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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

[redacted]

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 NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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COMMENTS OF NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA") hereby submits its comments on the Further Notice of Proposed Rulemaking in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

In 1992, Congress added Section 624 (i) to the Communications Act of 1934, directing the Commission to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator *within the premises of such subscriber*."[1] Congress intended that the rules adopted pursuant to Section 624(i) would apply to wiring installed by cable operators not only within single-family homes but also within individual subscribers' apartments in multiple dwelling units ("MDUs"). Congress made equally

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1 47 U.S.C. § 544(i) (emphasis added).

clear, however, that Section 624(i) was to apply only to MDU wiring "within the individual dwelling unit of individual subscribers."[2]

The rules adopted by the Commission in 1993 to implement Section 624(i) were, indeed, limited to the wiring within the premises of individual homeowners and within the individual dwelling units in MDUs.[3] The proposal set forth in the Further Notice, however, goes beyond the mandate of Section 624(i) insofar as it purports to deal with the disposition of MDU wiring *outside* a subscriber's premises upon termination of service. The Commission has proposed procedural requirements for the disposition of wiring that is dedicated to a particular subscriber's residential unit but is outside the premises of that unit ("home run wiring"), when such wiring is owned by the cable operator but the cable operator has no enforceable legal right to remain on the premises after termination of service. The Commission, correctly, appears to have rejected proposals that it regulate the disposition of such wiring pursuant to Section 624(i) by simply moving the demarcation point -- that is, by disingenuously treating all dedicated wiring as if it were within the individual subscriber's premises, even when it clearly is not. But the Commission proposes that it has *separate* jurisdiction to regulate that portion of MDU wiring that Congress specifically and purposely excluded from its Section 624(i) mandate. The Commission contends that such regulation will "more effectively promote competition and

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2 H.R. Rep. 102-628, 102d Cong., 2d Sess. 119 (1992) ("House Report").

3 Those rules require a cable operator to offer subscribers the opportunity, when they terminate service, to purchase the wiring inside their premises before the cable operator may remove that wiring. If a subscriber declines such an offer, the operator may remove the wiring, provided it does so within 30 days. The Commission defined the "demarcation point" within which MDU wiring would be deemed to be inside a subscriber's premises as "a point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit." 47 C.F.R. § 76.5(mm).

consumer choice"[4] and that it has general authority under Title I and Title VI to regulate for this purpose.

The Commission is right in recognizing that the demarcation point for purposes of Section 624(i) is essentially fixed by statute and may not be moved beyond subscribers' dwelling units. And it is also right to avoid seeking to regulate the disposition of wiring outside the premises where the cable operator has a continuing enforceable legal right to remain on the premises after termination of service. Such an assertion of regulation would require the preemption and abrogation of substantive contractual, statutory and common law property rights that both exceed the Commission's statutory authority and raise serious constitutional difficulties.

But the Commission is wrong to suggest that it has authority to regulate wiring outside the demarcation point, even where the cable operator has no enforceable legal right to remain on the premises. Neither Title I nor Title VI gives the Commission such *carte blanche* authority, especially where Congress clearly excluded wiring outside the subscriber's premise from the scope of Section 624(i) and rejected the notion that such regulation was necessary or desirable to meet the public policy objectives of the Act.

In any event, the specific rules proposed by the Commission would not, without important modifications, address the problem that the Commission identified as the principal existing impediment to alternative providers of video service in MDUs -- namely, confusion and uncertainty over the legal rights of terminated incumbents to remove existing wiring or to keep existing wiring on the premises and preclude its use by others. Whether or not the proposed

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4 Further Notice, ¶ 2.

rules even apply in particular circumstances *depends* on the legal rights of the parties and, in particular, on whether or not the incumbent cable operator has an enforceable legal right to remain on the premises. But the proposal does nothing to clarify those legal rights, nor does it indicate how any dispute over those rights -- and, thus, over the applicability of the rules -- might be determined.

Surely, the Commission is not the appropriate forum for adjudicating such matters. The rights at stake depend on contracts and state property law (both statutory and common law). These vary from case to case and from state to state. The Commission has neither the resources nor the expertise to determine property rights of cable operators and MDUs; these are matters that typically are and must be addressed by state courts. Therefore, the proposed rules must include a mechanism to permit a cable operator to establish in court that it has an enforceable legal right to keep its wiring on the premises *before* the rules' procedures and timetables come into play. Specifically, an operator that is served with a termination notification by an MDU owner must be afforded the additional option of responding that it intends to obtain a judicial ruling that it has an enforceable right to remain on the premises, and all further procedures and timetables under the rules should, and must, be stayed pending the outcome of that judicial proceeding.

