BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
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Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
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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 TIME WARNER CABLE

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COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby respectfully submits these comments in response to the above captioned Further Notice of Proposed Rulemaking released by the Federal Communications Commission ("Commission") on August 28, 1997.[1] Time Warner, through various subsidiaries and affiliates, operates cable television systems across the nation. Another Time Warner affiliate, Time Warner Communications Holdings, Inc., provides telephone and other telecommunications and information services in various communities.

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[1]Telecommunications Service Inside Wiring, Customer Premises Equipment, Further Notice of Proposed Rulemaking, CS Docket No. 95-184 (rel. August 28, 1997) ("Further Notice").

As such, Time Warner is directly interested in the proposals set forth in the Commission's Further Notice as they might affect both cable television and telecommunications operations.

I. Introduction And Summary.

The Further Notice proposes to adopt procedures suggested by the Independent Cable and Telecommunications Association ("ICTA") to govern the disposition of "home run"[2] wiring in multiple dwelling unit ("MDU") buildings at such time as the incumbent multichannel video programming distributor ("MVPD") no longer has a legally enforceable right to offer service to the residents of the MDU or retain its home runs in the MDU against the wishes of the MDU owner (the "ICTA proposal").[3] The Further Notice seeks to adopt rules that "more effectively promote competition and consumer choice."[4] Moreover, the Further Notice acknowledges the Congressional goal embodied in Section 624(i) of the Communications Act of 1934 (the "Act")[5] to avoid the "disruption of having the wiring

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[2]The procedures proposed in the Further Notice are limited to "home run" wiring in MDUs, i.e., broadband wiring running from the multitap or lockbox that feeds video signals to an individual unit at the MDU point of demarcation as currently defined in the Commission's rules. Further Notice at ¶ 7. Expressly excluded from any proposals being considered in the Further Notice are MDUs wired on a loop-through basis (id.), or distribution wiring that feeds signals to more than one MDU unit (id. at n.101). Moreover, the Commission has correctly determined that, in order to protect against theft of service and to prevent signal leakage, the incumbent MVPD is entitled to maintain its risers and lockboxes at an MDU even after its right to offer service to residents of that MDU may have expired. Id. at ¶¶ 38, 64.

[3]Id. at ¶ 2.

[4]Id.; see also id. at ¶¶ 25, 32.

[5]47 U.S.C. § 544(i) (also referred to herein as the "home wiring provision").

removed."[6] The Further Notice also seeks to clarify the uncertainty regarding disposition of wiring installed in MDUs after the incumbent MVPD's right to offer service has expired.[7]

As it stands, adoption of the ICTA proposal will do nothing to enhance "consumer choice" for MDU residents, or promote the availability of multiple competing video providers in MDUs. As the Commission correctly recognizes in the Further Notice, it is the reluctance of MDU owners to open their buildings to meaningful two wire competition that is the real barrier to enhanced consumer choice. Despite this explicit recognition, the proposed rules fail to address the overwhelming incentives of landlords to restrict video service provider access to their buildings, favoring those alternative providers who pay the most for access. The proposed rules likely will only exacerbate the tendency of MDU owners to act in their own economic interest, instead of the best interest of their residents, when making video service provider decisions for their buildings.

Incongruously, while recognizing that only unit-by-unit competition in MDUs leads to expanded consumer choice, the proposal in the Further Notice creates no incentives for MDU owners to allow unit-by-unit competition as opposed to building-by-building switchovers, which merely result in one broadband MVPD replacing another. To remedy this fundamental flaw, Time Warner proposes that any MDU home run disposition procedures adopted by the Commission apply only where the MDU owner agrees to allow unit-by-unit competition. Moreover, to ensure that decisions regarding which MVPDs should be allowed to offer services to MDU residents are based on the best interests of MDU

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[6] Further Notice at ¶ 5.

[7] Id. at ¶¶ 32, 33.

residents, rather than the economic interests of MDU owners, any procedures adopted by the Commission should apply only where the MDU owner receives no excess consideration from the affected MVPD, above and beyond the just compensation for allowing broadband wiring to occupy the MDU property.

