Notice*, the FCC explained its efforts as an attempt to harmonize its telephone inside wiring and cable inside wiring rules since technologies and services are converging.[7] In such a world, the Commission indicated then, it makes little sense to maintain two distinct regulatory schemes.

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[5] *Further Notice*, paragraphs 35-39; 75-79.

[6] For the most part, association income is derived from assessments paid by each owner in the association. This income is limited, and may not be sufficient to purchase any wiring. A majority of owners must improve any assessment increase, and in some associations, owners may not wish to pay additional assessments to purchase inside wiring.

[7] *Further Notice*, paragraphs 8-9.

While this *Further Notice* reflects a generally positive shift in direction from many of the proposals contained in the initial *Notice*, it makes no effort to reconcile the differences between the two sets of rules. While CAI recognizes that the decision to forgo uniformity is likely a pragmatic election on the Commission's part to advance this proceeding and the competitive environment in general, it also ensures that the FCC's rules grow increasingly complex just as more telecommunications laypersons – such as community association residents and professionals – find themselves impacted by the Commission's actions. Community associations, and others subject to this rulemaking, typically do not have board members, residents, managers or attorneys experienced in the complex issues raised in this and other proceedings. As a result, many such individuals regularly struggle to understand and comply with FCC rules. Increased uniformity would ensure more widespread and effective compliance with the Commission's regulations.

CAI encourages the FCC's awareness of and sensitivity to its expanding reach and how its rules and procedures may be further simplified and streamlined for all parties with concerns before the Commission. Toward this end, CAI requests the FCC to clarify how new wiring installations will be categorized as either cable or telephony wiring and how the varying rule structures will apply to new or existing inside wiring that delivers a combination of telecommunications and video services.

VI. SOME ADDITIONAL CLARIFICATIONS ARE NECESSARY

While the Proposed Rule outlines important procedures intended to increase competition among telecommunications providers in MDUs, there are several significant issues that

require the Commission's attention to ensure that the Final Rule is implemented effectively.

A. The FCC should establish the presumption that any incumbent provider does not possess an "enforceable legal right" to maintain its wiring on a property unless it secures such a ruling from a court of law.

The proposed procedural mechanisms outlined in the *Further Notice* will apply only where the incumbent provider no longer has an enforceable legal right to remain on the premises against the will of the MDU owner.[8] CAI strongly urges the Commission to stipulate that an enforceable legal right exists only if the incumbent provider secures such a ruling from a court of law. The absence of such a requirement will make the mere claim of an enforceable legal right the battle cry for any incumbent provider wishing to thwart the entry of competitors. Such claims would effectively prevent most community associations from using alternative providers because associations are not financially able or easily inclined to initiate difficult and costly legal action to prove that the incumbent provider does not possess an enforceable legal right.[9] Any Final Rule should include language placing the burden of proof on incumbent providers and ensuring that questions over terminology do not eviscerate competition.

CAI also encourages the FCC to clarify that any action to establish an enforceable legal right should not stay the disposition procedures outlined in the *Further Notice*. Otherwise, incumbent providers will have little incentive to participate in good faith in

[8] *Further Notice*, paragraph 34.
[9] See note 6 above. Litigation costs can easily consume a great deal of an association's budget. For this reason, associations do not quickly enter into litigation.

the wiring sale, removal or abandonment process since they could delay competition indefinitely simply by initiating legal proceedings to freeze the timeline.

B. The FCC should ensure that all types of community associations are addressed equally under the Proposed Rule.

There are three types of community associations: condominiums, cooperatives, and planned communities. All face the same cable inside wiring issues, yet the Proposed Rule only refers to MDUs that are apartments, condominiums and cooperatives and defines MDU owner as "whatever entity owns the common areas of an apartment building, condominium or cooperative."[10] CAI encourages the FCC to clarify that the Proposed Rule applies to all types of community associations including planned unit developments that may include townhome or single-family home configurations.

Community associations vary throughout the nation in legal structure, size, architectural style, and many other factors. Notwithstanding this variety, all community associations have several principles in common. Real property in community associations is divided into individually-owned and common property by a developer's declaration and by deed. Owners in a community association have limited ownership rights in the common property but exclusive ownership rights in individually-owned property. Through the declaration and deeds, owners are bound to covenants, rules, and restrictions, which regulate the use of individually-owned property. Through mandatory assessments, owners pay for the maintenance of common areas. Owners are also members of the community association, which operates the community and maintains common property.

[10] *Further Notice*, paragraph 34, n. 96.

Condominiums are associations in which each individual unit owner owns a particular unit and has a non-exclusive joint interest with all other co-owners in common property. Cooperatives are associations in which an owner has ownership of shares in a cooperative association. Share ownership entitles owners to the proprietary lease of an apartment since the cooperative association, not the owners, actually owns all real property. In a planned community, each owner owns a unit, while the association owns all common property.[11]

Like home run wiring in a high rise structure, incumbent providers also own and control substantial wiring running throughout the common areas of community associations that are planned unit developments. In such circumstances, the townhome or single-family home arrangement exists in practicality as a horizontal MDU since home run wiring regularly branches from a central cable artery to serve individual townhomes or single-family dwellings in essentially the same manner as in high-rise structures. The only difference is that the dwelling units are typically farther apart in planned unit developments than they are in residential high-rise buildings. CAI requests that the FCC amend its Proposed Rule to include community associations that are planned unit developments as well as associations that are condominiums and cooperatives.