There is no reason or basis for the Commission to establish a *presumption* as to whether or not the operator has a legal right to remain on the premises. First, because of the complexity and variations of state law in this area and the variety of contractual arrangements between cable operators and MDU owners, there simply is no basis for *any* across-the-board presumption. Second, unless the Commission intends either to adjudicate the property rights at issue or to alter or influence any state court adjudications of such rights, or to engage in wholesale preemption of

state law, such a presumption would serve no purpose. But the Commission has neither the expertise nor authority to decide such matters. And it has rightly made clear in the Further Notice that it has no intention of disturbing or affecting the property rights of the parties under state law.

Once it is established or conceded that the operator has no legal right to remain on the premises, the operator should retain the three substantive options that it would have in the absence of any Commission rules -- *i.e.*, removing the wiring; abandoning the wiring; or selling the wiring to the MDU owner or to an alternative video programming provider. But the proposed procedural rules provide little incentive to the MDU owner to agree to *buy* the wiring -- even at a fair price -- when they can be certain of knowing, before the contract with the incumbent expires, whether or not the incumbent will remove or abandon the wiring. A sale of the wiring may, in many such circumstances, be the most efficient and fair outcome, and the Commission therefore should not adopt rules making it the least likely outcome. Specifically, the rules should provide that if the operator offers to sell the wiring at a price deemed reasonable by the Commission and the MDU owner (or an alternative provider) refuses to buy it, the remaining deadlines and procedures of the rules will cease to apply.

The Commission should not adopt its additional proposal to permit alternative providers to use incumbent cable operators' moldings or conduits without the incumbents' permission -- a proposal that would raise not only jurisdictional but also constitutional problems. Nor should it require prospectively that cable operators convey all wiring to MDU owners upon installation.

NCTA has worked diligently in this proceeding to try to develop a proposal that would increase the opportunities for competition, allowing incumbents and newcomers to compete using the incumbent's home run wiring, for each subscriber in an MDU, subject to reasonable

compensation.[5] The Commission has declined to consider NCTA's proposed approach, and has instead proposed to adopt the approach preferred by the Independent Cable & Telecommunications Association. Having chosen this path, the Commission must square its proposal with the limits on its jurisdiction and on its power to preempt or interfere with state law.

I. THE COMMISSION LACKS JURISDICTION TO REGULATE THE DISPOSITION OF WIRING OUTSIDE SUBSCRIBERS' PREMISES.

The Commission asserts that it has authority to regulate the disposition of MDU wiring outside the premises of individual subscribers because Section 4(i) of the Communications Act broadly authorizes any action that "is *not expressly prohibited by the Act* and is necessary to the effective performance of the Commission's functions."

This is not what Section 4(i) says. And no court has endorsed such a broad construction of the provision. Section 4(i) specifically authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this Act*, as may be necessary in the execution of its functions." There is a difference between "not expressly prohibited" and "not inconsistent" -- and, in this case, the distinction is obvious and critical. Moreover, even if the proposed rules were not flatly inconsistent with the explicit intentions of Congress, they would still be outside the scope of the Commission's jurisdiction because they are in no sense necessary to any of the Commission's statutory responsibilities.

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5 *See, e.g.*, NCTA Ex Parte Memoranda, CS Docket No. 95-184, March 6, 1997 and April 11, 1997. In making those proposals, we reiterated our view that the Commission lacks authority to adopt rules regulating home run wiring and made clear that we were not waiving our right to challenge any such rules that the Commission might adopt on jurisdictional grounds. *Id.*

A. The Proposed Rules Are Inconsistent With the Intentions of Congress.

Section 624(i) of the Act directs the Commission to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator *within the premises of such subscriber.*"[6] The provision does not dictate the *substance* of the rules to be adopted by the Commission. It simply mandates that there *be* rules to deal with the disposition of inside wiring in such circumstances. The legislative history makes clear that Congress specifically did not intend for these rules to deal with MDU wiring outside the premises of individual subscribers:

> This section deals with internal wiring within a subscriber's home or individual dwelling unit. In the case of multiple dwelling units, this section is not intended to cover common wiring within the building, but only the wiring within the dwelling unit of individual subscribers.[7]