Adoption of the ICTA proposal would also run directly contrary to the express Congressional goal of avoiding the disruption that results from removal of MDU wiring. Despite this clear mandate, the Commission is proposing a procedure that will inevitably lead to removal of broadband distribution facilities from MDUs when the parties are unable to agree on a fair sale or lease price, which would preclude residents even from receiving additional non-video services offered by the owners of that wiring. Such a result is contrary to the longstanding public interest goals of promoting video competition and encouraging video service providers to extend overlapping broadband networks, not tear them out. To remedy this problem, Time Warner proposes a procedure whereby the MDU owner, rather than the MVPD, would be required to elect whether to purchase the home runs, and a procedure to establish a fair price absent agreement among the parties. Of course, the MDU owner could always choose to allow the incumbent provider to leave its facilities on the premises for possible future use, which would be consistent with Congressional goals of promoting competition and avoiding the senseless and wasteful destruction of broadband distribution infrastructure. If the MDU owner truly desires the removal of such facilities, the MDU owner should be responsible for the costs of such destruction.

The Further Notice also seeks to avoid the "uncertainty" that allegedly exists currently with respect to the ownership and disposition of MDU home run wiring when the incumbent MVPD's right to serve the building has expired. Rather than construct an elaborate regulatory regime to address this issue, Time Warner suggests that certainty could much more efficiently be achieved through private contractual negotiations among the affected parties.

Furthermore, there is no jurisdictional basis for adoption of the ICTA proposal. The Commission assertions in the Further Notice that Sections 4(i) and 303(r) of the Communications Act provide a jurisdictional basis for the ICTA proposal have no support in law or precedent. Promulgation of any such rules would exceed the Commission's powers. The statutory language of Section 624(i) of the Act is clear in restricting the Commission's authority in this regard, and Sections 4(i) and 303(r) do not give the Commission the right or authority to ignore Congress' specific direction. In addition, the ICTA proposal is in violation of the takings clause of the Fifth Amendment to the Constitution, and the Commission has an obligation to avoid adopting rules that potentially infringe on Constitutional rights.

Should the Commission proceed to adopt procedures affecting disposition of MDU home run wiring in spite of its lack of jurisdiction and the failure of the ICTA proposal to advance the Commission's stated goals, Time Warner proposes certain refinements and clarifications. First, the Commission should confirm that any rules adopted by the Commission would not apply to, or preempt, any contractual arrangements among the parties. Only in this way can the Commission fulfill its commitment not to "create or destroy any property rights."[8]

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[8] Id. at ¶ 32.

Similarly, the Commission should reiterate that any home run disposition rules would apply only where the incumbent MVPD has no continuing contractual or legal right to provide service to residents of the MDU or retain facilities in the MDU. Thus, the Commission should emphasize that MDU owners have no right to unilaterally terminate an incumbent's right to continue providing service pursuant to a contract or local law, particularly given their strong incentives for doing so. Moreover, any home run disposition procedures would never apply in mandatory access states, because cable operators *per se* have a right to maintain home run wiring in the building "against the will of the MDU owner."[9] Again, this approach is entirely consistent with the Commission's covenant not to "preempt an incumbent's ability to rely upon any rights it may have under state law."[10] In this same vein, in any case where the incumbent's continued right either to serve the property or retain its facilities on the property is disputed, the procedures and deadlines proposed by the Commission must be tolled pending a final resolution of such dispute.

Time Warner urges the Commission not to establish a "default" price for MDU home run wiring, which will simply become the *de facto* ceiling limiting how much an MDU owner would ever agree to pay. Rather, Time Warner proposes a conceptual framework for determination of the fair market value of MDU home run wiring. Time Warner also suggests that neither the MDU owner nor new competing MVPD should be allowed to act as the "agent" for the MDU resident in discontinuing MVPD service, unless the incumbent expressly agrees to such an arrangement. Such unauthorized agency will only lead to an

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[9] Id. at ¶ 34.