C. The FCC should modify the Proposed Rule's timeline for negotiating and deciding the sale of wiring.

The Proposed Rule outlines detailed procedures for the disposition of home run and cable home wiring.[12] While the timeline may be sufficient for MDUs such as apartment

[11] Clifford J. Treese, CPCU, ARM, ed. Community Associations Factbook, 1993, 1.
[12] *Further Notice*, paragraphs 35-39; 75-79.

buildings where there are typically individual owners who can make a decision to purchase wiring or agree to a price at essentially any point in the process, community associations will often be unable to make the necessary decisions within the current timeframe.

The decisions required by the proposed procedures must be made by community association boards of directors, which are comprised of individual homeowners who serve as volunteers. In most associations, the board meets only once a month to conduct association business. The volunteers are rarely able to meet more regularly and special meetings are largely impractical and often impossible for many associations because of scheduling conflicts and additional legal requirements for notifying owners in advance of such meetings.[13]

For the building-by-building and unit-by-unit procedures for the disposition of home run wiring, the association would be required to reach its first decision at day 30 regarding whether it wanted to purchase wiring which the incumbent provider had elected to sell, and its second decision at or before day 60 regarding the price for the wiring. The first decision regarding the desire to purchase will require at least one monthly meeting or more depending on the research and information required. The second 30-day window is more troubling. Most association boards will be unable to meet during the period to negotiate effectively. Even when the board delegates negotiating authority to an

[13] See, for example, Fla. Stat. ch. 718.112(c) (requiring 48 hours notice of meetings to all owners). Many states have similar provisions that limit the ability of boards of directions to schedule meetings within a short period of time.

association manager or attorney, the board must still make the final decision and may be unable to arrange the required meeting until after day 60.

While CAI supports the proposed procedure in general, two modifications are necessary to provide community association boards adequate time to make the necessary decisions. First, CAI recommends that the procedure allow the association to make its initial election regarding its desire to purchase wiring at day 30 when the incumbent provider decides to sell *or as soon thereafter as the association board is able to meet.* The negotiation period would commence once the board reached its initial decision (at day 30 or shortly thereafter). CAI also recommends that the FCC extend the negotiation period and deadline to 60 days from the date of the board's decision, with the transfer of ownership/effective date of sale the earlier of: (a) 30 days following the end of the negotiation period; or (b) the date of actual service termination.

These changes would provide the association with the necessary 60-day period in which to negotiate and agree to a purchase price for the wiring, similar to the decision period provided for the building-by-building procedure for cable home wiring.

Finally, CAI recommends that the unit-by-unit procedure for cable home wiring be modified to remove the requirement that the MDU owner provide notice on day one as to whether it or the alternative provider will purchase the wiring if the subscriber declines to do so. This does not give community associations ample time to learn the price of the cable home wiring and convene a meeting to decide whether it wishes to purchase the

wiring if given the opportunity. Upon notice from the MDU owner that the unit-by-unit procedure is being implemented, the incumbent provider should be required to provide the MDU owner with the per-foot replacement cost of the wiring just as it must do in the building-by-building approach. Likewise, the MDU owner should make its decision at day 60 as to whether it or the alternative provider will purchase the wiring. The decision would then take effect if the subscriber does not purchase the wiring upon termination.

Collectively, these recommendations would preserve the integrity of the Commission's proposed procedures while ensuring that community associations have ample time to make the necessary decisions.

D. The FCC should provide a mechanism to ensure that property is properly restored if wiring is removed.

The *Further Notice* provides no protection for MDUs when an incumbent provider elects to remove its wiring. Removal of wiring will cause some disruption to common property in nearly all circumstances, especially when wiring is embedded in structural or surface areas. If an association terminates service with an incumbent provider, and the incumbent provider elects to remove the wiring, it is also conceivable that the provider may take less than ordinary care during the removal. Should damages result, it may be difficult to guarantee that they are adequately repaired since the provider may be no longer serving customers in the property. To address these circumstances, CAI recommends that the Proposed Rule be modified to include some mechanism, such as a requirement that the provider post a significant bond upon electing to remove its wiring,

to guarantee that an incumbent provider does not damage or abuse the property as wiring is extracted.

E. The FCC should provide a mechanism to address situations where incumbent providers elect to remove wiring and then fail to do so.