Congress intended that the Commission adopt rules *only* with respect to wiring inside individual dwelling units and *not* with respect to wiring outside such units. To adopt rules regarding the disposition of home run wiring outside the premises of individual subscribers -- and, especially, to do so in the very same rulemaking proceeding in which it implemented Section 624(i) by adopting rules for the disposition of wiring *within* subscriber premises -- would thus be directly inconsistent with the Act and the intent of Congress. If the Commission had, in its initial rules implementing Section 624(i), set the demarcation point at the point of entry to the building or some other point far outside the individual subscribers' premises -- so as to regulate the disposition of home run and common wiring -- that clearly would have been at odds with the statute and the legislative intent. Section 4(i) cannot conceivably give the Commission

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6 47 U.S.C. § 644(i) (emphasis added).

7 House Report, *supra*, at 119.

jurisdiction independent of Section 624(i) to do the same thing -- or to adopt other rules in the same proceeding governing wiring outside the premises.

The Commission cites a bevy of cases to support the proposition that "Section 4(i) has been held to justify various regulations that were not within explicit grants of authority." That is an indisputable proposition, with which we have no quarrel. But those cases provide no support for the dubious proposition that a regulation is "not inconsistent" with the Communications Act, for purposes of Section 4(i), so long as it is not expressly prohibited by the Act. In none of the cases did the Commission attempt to adopt regulations pursuant to 4(i) that were inconsistent with contemporaneous indications of legislative intent, as would be the case here.

For example, in *Nader v. FCC*,[8] 520 F.2d 182 (D.C. Cir. 1976), the court held that the Commission had authority under Section 4(i) to prescribe a rate of return for AT&T. The court held that even though Section 205, which authorized the Commission to regulate carrier rates, did not explicitly authorize the prescription of a rate of return, it did authorize the Commission to prescribe each and all of the components that resulted in AT&T's rate of return. Accordingly, the Court found that simply prescribing the rate of return was "not ... at all inconsistent with section 205 or any other provision of the Federal Communications Act," and was "fully consistent with the prescription of charges" authorized by Section 205.[9]

In *New England Telephone & Telegraph Co. v. FCC*,[10] the court upheld the Commission's authority under Section 4(i) to order AT&T to refund earnings in excess of its

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8 *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1976).

9 *Id.* at 204.

10 *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987).

prescribed rate of return, even though the Act did not explicitly order such refunds. The court found that such refund authority was not only wholly consistent with the Commission's authority (as upheld in *Nader, supra*) to prescribe a rate of return but "absolutely necessary" to the exercise of that authority.[11]

The Commission notes that in *Mobile Communications Corp. of America v. FCC* ("*Mtel*"),[12] the court rejected an argument, based on the "*expressio unius* maxim," that "Congress' explicit grant of authority to the Commission to collect certain fees and to conduct auctions for specified types of licenses denied the Commission authority to impose other fees."[13] But it is one thing for Congress to authorize certain actions and remain silent as to others, and quite another for Congress to authorize certain actions and specifically indicate that other actions are not intended. There is no indication in *Mtel* of any Congressional intention that fees be limited to those that were explicitly authorized.

The current case in no way resembles *North American Telecommunications Association v. FCC.*[14] As the Commission states, the court affirmed the Commission's assertion of authority, pursuant to Section 4(i), over the Bell holding companies, "even though the Act conferred no authority on the Commission over holding companies (and the legislative history of the Act suggested that Congress had considered granting such authority but ultimately denied it) ...." In that case, the Commission asserted Section 4(i) authority *50 years* after Congress considered the

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11 *Id.* at 1107.

12 *Mobile Communications Corp. of America v. FCC,* 77 F.3d 1399 (D.C. Cir. 1996).

13 Further Notice, ¶ 55.

14 *North American Telecommunications Association v. FCC*, 772 F.2d 1282 (7th Cir. 1985),

issue, and, according to the court, "Section 4(i) empowers the Commission to deal with the unforeseen" -- such as, in that case, the divestiture of AT&T and the creation of the Regional Bell Holding Companies.[15] The Commission's proposal in the present proceeding does not deal with the unforeseen. The Act's legislative history foresaw the issue of the regulation of MDU wiring outside subscriber premises, and it said, "Do not go there." In this case, the proposed rules are inconsistent with a recently enacted statute and its legislative history.

B. The Proposed Rules Are Not Necessary to the Execution of the Commission's Responsibilities.

Even if 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) unless they were somehow "necessary" to the execution of some explicit Commission mandate or function. Section 4(i) jurisdiction, as the courts have made clear, must be "ancillary" to some other, explicit grant of jurisdiction.[16] The Commission strains to identify an explicit mandate to which its asserted Section 4(i) jurisdiction is ancillary -- but it fails.