[10] Id.

increase in the already prevalent practice of video "slamming." Finally, Time Warner suggests reasonable regulations to facilitate sharing of excess capacity in hallway moldings or internal conduit.

II. The ICTA Proposal Fails To Promote Consumer Choice Or To Avoid Disruption From Removal Of Wiring.

In the Further Notice, the Commission proposes to establish new procedural mechanisms to be used for the disposition of MDU home run wiring in buildings where an incumbent provider's rights to continue to serve residents in the building have expired. Such rules will fortify the power of MDU owners to make the important decision for their residents as to whether to facilitate choice among multiple providers of multichannel video programming service (and potentially other services), or whether to only allow a single wire-based broadband distribution facility. In exercising such power, the Commission would be entrusting MDU owners to make the video services decisions that are in the best interests of their residents.

The assumption underlying such a policy -- that MDU owners will exercise that power judiciously -- is contrary to the evidence in this proceeding. As shown by the great weight of submissions in this docket, MDU owners repeatedly demonstrate a lack of concern for the best interests of their residents in making video service decisions. As it is more often the case that an MDU owner only considers its own economic interests, the ICTA proposal is inadequate in protecting MDU residents' best interests, because it fails to respond to, and likely will only further encourage, MDU owners' inclination to restrict access to a single broadband distribution facility. Any policy that ignores or encourages such behavior is directly contrary to the Commission's stated goal of enhancing competition and consumer choice, is contrary to the public interest, and must be significantly refined or else rejected.

A. The ICTA Proposal Fails To Address The Real Problem -- The Bottleneck Power Of MDU Owners To Deny Multiwire Competition.

Both in the original comments and reply comments in this docket, and also through numerous *ex parte* presentations, parties have repeatedly acknowledged that it is the ability of MDU owners to restrict access to their buildings that ultimately frustrates multiple MVPDs from constructing broadband distribution facilities in MDUs.[11] Experience has demonstrated that, because of their ability to restrict access, MDU owners have little, if any, incentive to see the benefits of video service competition conferred upon the residents of their buildings. Because MDU owners have the power to exclude (at least absent a mandatory access requirement),[12] and because exercise of this power reaps such enormous economic benefits, MDU owners almost always choose to deny their residents access to alternative sources of video programming. By limiting access to a single broadband distribution facility, an MDU owner is able to extract substantial compensation in exchange for granting such access.[13]

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[11]Significantly, the documentation submitted by Time Warner and others in this record of growing multiwire competition in MDUs demonstrates that there is no physical limitation restricting such access, only the economic incentive of MDU owners to auction exclusive access to the highest bidder. See id. at ¶ 27.

[12]In a mandatory access state, however, where the MDU owner is essentially precluded from auctioning exclusive access, the fact that alternate MVPDs offer consideration to the MDU owner creates an incentive for the MDU owner to allow multiwire competition. See id. at n.75.

[13]While some providers, such as franchised cable operators, are often prevented by operation of law from offering such consideration to landlords, it is standard practice for non-franchised video service providers such as Satellite Master Antenna Television (SMATV) operators to enter into such long-term exclusive contracts with an MDU owner in exchange for providing the MDU owner a cut of the revenues derived from MDU resident subscribers.

Indeed, as recognized in the original round of comments, the real inhibition to consumer choice for MDU residents results from MDU owners' ability to act as "broadband services gatekeepers," using their "authority to grant or deny service providers access to potential subscribers residing in MDUs based upon considerations that may be wholly unrelated to the range and quality of services offered by providers" and most commonly based solely upon "their own pecuniary interests."[14] Furthermore, as recognized in a recent *ex parte* communication in this docket, MDU owners "rarely award exclusive contracts based upon paternalistic notions of consumer welfare, but rather are most often influenced by the MVPD willing to pay the largest kickback in return for the exclusive contract."[15] Factors that are in the best interest of MDU residents, such as video service providers' technical proficiency, diversity of programming, innovativeness, service quality, service price or customer service, are simply subordinated, and often dismissed entirely, from the MDU owners' decision making.