The Commission requested comment on whether it should impose a penalty on any incumbent provider who fails to remove wiring after electing to do so, thereby delaying the smooth transition to an alternative provider's service.[14] This is clearly a concern to an alternative provider who may install a second set of wiring when the incumbent provider had no intention of removing its wiring or who may delay service to wait for space occupied by the incumbent provider's wiring. However, this is also a concern to community associations who desire to provide the most advanced, competitive services to residents in the shortest possible timeframe. A broken pledge to remove wiring will make the transition between providers more difficult for associations and residents alike. Therefore, CAI again proposes that the FCC require the incumbent provider to post a significant bond upon its election to remove its wiring. Not only would this bond guarantee that any damage to property is repaired, it would also ensure that providers who elect to remove wiring actually do so since the bond would be forfeited if the provider unilaterally chose to leave the wiring in place. Such an approach would allow for a smoother transition between providers and the important continuity of telecommunications services.

[14] *Further Notice*, paragraph 36.

F. The FCC should allow MDU owners to require the removal of obsolete, substandard or inoperative wiring.

In situations where the incumbent provider elects to abandon existing wiring, CAI recommends that the FCC allow MDU owners to require the incumbent provider to remove any wiring that is obsolete, substandard or inoperative. As wiring is abandoned, it becomes the property of the MDU owner. If it is obsolete, substandard or inoperative, the association must then finance the removal before additional wiring can be installed. This will burden the association with additional expense and limit available space for functional wiring for competitive services.

G. The FCC should provide the MDU owner the option to receive future inside wiring upon installation.

The Commission requested comment on the disposition of inside wiring in contracts entered into on or after the effective date of any final inside wiring rules. The FCC proposed that any inside wiring be transferred to MDU ownership.[15] CAI recommends that MDU owners be given the option to assume this responsibility for new wiring but that the FCC not require such a transfer. As stated earlier, some associations may be able to assume and professionally manage wiring infrastructure and should be given that opportunity. However, a mandated transfer of wiring would impose a great hardship on others who are unprepared and unable to assume the associated expense and managerial responsibilities. CAI recommends that the FCC establish consistent regulations for new and existing configurations by providing MDU owners with the option but not the obligation to purchase inside wiring in both circumstances.

[15] *Further Notice*, paragraph 85.

H. The FCC should clarify that MDU owners may allow wiring to be added to existing moldings and conduits unless they are otherwise contractually obligated but the Proposed Rule should not interfere with an MDU owner's ability to consider exclusive contracts since such options are a right of property ownership.

Clearly, MDU owners may direct the addition of wiring to moldings and conduits that they own or control. Some MDU owners are responding to market forces and the increasing number of available providers by installing larger and multiple conduits to accommodate competitive services under non-exclusive arrangements. CAI supports such an approach and believes that the realities of a competitive telecommunications marketplace will continue to enforce such a trend where it is economically feasible. The Proposed Rule should not interfere with an MDU owner's ability to consider exclusive contracts of any sort, however, since such options are a right of property ownership.

I. The FCC should ensure that MDU owners decide the new location of any physically inaccessible demarcation point.

The *Further Notice* proposed that when a cable demarcation point is truly physically inaccessible to an alternative service provider, the demarcation point should be moved back to the point at which it first becomes physically accessible.[16] CAI agrees with this proposal since demarcation points are regularly embedded in the building structure and providing access to the demarcation point would involve damage to common property. To preserve the integrity of the property, MDU owners should determine the point at which wiring becomes physically accessible. While such a determination would generally be made in consultation with the alternative provider, the MDU owner is best suited to establish the new demarcation point since it will remain on common or private

[16] *Further Notice*, paragraph 84.

property and the MDU owner is responsible for making all determinations relating to the use and protection of such property.

J. The FCC should extend the MDU owner's option to purchase cable wiring in situations where all subscribers on a loop-through system decide to switch to a new provider.

In the *Further Notice*, the FCC requested comment on whether it should require cable operators to allow MDU owners to purchase loop-through wiring in the limited situation where all subscribers in a building want to switch to a new service provider.[17] CAI agrees that the Proposed Rule should be extended to those situations to provide additional choice and flexibility for subscribers receiving service via loop-through wiring configurations.

K. The FCC should require that all providers cooperate during wiring and service transfers to ensure a seamless transition for cable subscribers and MDU owners.

The Commission requested comment on whether it should adopt a general rule requiring the incumbent and alternative providers to cooperate to ensure a seamless transition or whether a provider's desire to win back subscribers will compel the provider to cooperate during the transition period.[18] It is probable that transitions envisioned by this *Further Notice* will occasionally involve a lack of coordination, a degree of confusion or even intentional disruption of service. While this concern can be addressed partially through procedures and timelines that incorporate the modifications recommended above, CAI concurs that the Commission should require that providers cooperate to ensure as seamless a transition as possible.

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[17] *Further Notice*, paragraph 75.
[18] *Further Notice*, paragraph 48.

CONCLUSION

CAI reiterates the importance of this proceeding to the nation's community associations and their more than 32 million residents. Community associations seek to provide their members with advanced, competitive and affordable telecommunications services and CAI welcomes a rule that enables MDU owners to voluntarily accommodate additional video operators while thoroughly protecting common and private property. While CAI is pleased with the generally positive direction of this Proposed Rule, the important modifications discussed above will ensure that the Commission's actions truly and appropriately maximize the competitive use of inside wiring and the availability of quality video services.

CAI appreciates the opportunity to provide Comments in this proceeding.

Respectfully submitted,

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