The Commission first suggests that regulating MDU wiring outside individual subscribers' premises is somehow necessary to enable the Commission to perform its statutory functions under Section 624(i) -- even though, as discussed above, Congress specifically indicated that it did not intend that the rules adopted pursuant to Section 624(i) apply to such wiring. The Commission suggests that promoting building-by-building competition in those circumstances where MDU owners are unwilling to allow multiple providers or multiple home

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15 *Id.* at 1292-93. *See also Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981).

16 *See generally, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *FCC v. Midwest Video Corp.*, 440 U. 689 (1979); *California v. FCC*, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990); *Iowa Utilities Board v. FCC*, No. 96-3321, 8th Cir., (slip op., July 18, 1997).

run wiring is part of its mandate under Section 624(i). But if that had been one of the Commission's responsibilities under the Section 624(i), Congress would not have limited the provision's applicability to wiring inside subscribers' premises and would not have made clear that this limitation applied to MDUs as well as to individual homes. The point of Section 624(i), as applied to MDUs, must have been to promote individual subscriber choice, on a unit-by-unit basis, in those circumstances where landlords (or state law) permit access by more than one provider. Even if, as the Commission contends, it is not foreclosed by Section 624(i) from regulating the disposition of MDU home run wiring outside subscribers' premises, it certainly has no responsibility under that section to regulate such wiring. Any such specific responsibility must be located elsewhere.

The Commission relies, second, on Section 601 as a general directive to promote competition, which gives it ancillary jurisdiction to promote building-by-building MDU competition by regulating home run wiring. Section 601 embodies no such sweeping mandate. It is simply a statement of the *purposes* of Title VI -- not the responsibilities of the Commission.

One of the purposes set forth in Section 601 is, indeed, to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." But nothing in Title VI gives the Commission the general authority or responsibility to adopt whatever rules it may deem necessary or appropriate to promote such competition. To the contrary, the provisions of Title VI establish a comprehensive framework for "the exercise of Federal, State, and local authority with respect to the regulation of cable systems." Those provisions reflect determinations by Congress that, in certain circumstances, regulation by State and local governments will best promote competition and the interests of consumers. In some circumstances, regulation by the Commission will best further those

objectives. And, in other circumstances, competition and the public interest will best be served by no regulation at all. Section 601(6) simply confirms that one of the purposes of the framework of regulatory authorizations and prohibitions contained in Title VI is to promote competition. It does not impose on the Commission (or state or local governments) any general responsibility to promote competition outside the scope of that regulatory framework, nor does it grant any residual authority to do so.

Finally, the Commission claims that its proposed regulation of home run wiring will somehow "assist the Commission in discharging its statutory obligations under Section 623(b)." In essence, the Commission contends that because promoting building-by-building competition may ultimately reduce the rates paid by MDU subscribers for cable service, its proposed rules are necessary to the furtherance of its *rate regulation* responsibilities under Section 623. This argument, which is simply another way of saying that the Commission has broad Section 4(i) authority to adopt any regulations that it deems appropriate to promote cable competition, does not pass the straight-face test.

First of all, the proposed regulations are not within the scope of the Commission's regulation of *equipment* rates under Section 623(b), as the Commission suggests. The Further Notice, in noting that "the regulations authorized by Section 623(b) cover 'equipment used by subscribers to receive the basic cable tier,'" omits some rather important qualifying language. What Section 623(b) specifically authorizes is the regulation (by local franchising authorities, pursuant to Commission standards) of rates for the "*installation and lease of the* equipment used by subscribers to receive the basic service tier." It has absolutely nothing to do with the disposition or sale of wiring upon termination of service -- which is obviously why Congress addressed that issue in a wholly separate provision of Title VI.