In the Further Notice, the Commission assumes incorrectly that landlords' primary concern in making video service decisions is their residents' well-being, and that they will therefore select between the building-by-building and unit-by-unit approaches based on the best interests of their residents. While acknowledging that MDU owners have substantial powers to elevate their own economic interests over the well-being of MDU residents, the

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[14]Comments of Cablevision, Inc. and Cablevision Systems, Corp. in response to Telecommunications Services Inside Wiring, Customer Premises Equipment, Notice of Proposed Rulemaking, CS Docket 95-184 (rel. Jan. 26, 1996), at 22.

[15]See *ex parte* Letter from Thomas O. Might, Cable One, Inc. to William F. Caton, Acting Secretary, Federal Communications Commission, dated July 1, 1997, at 2.

Further Notice nevertheless tentatively concludes "that where the real estate market is competitive it will discourage MDU owners from ignoring their residents' interests."[16] In support of this assertion, the Commission cites to the Comments of the Building Owners and Managers Association, the MDU owners' trade group. Aside from the obvious problems in relying on such self-serving statements, the Commission cannot point to any reliable evidence that the real estate market is responsive, even in the slightest degree, to the video service interests of residents. Indeed, any such assumption is flawed in that it fails to overcome the overwhelming incentive for an MDU owner to choose to restrict access to its building in the hope of extracting further compensation from the MVPD and/or the residents, the option that is least in the interest of its residents.[17]

The Further Notice itself recognizes that it is the unwillingness of MDU owners to allow multiple video service providers access to their buildings that frustrates "the ability of subscribers who live in MDUs to choose among competing service providers."[18] Indeed, the Commission has expressly recognized the "substantial" harm to MDU residents caused by the gatekeeper behavior of MDU owners.

> We believe that property owners' resistance to the installation of multiple sets of home run wiring in their buildings may deny MDU residents the ability to choose among competing service providers, thereby contravening the purposes

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[16]Further Notice at ¶ 47.

[17]This is particularly true in rent controlled situations such as New York City where long waiting lists exist for rental housing, and MDU owners often have an incentive to drive out longstanding tenants so that rents can be inflated for new residents.

[18]Further Notice at ¶ 25.

of the Communications Act, and particularly Section 624(i), which was intended to promote consumer choice and competition. . . .[19]

* * *

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.[20]

The Commission attributes the source of MDU owners' reluctance to open their buildings to more than one provider purely to benevolent and aesthetic concerns, ignoring the strong economic benefits MDU owners enjoy for limiting access.[21] Such blindness to the real motives underlying MDU owner restriction of MVPD access to MDU buildings taints the entire proposal put forth in the Further Notice.

The Commission's Further Notice disingenuously attempts to lay the blame for the lack of choice available to MDU residents at the feet of the franchised cable operators,

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[19]Id. at ¶ 26.

[20]Id. at ¶ 25.

[21]Id. at ¶ 25. In the Further Notice, the Commission notes the arguments put forth by the SMATV industry that two wire competition in many buildings is impractical, citing an alleged reluctance on the part of "a large majority of property owners [who] refuse to allow a second set of cable wires in their buildings due to the risk of property damage, space limitations, and aesthetic concerns." Further Notice at ¶ 11. Such arguments are disingenuous and are against the great weight of evidence in this docket. The Commission itself recognizes that in many markets, there are scores of buildings where two-wire competition is a reality. Further Notice at ¶¶ 27-28. Indeed, as of August 1997, within Time Warner's Manhattan franchises, over 247 MDU buildings now allow at least two video providers into their buildings, and residents in over 73,000 units within those buildings now enjoy the benefits of choice among broadband providers. Furthermore, contrary to the Commission's assertion that the rate at which MDU buildings are switching to allowing two-wire competition is slowing in Manhattan, Time Warner notes that the August 1997 figures demonstrate that this is not in fact the case. Indeed, in just the first eight months of 1997, over 104 buildings in Manhattan have opted to open their buildings to competition and provide their residents the benefits of competitive choice.

implying that, because they often are incumbent video service providers, cable operators are the real gatekeepers in MDUs.[22] There is no doubt that in many cases, franchised cable operators such as Time Warner are the incumbent provider in particular buildings. However, the Commission can point to no evidence that the cable operator, as opposed to the MDU owner, is the real gatekeeper.

