One state that has enacted a cable television access to premises law did so with one of its goals being to increase MDU tenants' choice of MVPDs. The Pennsylvania General Assembly stated:

> (2) It is in the public interest to assure apartment residents and other tenants of leased residential dwellings access to cable television service of a quality and cost comparable to service available to residents living in personally owned dwellings.
>
> (3) It is in the public interest to afford apartment residents and other tenants of leased residential dwellings the opportunity to obtain cable television service of their choice and to prevent landlords from treating such residents and tenants as a captive market for the sale of television reception services selected or provided by the landlord.

1990 Pa. Laws 221, § 3. The Cable Operators assert that the Commission, through this Rulemaking, should attempt to provide MDU residents throughout this Country with the same opportunity that the Pennsylvania General Assembly has given its MDU residents.

B. Unit-by-Unit Disposition[16]

Like the building-by-building disposition, the unit-by-unit disposition requires a conclusion that the incumbent video service provider "does not (or will not at the conclusion of the notice period) have a legally enforceable right to maintain its home run wiring on the premises...." FN at ¶ 39. Thus, similar to the building-by-building disposition, the Cable Operators contend that none of the time limitations set by the rules eventually adopted by the FCC should be effective if one of the parties find it necessary

[16] The Cable Operators find it almost a futile activity to comment on the unit-by-unit disposition scenario because they have found that most, if not all, alternate providers require and mandate exclusivity in their contracts with MDU owners. Moreover, often when the alternate provider cannot obtain exclusivity, it will not compete unit-by-unit with the franchised cable operator. Consequently, while the unit-by-unit disposition scenario is most in line with Congressional intent to increase competition for the consumer, it is the scenario that will be utilized the least.

to seek judicial intervention as to whether or not the incumbent, in fact, has the legally enforceable right to maintain its wiring on the premises.

The Cable Operators totally disagree with the *Further Notice*'s tentative conclusion that "it would streamline and expedite the process to permit the alternate service provider or the MDU owner to act as the subscriber's agent in providing notice of a subscriber's desire to change services." FN at ¶ 39. Such an agency scenario would, at minimum, provide the appearance of impropriety where the MDU owner is receiving a share of the revenue from the alternate provider. That financial incentive could lead to "slamming", where the MDU owner switches MVPD providers for tenants without their consent. The FCC should adopt similar rules to those adopted prohibiting "slamming" in the telephone long distance market. Thus, the head-to-head competition in the building may not be a fair one with the owner assisting the alternate provider in a number of ways. Moreover, the Cable Operators fail to understand how making the MDU owner or the alternate provider the subscriber's agent will streamline or expedite the process. Finally, subscribers are smart and knowledgeable enough to know how to call and cancel service from one operator and call and activate service from another without requiring the MDU owner and/or the alternate provider to be in the middle of the transaction.

The Cable Operators again agree that, as with the building-by-building disposition scenario, the reasonable price for the home wiring in the unit-by-unit disposition scenario should be resolved by letting market forces play its role, but allowing the parties to be guided through the market forces with the formula set forth earlier in this Comment. *See supra* at 4. A lump sum payment in lieu of a unit-by-unit payment appears to a reasonable proposal in order to avoid the administrative burdens discussed in the *Further Notice* and to avoid small payments for single unit home wire being made between

the cable operators and the MDU owner. However, by permitting the MDU owner to make one lump sum payment, the alternate provider receives a subsidy in its head-to-head competition with the incumbent provider. Thus, requiring the alternate providers to pay one-half or some portion of the lump sum payment would, at least, partially alleviate that problem.

The Cable Operators agree with the proposal set forth in the *Further Notice* that if the subscriber's service is simply terminated without any indication that a competing service provider wishes to use the home run wiring, the incumbent service provider would not be required to carry out its election to sell, remove or abandon the home run wiring. FN at ¶ 42. However, the following paragraph of the *Further Notice* appears to be in direct conflict with this provision. Paragraph 43 of the *Further Notice* states "even where the incumbent receives a request for service termination but does not receive notice that an alternative provider wishes to use the home run wiring, we would still propose to require the incumbent to follow the procedures set forth in our cable home wiring rules -- e.g., to offer to sell to the subscriber any cable home wiring that the incumbent provider otherwise intends to remove." FN at ¶ 43. Consequently, if the FCC implements the proposal set forth in Paragraph 42 of the *Further Notice*, it simply cannot implement the proposals set forth in Paragraph 43. In order to avoid any action until necessary — until a subscriber requests service from an alternate provider of service — the Cable Operators favor the proposals set forth in Paragraph 42. There will certainly be enough action taken once the Rules are implemented so that no action need be taken prematurely.