In any event, while it is a truism that any regulation that promotes cable competition *could* have the effect of promoting competitive rates, it cannot be the case that every such regulation is "necessary" to the execution of the Commission's rate regulation functions, for purposes of Section 4(i). Indeed, Section 623(b)(2) specifically describes the regulatory considerations and the types of regulation that Congress deemed integral and necessary to the implementation of its responsibilities under Section 623(b) -- and there is not a hint in that section that Congress meant Section 623 to authorize, much less require, the Commission to take on the responsibility of reducing rates by promoting competition. To the contrary, what Section 623 contemplates is regulation of *rates* to ensure that they are reasonable in the *absence* of effective competition. In short, Section 623 is part of the comprehensive framework established by Title VI to protect consumers, promote competition and allocate regulatory responsibilities. It is not a directive to the Commission to promote competition, and it cannot provide the Commission with ancillary Section 4(i) jurisdiction to regulate home run wiring in the name of promoting competition.[17]

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[17] The Commission proposes to apply its rules not only to cable operators but to all multichannel video programming distributors, pursuant to its authority under Section 303(r) of the Communications Act. If the Commission were to conclude that it had jurisdiction to regulate the disposition of cable-owned MDU home run wiring outside individual dwelling units and adopted its proposed rules, it surely should apply the rules to all MVPDs. There is no basis whatever in the Act for adopting discriminatory home wiring rules designed to give non-cable MVPDs an artificial competitive advantage vis-à-vis cable operators, and such an outcome would be inconsistent with the Commission's professed objective of promoting competition in the video marketplace.

II. THE PROPOSED RULES SHOULD PROVIDE FOR A STAY OF ALL PROCEDURES AND TIMETABLES UNTIL A STATE COURT HAS RESOLVED ANY DISPUTE AS TO WHETHER A CABLE OPERATOR HAS A RIGHT TO REMAIN ON THE PREMISES.

A. The Proposed Rules Provide No Mechanism for Resolving the Threshold Question of Whether the Operator Has a Right To Remain on the Premises.

Even assuming that the Commission has jurisdiction to regulate the disposition of home run wiring outside the premises of individual subscribers, the rules proposed in the Further Notice would not fall within this jurisdiction because *they do nothing to achieve their intended purpose.* The Commission explains that its proposed procedural mechanisms are meant to "promote competition and consumer choice by bringing *order and certainty* to the disposition of the MDU home run wiring upon termination of service."[18] The crux of the problem, according to the Commission, is that MDU owners "are unsure of their legal rights" and that alternative service providers and MDU owners "have no timely and reliable way of ascertaining whether they will be able to use the existing home run wiring upon a change in service."[19] The proposed procedures "are intended to provide all parties sufficient notice and certainty of whether and how the existing home run wiring will be made available to the alternative video service provider so that a change in service can occur efficiently."[20]

But because the Commission has properly determined not to "create or destroy any property rights"[21] or to "preempt an incumbent's ability to rely upon any rights it may have

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18 Further Notice, ¶ 32 (emphasis added).

19 *Id.*, ¶ 33.

20 *Id.*

21 *Id.*, ¶ 32.

under state law,"[22] the proposed procedures would come into play only in those circumstances where the cable operator does not have "an enforceable legal right to remain on the premises."[23] Determining whether or not this right exists is at the crux of the matter. If, as the Commission notes, it is often unclear whether such a right exists, then the proposed rules cannot provide landlords with certainty regarding the rights of the parties or the disposition of existing wiring *unless* the rules provide a mechanism for resolving that threshold issue. The proposal includes no such mechanism. To bypass this step would be to preempt fundamental state law.

If a cable operator is served with a notice of termination under the proposed rules but believes that the rules do not apply because it has an enforceable right to remain on the premises, what is the operator to do? If the operator's belief is correct, it may simply ignore the notice and refuse to notify the MDU owner of its election to remove, abandon or sell its wiring. But if the MDU owner then complains to the Commission, how is the Commission to determine whether or not the rules apply? A step is obviously missing in the protocols proposed in the Further Notice, and it must be added.

B. The Commission Should Not Attempt To Adjudicate Disputes Regarding the Operator's Legal Right To Remain on the Premises.

The Commission is not the appropriate entity to resolve disputes regarding the contractual, statutory or common law rights of a cable operator to keep its wiring on an MDU's premises and to preclude the use of such wiring by others. Adjudicating contractual and common law claims is a judicial function that would not generally be within the Commission's expertise even if the relevant legal standards and precedents were uniform throughout the nation.

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22 *Id.*, ¶ 34.

23 *Id.*

But these disputes involve complex issues that often depend on the unique laws and precedents of the state in which they arise. Wholly apart from the novel burden of attempting to resolve the disputes that are likely to arise, there is simply no way for the Commission to adjudicate such matters in a way that accurately applies the appropriate legal standards and precedents of each state, if the traditional powers of state law and state courts is to be maintained.