While there are some instances where a franchised cable operator, like many other non-franchised video service providers, may have an existing, enforceable right to serve a building exclusively, this right ultimately stems from the MDU owner's power to restrict access to the building, not the cable operator's control over its own wiring. In such instances, cable operators have bargained for such exclusivity, which has been conferred upon them by MDU owners. Ultimately, the decision to allow exclusive access to a single MVPD, whether franchised cable operator or alternative provider, rests with the MDU owner (at least outside mandatory access states). Thus, it is always within the MDU owner's power to allow multiwire competition.

The ICTA proposal utterly fails to address the real barrier to multiwire competition in MDUs -- the bottleneck power of MDU owners to deny access. As the Further Notice recognizes, multiwire competition in MDUs flourishes in mandatory access states.[23] At a very minimum, as Time Warner suggests in Section III.B. of these Comments, the

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[22]Id. at ¶ 24.

[23]Id. at ¶ 29. Thus, the Commission may wish to urge Congress to adopt a nationwide mandatory access law.

Commission's rules should create incentives for MDU owners to allow multiwire competition in their buildings.

B. The ICTA Proposal Encourages Incumbent Providers To Remove Existing Broadband Distribution Facilities.

Besides undermining MDU residents' ability to choose among multiple competing video providers, the Commission's proposal is contrary to the articulated public interest goal of increasing the nationwide deployment of broadband wiring. Indeed, contrary to explicit Congressional direction to promote the wide deployment of competing telecommunications facilities, implementation of the proposed rules will instead lead to wasteful and uneconomic removal of existing MDU wiring, further limiting consumers' choices when it comes to video programming and other broadband services.[24]

1. Removal Of MDU Home Run Wiring Is Likely To Occur Under The ICTA Proposal.

Removal of MDU home run wiring will likely occur if the ICTA proposal is adopted because there is little likelihood that an MDU owner and the incumbent MVPD will ever come to an agreement as to the valuation of home wiring upon expiration of the MVPD's right to serve the MDU building. This is likely because an MDU owner will have little incentive to purchase the departing provider's wiring at a fair price, and the exiled provider, in response, will be left with no option but to remove its home run wiring altogether.

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[24]Acknowledging that it is a Congressionally stated goal of which it must be aware in adopting rules in this proceeding, the Commission claims that the proposal set forth in the Further Notice would promote the development of telecommunications facilities. However, the Commission entirely fails to explain how rules that encourage either one provider to take over the wiring left behind by another (rather than construct their own facilities), or an incumbent provider to tear out existing wiring, come even remotely close to "accelerating" the deployment of advanced technologies. See id. at ¶ 61.

To explain, under the proposed rules, when an MDU owner elects a building-by-building switchover, an incumbent provider, faced with an election among sale, removal or abandonment, will typically choose to protect its property by electing to sell its wiring.[25] Instead of offering the provider a fair price, the MDU owner will likely stonewall negotiations and/or to refuse to purchase the wiring with the hope that the exiled provider will be forced simply to abandon the wiring, allowing the MDU owner to take over the wiring for nothing. Landlords will initially choose to engage in such behavior because, after removal, such wiring will have little value except as scrap, and the costs of such removal cannot be recouped.[26]

The exiled provider, on the other hand, likely anticipating such resistance from the MDU owner, or even after a few unharmonious experiences with building switchovers, or bad-faith price negotiations conducted with building owners under the new rules, will eventually choose to remove its wiring. While the landlord may have anticipated that the incumbent will have left its wiring behind, the incumbent provider cannot rationally allow a competitor to take over its wiring for free. Furthermore, such removals are bound to

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[25]The FCC must clarify what it means by "abandon without disabling." For example, the Further Notice recognizes that facilities such as amplifiers, taps, splitters, etc. are not part of the home run, and thus the incumbent should be free to remove such facilities even if it elects to abandon the home run. Id. at ¶ 7. Absent further clarification, this issue is likely to lead to innumerable disputes.

