

and alternative providers will have a reasonable opportunity to use the installed wiring, and they will know that such an opportunity exists well in advance of the announced termination date. No further legitimate purpose is served by giving MDU owners the leverage and incentive to refuse to agree on a reasonable price until they have forced the operator to choose between simply giving up the wiring at no charge or removing it at considerable cost.

Therefore, if an incumbent operator, in response to a notice of termination from an MDU owner, elects to sell its wiring and offers to sell at a reasonable price, it should have no further obligations under the rules. In other words, if the incumbent operator offers to sell at a reasonable price and the MDU owner declines the offer, the operator would *not* be required to make any further election between removing or abandoning the wiring. The MDU owner will, in such circumstances, be on notice that it can acquire and use the existing wiring if it is willing to pay for it. That should be sufficient to remove the cloud of uncertainty that, according to the Commission, has the effect of discouraging MDU owners from dealing with alternative providers.

This approach requires that there be some means of determining whether the cable operator has offered to sell at a “reasonable price.” One option is simply to establish a default price, or a range of default prices, that are determined to reflect marketplace value. Alternatively, once an operator elects to offer to sell the wiring, that election should terminate its obligations under the rules unless the MDU owner demonstrates that the operator has failed to negotiate in good faith.

Allowing good faith negotiations to toll the artificial time constraints of the proposed rules will promote a genuine negotiation process that is more likely to result in a sale price that reflects the marketplace value of the wiring in each particular case. Such a process might

quickly establish meaningful precedents for future negotiations. The compressed time frame that would be established by the proposed rules would, in contrast, produce no meaningful back-and-forth negotiating. It would produce arbitrary results (if it produced any results at all) that would be of little precedential value in subsequent negotiations.

IV. THE COMMISSION SHOULD NOT PERMIT ALTERNATIVE PROVIDERS TO USE MOLDINGS OR CONDUITS WHERE THEY WOULD OTHERWISE BE PRECLUDED BY LAW FROM DOING SO.

The Commission has proposed, as an alternative to the principal proposed procedural framework discussed above, to permit an alternative service provider “to install its wiring within the existing molding or conduit, even over the incumbent provider’s objection, where there is room in the molding or conduit and the MDU owner does not object.”²⁷ In addition, the Commission asks for comment “on whether and how this rule would apply in the situation where an incumbent provider has an exclusive contractual right to occupy the molding or conduit.”²⁸

This alternative shares one of the fundamental flaws of the principal proposed approach -- which is that the Commission has no authority under Section 624(i), Section 4(i) or any other provision of the Communications Act to impose it. Moreover, while the principal approach embodies a firm commitment not to disturb existing property rights, the proposed alternative consists in its entirety of an abrogation of existing property rights, thereby raising serious *constitutional* problems.

The Commission asks “*whether* and how to allow for compensation for the alternative service provider’s use of the molding or conduit”²⁹ -- as if there were some doubt that forcing

²⁷ *Id.*, ¶ 83.

²⁸ *Id.*

²⁹ *Id.* (emphasis added).

cable operators to allow a permanent physical occupation of their moldings and conduits would constitute a taking of property. Not only would such a requirement constitute a taking under the Fifth Amendment, *see, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), but it would be a taking that could not be made constitutionally permissible merely by providing “just compensation.” This is because, wholly apart from matters of compensation, the Commission may not impose a taking unless it is “expressly” authorized by Congress.³⁰ This, no doubt, is one reason why the Commission correctly determined that it could not apply its principal proposed procedural requirements where the incumbent cable operator had an enforceable right to remain on the premises. And it is a compelling reason why the Commission may not grant alternative providers the right to occupy the moldings and conduits of incumbent cable operators against their will. The right of alternative providers to occupy such moldings and conduits should remain a matter of contract and property law.

V. THE COMMISSION SHOULD NOT DICTATE THE TERMS TO BE ADOPTED IN FUTURE CONTRACTS REGARDING THE DISPOSITION OF HOME RUN WIRING.

The Commission asks, again as an alternative to its proposed procedures, whether it should adopt a rule requiring operators to transfer the ownership of any MDU home wiring and home run wiring that they may install after the effective date of the proposed rules to MDU owners upon such installation. There is no basis for interfering with marketplace negotiations in such a manner -- and the Commission, in any event, is wholly without authority to do so. This proposal contains all the jurisdictional flaws of the proposals discussed above -- and then some.

³⁰ *See Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1446-47 (D.C. Cir. 1994).

Like the principal proposed framework, it addresses the disposition of MDU wiring outside individual dwelling units, in direct contravention of what Congress intended. Like the proposal to require incumbent operators to grant alternative providers access to moldings and conduits, it imposes a taking of property rights in a manner that is not expressly authorized -- and, indeed, is explicitly not intended -- by Congress. And, in addition, while the Commission's mandate under Section 624(i) is limited to rules regarding the disposition of wiring within individual subscribers' premises "after a subscriber ... terminates service," this proposal is aimed at the disposition of wiring at the time that the cable operator *initiates* service.

If MDU owners want to own and control the wiring used by cable operators and other MVPDs in their buildings, nothing prevents them from negotiating to purchase the wiring upon installation or from negotiating an option to purchase the wiring at some future date. There is no reason to interfere with the negotiating process by forcing operators to sell the wiring in all circumstances at a price that is mandated by the Commission rather than by the marketplace.

CONCLUSION

For the foregoing reasons, the Commission is wholly without authority to adopt the rules proposed in the Further Notice. Even if the Commission had authority to adopt such rules, they would not be effective in meeting the Commission's objective -- and in preserving existing property rights -- unless they included provisions that (1) established procedures for determining whether an incumbent cable operator has an enforceable right to remain on the premises before the operator is required to comply with the proposed procedural requirements, and (2) provided that an incumbent operator that offered to sell its home run wiring to the MDU owner at a reasonable price would have no further obligations, whether or not the MDU owner accepted the offer. If the Commission adopts its proposed rules, it should include these provisions and should confirm that the rules are not intended to apply in a manner that disturbs existing property rights.

Respectfully submitted,



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