Finally, while the Cable Operators agree that the procedural mechanisms should apply regardless of the identity of the incumbent video service provider involved, FN at ¶ 74, based upon the fact that alternate providers are entering into long-term,

exclusive contracts, they do not believe that, in reality, these Rules will ever be used to purchase home run wiring from SMATV providers, MMDS providers or DBS providers. In most scenarios where a franchised operator has taken over the contract from such alternate providers of service, the cable operators often find themselves in the position of rewiring the MDU because of the condition of the wiring after so many years.

C. Ownership of Home Run Wiring

The Cable Operators agree that the property owner is the one responsible for "the common areas of a building, including safety and security concerns, compliance with building and electrical codes, maintaining the aesthetics of the building and balancing the concerns of all of the residents." FN at ¶ 44. However, they do not agree that vesting ownership in the property owners will increase competition for the individual consumer or tenant of that MDU. It appears that the FCC did little or no information-gathering concerning the number of MDU owners that will utilize the building-by-building compared to the unit-by-unit disposition scenarios. Had the FCC reviewed such information, it might have decided that the proposed rules for unit-by-unit disposition was unnecessary to even formulate. Thus, the conclusion in the *Further Notice* "that the individual subscriber would not be disadvantaged by having the MDU owner own the home wiring," FN at ¶ 45, is only correct if the following statement in the *Further Notice* will actually occur in the real world, that is, if, in fact, MDU owners provide its tenants with a choice between MVPDs in the unit-by-unit context. However, these Cable Operators know of only rare instances when an MDU owner has properly terminated an incumbent's legal right to maintain cable wiring on the premises and then allowed the cable operator to compete unit-by-unit with the alternate provider.

If the alternate provider has been able to persuade the MDU owner to terminate the incumbent's legal rights to stay on the premises, the alternate provider has also been able to obtain a long-term (15 to 20 year) exclusive contract, frequently with either a lump sum payment up-front or a 10-20% revenue share during that term. Consequently, the vesting of the ownership of the wire makes little difference with respect to "reduc[ing] future transactional costs" since the above procedures will **not** soon be repeated and the alternate provider will have ample time to recoup such a capital investment, should it have to make it.

D. Impact on Incumbent Video Service Providers

The *Further Notice* appears to take a "this is the best we can do" attitude in describing the impact on incumbent video service providers in Paragraph 46. First, it notes "the MDU owners' resistance to the installation of multiple home run wires", *id.*, yet these very Rules are permitting and encouraging that purported resistance. Second, the *Further Notice* then states that "affording **consumers** a choice among various packages offered by multiple service providers is better than the current situation, in which MDU residents often have no choice at all." *Id.* What is changing? The consumer, the MDU resident is getting no choice as a result of these proposed Rules. The only one getting the choice is the MDU owner, who is making secret deals, rarely consulting any of its residents, and seeking out the most prosperous deal for itself. In almost no situation where an alternate provider attempted to take over the contract for an MDU (other than in a condominium or cooperative) are the tenants in any way consulted before the deal is done. So, again, the question must be asked — where is the choice for the consumer if the MDU owner makes it for him?

Moreover, the Cable Operators believe that the *Further Notice* is giving the theoretical statement that "where the real estate market is competitive it will discourage MDU owners from ignoring their residents' interest," FN at ¶ 47, too much credit. (Of course, this conclusion is based upon the unsupported Comments of the Building Owners). The FCC cannot believe that tenants are going to move from one apartment building to another simply because one allows the resident to receive multichannel video services from a franchised cable operator and the other allows the resident to receive a similar, but not quite the same service, from an alternate provider. Thus, if in the middle of a one year lease, the MDU owner decides to switch to an alternate provider of service, the tenant has no say in the switch and can do little about it without breaching his/her lease. Moreover, if the MDU is convenient to work, close to his/her children's school and to shopping and parks and has all the other required amenities, the chance of the tenant switching apartments in order to obtain a specific MVPD is highly unlikely.