[26]To elaborate, under the proposed rules, where an exiled provider and the MDU owner are unable to agree upon a price for the wiring within the allotted time frame, the incumbent provider must select one of the other two options, remove the wiring or abandon the wiring altogether. The landlord, believing that the former provider will not expend the resources to actually remove the wiring, and knowing that it can make artificial claims about damage to the building during removal, will have the clear incentive to low-ball the price negotiations, hoping to reap a windfall as the wiring is abandoned.

become standard practice for departing providers, who will be reluctant to set a precedent that they will not defend their property from confiscation under pressure and gamesmanship by MDU owners. Such removal ultimately is not in the interests of the MDU owner, MDU residents, or the public's interest in encouraging access to more, not less, telecommunications infrastructure.

2. Congressional Policies Are Designed To Promote Telecommunications Infrastructure Deployment, Not Destruction Of Facilities.

Removal of home run wiring contradicts a longstanding public interest goal of increasing consumer access to multiple, overlapping broadband networks. Indeed, any policy that leads to removal of MDU wiring undermines explicit legislative direction pronounced by Congress. Such goals were enumerated in the Telecommunications Act of 1996[27] to promote facilities-based competition, and any rule that frustrates this goal must be rejected. Indeed, the Conference Report for the 1996 Act states, on the very first page, that the purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly <u>private sector deployment of advanced telecommunications and information technologies</u> and services to all Americans by opening all telecommunications markets to competition."[28] Congress expected that the 1996 Act would promote facilities-based competition in the video services industry by, for example, encouraging telephone companies to further build and develop their own broadband networks. As noted in the House Report:

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[27]Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[28]H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996) (emphasis added).

> Telephone company entry into the delivery of video services will encourage telephone companies to modernize their communications infrastructure. Specifically, the deployment of broadband networks would be accelerated if telephone companies were permitted to offer video programming. These networks would be capable of transmitting voice, data, and video to consumers. Without this incentive, telephone companies will build advanced networks more slowly. Moreover, telephone company entry into cable would encourage technological innovation.[29]

In discussing restrictions on in-region mergers of cable and telephone companies, Senator Thurmond stressed the need "to promote competition between the two wires -- cable and telephone -- that already run to the home, and avoid a single monopoly provider of both cable and telephone services, which would result in higher cable and telephone prices for customers."[30] Senator Kerry echoed the fundamental national policy in favor of facilities-based competition: "[A]nother particular provision of this legislation that says a local telephone company can buy a local cable company, we cannot allow that in the local area, because then you are only going to get one line to 75 percent of the homes."[31]

Two express provisions of the 1996 Act demonstrate that Congress was intent that all consumers reap the benefits of access to multiple broadband wires. First, the "Joint Use" provision of the 1996 Act expressly contradicts any suggestion that cable operators should be forced to relinquish ownership of home run wiring in MDUs. Section 652(d)(2) provides as follows:

> (2) JOINT USE -- Notwithstanding subsection (c), a local exchange carrier may obtain, with the concurrence of the cable operator on the rates, terms, and conditions, the use of that part

[29]H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 53 (1995).

[30]41 Cong. Rec. 872 (June 15, 1995).

[31]41 Cong. Rec. 798 (June 8, 1995).

> of the transmission facilities of a cable system extending from the last multi-user terminal to the premises of the end user, if such use is reasonably limited in scope and duration, as determined by the Commission.

In adopting this provision, Congress clearly intended for MDU home runs installed by the cable operator to remain under the control of the cable operator. The decision to allow a local exchange carrier to share the use of such home runs lies within the sole discretion of the cable operator, and even then any such permission that the cable operator may choose to grant must be "reasonably limited in scope and duration."