Whether incumbents have enforceable rights to remain on the premises is often the subject of complex state litigation. This holds true even in states with strongly-worded statutes protecting the right of a cable operator to serve MDU residents. Given the efforts incumbent providers have had to make to prove the enforceability of these rights, and the effort the courts have made in interpreting these rights, it is inappropriate for the FCC to attempt to adjudicate these matters.

1. State Common Law Issues.

The existence and enforceability of common law rights is a frequent source of dispute between incumbents and MDU owners. For example, in *Power v. Cablevision Investor's, Inc.*, 929 S.W.2d 15 (Tex. App. 1983), an MDU owner ordered a cable operator to terminate service on grounds that the operator had only a revocable license to operate in the building. The court affirmed the trial court's grant of a permanent injunction enjoining the MDU owner from interfering with the operator's service and its contracts with tenants, on grounds that the license had become irrevocable through the operator's expenditure in reliance on the MDU owner's permission, and the MDU owner's acceptance of the benefits of cable service on the premises. This principle is black letter law, and provides an incumbent with a "clearly enforceable" right to remain on the premises in appropriate circumstances. *See, e.g.,* Restatement of Property § 513 and comments (1944); 3 H. Tiffany, *Real Property* § 815 (3d ed. 1939); *Shearer v. Hodnette*, 674 So. 2d 548 (Ala. Civ. App.

1995); *Dance v. Tatum*, 629 So. 2d 127 (Fla. 1993); *Closson Lumber Co. v. Wiseman*, 507 N.E.2d 974 (Indiana 1987); *Carr v. Barnett*, 580 S.W.2d 237 (Ky. App. 1979).

Courts have issued injunctions against MDU owners intent on evicting incumbent operators on grounds of tortious interference with contracts. In *Cox Communications West Texas v. Heartland Wireless-Lubbock, Inc.*, 96-555, 303 (Lubbock County, Tex., April 30, 1996) (reported in *Cable TV Law Reporter*, April 30, 1996, p. 12), the court issued a temporary injunction on the ground that the incumbent provider's contracts with the MDU were enforceable, over the MDU owners' claims that the signatories to the contracts lacked authority. In the same case, a jury later concluded that the wireless cable provider and the apartment owner had illegally conspired to confiscate the incumbent provider's wiring and equipment, and the court entered a permanent injunction preventing the property owner from denying access to Cox or from taking control of that wiring and equipment. *Cable TV Law Reporter*, November 30, 1996, p. 8.

Incumbent providers with what seem to be facially valid contracts to serve MDUs nevertheless often find themselves in litigation over their contractual and common law right to continue to serve the premises. *See, e.g., Polo Club of Boca Raton Property Owners Ass'n v. Tele-Media Co*, CL 93-8621 AB (Palm County, Fla., Cir. Ct. Aug. 18, 1995)(order granting judgment after trial) (reported in *Cable TV Law Reporter*, Aug. 31, 1995, p. 11); *Boca Gardens Homeowners Ass'n v. National Cable Comm.*, CL 92-8103 AI (Palm Beach County Cir. Ct., Feb. 16, 1994) (reported in *Cable TV Law Reporter*, Feb. 28 1994, p. 8). When the economic benefit to the MDU owner of breaking the incumbent's contract is sufficiently great, any plausible legal challenge to its enforceability can be expected.

Tortious interference with contract was but one of several common law bases on which an incumbent's right to remain on MDU premises was upheld in *Multi-Channel TV Cable Co. v.*

Charlottesville Quality Cable Corp., 22 F.3d 546 (4th Cir. 1994). In that case, the district court had granted a preliminary injunction allowing the incumbent provider to remain on the premises, finding it likely to succeed on its claims of tortious interference with contract, conversion, and conspiracy, in addition to finding the incumbent likely to succeed on its claim for access under the state landlord-tenant act. The court recognized that "the MDU owners 'gave [the incumbent] a business expectancy with those tenants for the duration of the tenants' leases at the respective MDUs." *Multi-Channel TV Cable*, 22 F.3d at 550 (quoting district court).

The court of appeals affirmed on grounds that the SMATV operator's use of the incumbent's wiring created a strong likelihood of success on the incumbent's claim, under Virginia state law, of conversion. *Multi-Channel TV Cable Co.,* 22 F.3d at 553. In related litigation, the same court later affirmed the trial court's determination that the incumbent operator had enforceable rights to remain on the premises under state-law theories of conversion, interference with contractual relations, and conspiracy, in addition to the state access to premises statute. *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113, 1122, 1125 (4th Cir. 1995).