Thus, these proposed rules will accomplish little but cause bidding wars for entire MDU buildings and provide the MDU owner with a windfall stream of revenue, clearly a result outside the Commission's statutory authority.

E. Alternatives to Procedural Framework

1. Required Co-Use of Molding May Have Constitutional Problems

In the *Further Notice,* the Commission seeks comments concerning a new issue that had not been raised in the in the previous request for comments. That new issue is the alternate provider's request that the Commission require incumbent operators to share or allow the co-use of its conduit or molding running through hallways of MDU

> We propose to permit the 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. We seek comment on whether and how to allow compensation for the alternative service provider's use of the molding or conduit. We tentatively conclude that such a rule would promote competition and consumer choice and would not constitute a taking of the incumbent provider's private property without just compensation under the Fifth Amendment. We seek comment on these tentative conclusions. We also seek 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. FN at ¶ 83.

The Cable Operators agree that practically any proposal that results in two wires in an MDU building giving the residents a true choice between MVPDs would truly promote competition and consumer choice. However, the Cable Operators do not agree that the Commission's proposal to require incumbents to share molding and/or conduit would not be an unconstitutional taking under the Fifth Amendment. In the situation where the incumbent has a been granted a private easement or license to place and occupy the moldings and conduits or where the incumbent has the contractual right to exclusively occupy the moldings and conduit, any interference with that right would amount to a taking. In a very analogous situation, MDU owners and alternate providers made very similar arguments of taking against allowing franchised cable operators to obtain access to private utility easements in accordance with Section 621(a)(2) of the Cable Act, 47 U.S.C. § 541(a)(2), in order to construct cable systems. *See, e.g., Media General Cable Of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 991 F.2d 1169 (4th Cir. 1993); *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 606 (11th Cir. 1992) ("the Cable Act does not provide a right to access wholly private easements granted by property owners in favor of particular utilities.").

However, should this Commission disagree with the Cable Operators' contrary conclusion that a rule requiring incumbents to co-use molding and/or conduit under certain situations would result in a Fifth Amendment taking, the Cable Operators further state that the payment of just compensation to the incumbent should be equal to the cost, including labor and materials, that the alternate provider would have incurred were it required to install its own molding and/or conduit. Moreover, the alternate provider should be required to agree in writing that it will repair any damage to the incumbent's wiring and molding/conduit should it be damaged during the installation and that it will hold harmless the incumbent and repair any damage to the MDU building or any of the resident's property as a result of the installation and/or operator of its system within the molding/conduit.

2. Physically Inaccessible Home Wiring

The Commission next seeks comment on how to define a "physically inaccessible" cable home wiring as a result of the 12 inch demarcation point. It would seem practical to the Cable Operators that if as a result of the application of the 12 inch demarcation point, cable home wiring is embedded in brick, metal conduit or cinder blocks, FN at ¶ 84, that it should be only in those situations in which the wiring should be considered physically inaccessible and the demarcation point be moved to the point where it first becomes accessible. *Id.* It would be impossible for CableVision, Classic and Comcast to comment on the percentage of installations in which the demarcation point would be deemed physically inaccessible under this definition. However, the Cable Operators assert that the percentage of such problematical installations is probably low because often installers need access to the home wiring during and after installation.