Moreover, by acknowledging that the facilities of the cable operator extend "to the premises of the end user," Congress has again reiterated its intent, as originally set forth in the 1992 Cable Act,[32] that the point of demarcation be located in close proximity to the actual customer's premises, i.e., the individual dwelling unit or office in an MDU building.[33] Finally, when Section 652(d)(2) was enacted, Congress was fully aware that several parties had urged the Commission to reconsider its decision in MM Docket No. 92-

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[32]Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

[33]Time Warner agrees that any procedural mechanisms adopted should apply with equal force regardless of the video service provider or providers involved, except with respect to Open Video Systems ("OVS"). An OVS operator is explicitly required to construct end-to-end facilities to the demarcation point of each and every subscriber residence facility or unit in an MDU -- within its service area. See Order on Reconsideration, Metropolitan Fiber Systems/New York, Inc. d/b/a MFS Telecom of New York, and Metropolitan Fiber Systems/McCourt, Inc., FCC 97-169 (rel. May 16, 1997). Indeed, Congress clearly intended that OVS operators become full-fledged, end-to-end, wireline overbuilders of franchised cable operators. See 1996 Act, at § 302(a), adding a new Section 653 to the Communications Act of 1934, 47 U.S.C. § 653. An OVS operator must, therefore, be required to construct its own complete distribution system within an MDU, including analogous portions of home run wiring connecting the OVS system's main MDU distribution riser and equipment to individual subscriber residences.

260, and move the point of demarcation to the point where the last multi-user terminal splits off to a cable extending to an individual subscriber. Adoption of Section 652(d)(2) was intended to firmly instruct the Commission to reject any such changes in the point of demarcation that would result in a relinquishment of control by the cable operator of distribution facilities located far outside the customer's dwelling unit.

Second, the anti-buyout provisions of the Telecommunications Act of 1996, contained in Section 302,[34] are designed to ensure that consumers are given at least two options to obtain services from competing wire-based, broadband facilities.[35] By forcing local exchange carriers to build their own broadband distribution networks if they want to compete with existing cable operators, the anti-buyout provisions ensure that consumers will truly enjoy a choice between at least two entirely separate competing broadband networks. If incumbent telephone companies desire to compete with cable operators for the delivery of broadband service, these provisions are designed to require construction of overlapping broadband distribution networks. By generally prohibiting buyouts of the incumbent cable

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[34] See 1996 Act, at § 302(a), adding a new Section 652 to the Communications Act of 1934, 47 U.S.C. § 652.

[35] These provisions add a new Section 652 to the existing Telecommunications Act. Under Section 652, no local exchange carrier may acquire more than a ten percent financial interest or any management interest in any cable operator providing cable service within the carrier's telephone service area. Similarly, no cable operator or affiliate may acquire more than a ten percent interest or any management interest in any local exchange carrier that provides telephone exchange service within the cable operator's franchise area. A local exchange carrier and cable operator in the same market may not enter into a joint venture or partnership to provide video programming directly to subscribers or to provide telecommunications services within that market. Joint ventures and partnerships for other purposes, including the construction of joint facilities to provide such services separately, are not barred.

operator by the local telephone company, Congress has emphatically proclaimed its preference for facilities-based competition.

Encouraging the deployment of broadband facilities is a goal that predates the 1996 Act. Section 2(b) of the 1992 Cable Act proclaims that a Congressional goal was to "ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems."[36] In the 1984 Cable Act, a stated Congressional goal was to "establish . . . standards which encourage the growth and development of cable systems. . . ."[37] The Commission itself has promoted facilities-based video competition. In the Video Dialtone Orders, the Commission recognized the benefits of facilities-based competition in requiring telcos to build their own broadband networks to enter the video delivery business. To paraphrase, the Commission recognized that facilities-based competition resulting from multiple overlapping broadband networks built by competing MVPDs (1) constrains rates; (2) creates incentives to develop infrastructure and new services; (3) results in increased channel capacity; (4) promotes new programming options; and (5) facilitates development of competing local exchange telephone networks.[38]

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[36]1992 Cable Act, at § 2(b).

[37]Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2779, § 601(2) (1984) ("1984 Cable Act").

[38]See In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, ¶ 110 (1992); In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58 and Amendments of Parts 32, 36, 61, 64 and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, ¶ 49 (1994).

Commission policy should not now break with longstanding public policy to encourage the buildout, rather than the tear out, of broadband facilities.