Given the broad range of potential factual scenarios, MDU owners and alternative providers have sometimes succeeded in proving through litigation that the incumbent has no enforceable right to remain on the premises under a contract, conversion, or other common law theory. For example, in *Community Cablevision Co. v. Oilton, Ltd*, No. CV 95-1487-L (W.D. Okla., April 1, 1996) (reported in *Cable TV Law Reporter*, April 30, 1996 at p. 12), the district court denied the incumbent operator's request for a preliminary injunction to remain in an apartment building, concluding that the incumbent had not established a substantial likelihood of success on the merits of its conversion, tortious interference with contract, and federal Cable Act claims. And in *American Cablecom L.P. v. Oxford Associates*, 758 F. Supp. 1052 (E.D. Pa. 1991), the court denied the incumbent's request for a

temporary restraining order, despite the incumbent's presentation of a contract to serve the property for another three years. The point is that neither the incumbent cable operators nor the MDU owners are always the winners in state common law disputes, that the issues in such disputes are diverse and complex, and that the outcomes vary from state to state and from case to case.

2. Easement Rights.

Cable operators often have independent written *easements* that grant a right of access to MDUs, wholly apart from their service agreements. In a building where the owner elects a new service provider, the cable operator may retain an easement that allows it to maintain wire and facilities on the premises, presumably with the hope that the operator will one day re-obtain the right to serve residents of the building.

The easements operators have obtained are extremely varied, and cannot be subject to any broad generalizations as to their enforceability. They are interests in real property. For example, one easement recently obtained by a major MSO in a metropolitan area is included in a service agreement, and reads as follows:

> Easement. Operator shall have the right, during the term hereof, to maintain, upgrade and expand the System owned by Operator, without interference from Owner, for the purpose of maximizing the number of Subscribers. Said maintenance, upgrade and expansion shall be completed at reasonable times as mutually agreed by Owner and Operator. Any expansion or upgrade of the System by Operator shall not, without Owner's prior written consent, occupy a greater amount of space on the Premises than is initially granted by Owner hereunder. If, during the term hereof, any additional space requested and used exclusively by Operator is deemed commercially rentable space, then Owner may charge and collect a commercially reasonable monthly rent for Operator's use of such space.

Another generic easement negotiated by a different MSO was created as an attachment to a service agreement, and was designed to be recorded separately in the land records. That easement provided in part:

> Owner grants to the Company a non-exclusive easement and free access of ingress and egress over, in, across, and under the Premises for use and benefit of the Company ... for the purpose of construction, installation, operation, maintenance, ... repair or removal and reasonably associated activity of all equipment, facilities or

> apparatus necessary to provide multi-channel programming and any other services the Company may lawfully provide to the Premises . . .

And a third major MSO has been successful in obtaining stand-alone easements that provide:

> an easement and right-of-way to install, construct, operate, maintain, repair, replace and remove such cable television cables, lines and other ancillary equipment and facilities as Grantee [Cable Operator] deems necessary or convenient for the provision of cable communications and other television services to occupants of the [Premises] . . .

Each of these agreements could permit an incumbent to maintain both a physical presence in an MDU when it has no clear right to provide service and to maintain ownership of wiring it has installed under such an easement. In some cases, there may be oral understandings that will amplify or clarify what the parties intend, and behavior of the parties may also provide evidence of intent.

Thus, the variations in the easements are great. And the meaning of the language, in any given situation, could be subject to a wide range of interpretations by the parties to the agreements and any courts that might be called upon to interpret them. This is the stuff of court-made state property determinations, which are beyond the expertise and purview of the Commission.

C. The Rules Should Provide for State Court Resolution of Disputes Over the Right To Remain on the Premises.

In order to determine whether or not the rules apply when the cable operator's right to remain on the premises is in dispute -- and to ensure that the existing property rights of the parties are not preempted or altered by the Commission's procedural rules -- there must be some procedure for obtaining a judicial determination from a state court with competent jurisdiction to adjudicate such matters. The best way is to provide a fourth option for cable operators that have received notification of termination under the proposed rules.

Instead of notifying the MDU owner of its intent to remove, abandon or sell the wiring, a cable operator that believed that it had an enforceable right to remain on the premises would be required to notify the MDU owner of its intention to initiate a state court proceeding within 30

days to confirm its belief. If such a proceeding is, in fact, initiated during that time period, all further procedures and requirements under the proposed rules would be stayed until the judicial proceeding is terminated. Only by adding this option would the Commission provide MDU owners and alternative providers with the "order and certainty" that is the *raison d'être* of the proposed rules without disturbing existing legal rights.

D. There Is No Basis for the Adoption of a Presumption Regarding the Right To Remain on the Premises.

There is, in any event, no need or justification for the Commission to establish any *presumptions* regarding any such legal rights that may be in dispute. And there is especially no basis for presuming, as the Commission proposes, "that the incumbent does *not* possess an enforceable legal right to maintain its home wiring on the premises ... unless the incumbent can adduce a clear contractual or statutory right to remain."[24] First, in light of the variety and complexity of the contractual, statutory and common law issues that arise in the states with respect to such rights, the Commission has no basis in fact for establishing any presumption at all as to whether or not a cable operator is likely to have an enforceable right to remain on the premises. And, as illustrated above, the cable operator *does* have such an enforceable right in some cases, while in others a presumption means nothing in light of the fact-specific outcomes.

Second, establishing a presumption that is rebuttable upon a showing of "a clear contractual or statutory right" would require the Commission to review and adjudicate matters wholly outside its area of expertise. It is not clear how this rebuttal would apply prior to a legal ruling from a court of competent jurisdiction. If the presumption and/or any determination by the Commission as to whether the presumption had been rebutted were to affect any subsequent

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[24] *Id.*, ¶ 34 (emphasis added).

judicial adjudications of parties' rights or were to result in the transfer of control of inside wiring before any subsequent judicial adjudications were completed, the presumption would have the effect of altering and disturbing the existing rights of the parties -- which is precisely what the Commission has determined it should not do. If, on the other hand, the Commission's presumption had no ultimate effect on the legal rights of the parties -- if, for example, a cable operator could subsequently seek a judicial determination that it had a legal right to remain on the premises even after committing, under the proposed rules, to remove or abandon the wiring -- then the presumption would do nothing to promote the rules' objective of clarifying any uncertainty regarding the disposition of wiring before service is terminated.

In short, there is no reason for the Commission to inject itself into the determination of the substantive contractual, statutory and common law rights of the parties by establishing any sort of presumption. At best, such a presumption -- and Commission proceedings to determine whether the presumption has been overcome -- will simply delay final adjudication by a state court of the parties' rights and prolong uncertainty regarding those rights. At worst, it will inappropriately and irreparably affect the rights of cable operators by forcing them either to incur the costs of removing their wiring or to abandon such wiring *as if* they had no enforceable rights to remain on the premises before their rights have been fully and impartially adjudicated by a state court.

III. IF A CABLE OPERATOR OFFERS TO SELL HOME RUN WIRING TO THE MDU OWNER AT A REASONABLE PRICE AND THE OFFER IS DECLINED, NO FURTHER ELECTION SHOULD BE REQUIRED.

The proposed rules would require cable operators that have no enforceable legal right to remain on an MDU's premises after termination to elect one of three options regarding the disposition of home run wiring outside individual subscribers' premises and to notify the MDU

owner of the option that it has elected. Specifically, the operator may choose to remove the wiring, abandon the wiring, or sell the wiring. Unlike the first two options, the alternative of selling the wiring cannot, of course, be implemented unilaterally by the operator. Either the MDU owner or an alternative provider must also be willing -- or required -- to buy.

The Commission's proposal, however, removes any incentive on the part of MDU owners and alternative providers to accept an operator's offer to sell, even if the proposed terms and conditions are wholly reasonable. If, under the proposed rules, the operator and the MDU owner are unable to agree on a price within 30 days of the incumbent operator's election to sell the wiring, "the incumbent would be required to elect one of the other two options (i.e., abandonment or removal) and notify the MDU owner at the time of this election if and when it intends to terminate service before the end of the 90-day notice period."[25] If, after the parties have failed to agree on a price, the incumbent elects to abandon the wiring, the MDU owner will be able to use it free of charge. And if the incumbent elects to remove the wiring, the MDU owner will presumably still be able to offer to buy the wiring at that time, after it has forced the operator to commit to removing the wiring rather than abandoning it.

If MDU owners are afforded the opportunity to forestall negotiations until after they know whether an incumbent operator is committed to remove or abandon the wiring, their bargaining leverage will be unfairly enhanced and the outcome will not reflect "market forces."[26] Once an operator makes clear that it is willing to sell its wiring at a reasonable price rather than remove the wiring, the purposes of the proposed rules will have been fully served. MDU owners

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25 *Id.*, ¶ 38.

26 *See* Further Notice, ¶ 37.