That the promotion of multiwire, facilities-based video service competition has been a consistent public policy goal could not be more evident, and this longstanding principle should apply with no less force in the MDU context. Accordingly, the Commission, in implementing Congress' express intent to promote facilities-based competition, and to promote the construction of multiple broadband infrastructures, must not adopt the regulatory scheme proposed in the Further Notice, which would deny MDU residents the benefits of such policies. The Further Notice's proposal, which does not require competing providers to build their own broadband networks and infrastructures if they wish to compete, but instead encourages incumbent providers to remove their wiring and equipment, simply does not accomplish Congressional objectives, and therefore must be rejected.

C. Rather Than Adopt Complex Regulations, Disposition Of MDU Home Run Wiring Is Best Left To Private Negotiations.

The Further Notice asks "whether we should adopt a rule requiring video service providers to transfer to the MDU owner upon installation ownership of the home wiring and home run wiring installed in MDUs under contracts entered into on or after the effective date of any rules we may adopt."[39] Such a result would only enhance the bottleneck leverage of landlords who would have no incentive to pay fair market value for wiring if they know they can claim ownership immediately upon installation even if they refuse to pay. Moreover, MVPDs would have little incentive to install facilities with no guarantee of compensation.

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[39] Further Notice at ¶ 85.

The Commission should leave resolution of such issues to private negotiations. At most, FCC should require all future contracts to expressly address disposition of the home runs upon expiration of the contract, thereby ultimately phasing out the need for regulatory involvement.

The Commission claims that it is MDU owners who are the weaker party in video service negotiations, that they are often confused as to their legal rights, and are often held hostage to the anti-competitive activities of franchised cable operators attempting to protect their property.[40] To the contrary, MDU owners are sufficiently sophisticated when it comes to understanding their property rights and choosing video service options, and there is no basis for the supposition that MDU owners are somehow deterred from authorizing second providers because they are "confused" by the legal status of the wiring in their buildings. There is also no basis for the notion that cable operators are inherently more litigious than MDU owners. The status of the wiring depends upon the language of the contracts negotiated and entered into by the MDU owners and the service providers and upon state and common law, and MDU owners are as capable as cable operators of ascertaining and protecting their rights in entering into service agreements.

If the Commission is truly committed to certainty when it comes to the disposition of MDU home run wiring, then it should simply require that all future video service contracts between MDU owners and MVPDs contain provisions that clearly address ownership and disposition of wiring upon termination of the contract. This simple step would eliminate future confusion, as well as the need for a complex, structurally rigid procedural mechanism

[40] Further Notice at ¶¶ 31, 33.

such as the one proposed in the Further Notice. Adoption of this straightforward requirement will resolve, at least on a going forward basis, issues related to the ownership and disposition of home run wiring, and eliminate the need for an overly complex procedural regime to resolve these issues. Moreover, this streamlined approach would avoid administrative burdens, and prevent the Commission from becoming enmeshed in the plethora of disputes that the intricate proposed procedures would surely engender.

III. Any Procedures Adopted By The Commission That Affect Disposition Of MDU Home Run Wiring Require Certain Clarifications And Refinements.

As explained above, the ICTA proposal falls woefully short of meeting the Commission's stated goals in the Further Notice of enhancing consumer choice and avoiding removal of broadband distribution facilities. Moreover, the goal of promoting certainty regarding the fate of the facilities upon contract expiration could be met much more efficiently by simply requiring such issues to be addressed contractually among the parties, as opposed to the byzantine procedures displayed in the flow charts, attached as Exhibits B and C to the Further Notice, that would have boggled the mind even of Rube Goldberg. In addition, as demonstrated in detail at Section IV of these Comments, the Commission is entirely devoid of jurisdiction to adopt the ICTA proposal. Nevertheless, assuming that the Commission elects to proceed to adopt regulations establishing procedures applicable to the disposition of home run wiring once the incumbent provider's rights to offer service or maintain its facilities in a particular building have been extinguished, Time Warner suggests the following clarifications and refinements to more faithfully carry out the Commission's stated goals.