3. Rule Requiring Transfer of Ownership of Home Wiring to MDU Owner at Time of Installation Should Not be Adopted

Another new issue that the Commission has raised and seeks comment in this *Further Notice* is whether it should adopt a rule that after the effective date of this rule, MVPDs would be required to transfer ownership of home wiring to the MDU owner upon the installation of the wiring. The Cable Operators disagree with the adoption of such a rule. First, it was already considered by the Commission earlier in this proceeding and decided that the Congress did not give it authority to make such a rule since Section 624(i) specifically states: "the Commission shall 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. *Cable Home Wiring*, MM Docket 92-260, First Order on Reconsideration, 11 FCC Rcd 4561, 4566 (1996) (emphasis added). Second, if the MDU owner desires to own the home wiring upon installation it has the means to do so without intervention by the Commission. At the time that the MDU owner contracts for service with an MVPD, it can make provision in the contract for transfer of ownership of the home wiring at the time of installation. Additionally, the MDU owner has the ability to contract with its electrical contractor of some other contractor to purchase and install not only the home wiring but all of the distribution system for mulitchannel video service in order to ensure ownership of the system of any portion thereof. Consequently, the Cable Operators contend that the Commission will be implementing enough new regulations concerning the procedural mechanism for disposition of home wiring within MDUs so that additional regulations concerning initial ownership of the home wiring are unwarranted, and unnecessary. Neither does the Commission have the authority to implement such rules.

F. The Cable Operators' Recommendations

1. The Cable Operators seek the implementation of a Rule that would prevent alternate providers from accessing home run wiring until a cable operator agreed that these Rules applied or until after a court ruled that the property owner had the right to properly and legally terminate the cable operator's ability to maintain wiring on the premises. Most of the lawsuits brought by cable operators have been last ditch efforts when the neither the MDU owner nor the alternate provider would heed the cable operator's claim of continued contractual or statutory access to the premises.

2. An additional suggestion set forth earlier in this Comment is the need for an automatic stay of the time limits set forth in the procedural mechanisms should one of the parties — the incumbent, the alternate provider or the MDU owner — decide that it is necessary, under the circumstances, to initiate a declaratory action seeking court determination as to whether the incumbent has the contractual or statutory right to continue to maintain cable home wiring on the premises of the MDU or whether the incumbent is the owner of the cable home wiring. That determination would then trigger the operation of these proposed rules. As noted earlier, while the Cable Operators agree that litigation does not contribute to competition, it should not be deemed to be anti-competitive behavior, especially when the operator contends that it is simply protecting the integrity of a contract or the rights that it possesses under a particular state statute, and is preventing unlawful self-help. In response to alternate providers' and/or MDU owners' possible response that allowing an automatic stay will cause incumbent franchised operators to file lawsuits in order to delay the inevitable and to make it more expensive for the alternate provider, the Cable Operators suggest that a petition can be filed in federal court seeking enforcement of FCC's rules, 47 U.S.C. § 401(b), or a waiver of such an

automatic stay rule can be sought from the FCC under *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). Moreover, the Cable Operators certainly believe that the Commission has the authority to stay its own rules when the reason for the stay is to determine whether the rules themselves should be operational.

3. CableVision, Classic and Comcast have noted throughout this Comment that they contend that the MDU owner is the big winner under these proposed rules because they are going to be able to continue to restrict the number of home run wires within their buildings to one — which means they can restrict the number of MVPDs to one. As a result, the MDU owners are permitted to continue to demand up-front lump sum payments and/or revenue sharing throughout the term of the contracts with the MVPD in exchange for their being named the exclusive provider of multichannel video services within the building. The Cable Operators contend that Congress did not enact Section 624(i) in order to provide a new stream of revenue for MDU owners throughout this country. Consequently, the Commission should consider implementing a rule that prohibits the use of these rules should the MDU owner grant long-term (in excess of five years) exclusive access to an alternate provider <u>and/or</u> require the alternate provider to pay the MDU owner an up-front payment or share the revenue during that long-term contract.

Such a prohibition should be able to withstand a constitutional challenge since it is similar to a Virginia statute that recently withstood a constitutional challenge in federal court. In *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Corp.*, 65 F.3d 1113 (4th Cir. 1995), the incumbent cable operator brought an action against an MDU owner and the alternate provider for continued access to the MDUs to provide service and for the disconnection and conversion of its distribution systems, including the home run wiring, at the MDUs. The cable operator also claimed that the payment by the alternate

operator of a "consulting fee" to the MDU owner violated section 55-248.12:2 of the Virginia Residential Landlord and Tenant Act, which provides in pertinent part that:

> No landlord shall demand or accept payment of any fee, charge or other thing of value from any provider of cable television service, satellite master antenna television service, direct broadcast satellite television service, subscription service or service of any other television programming system *in exchange for giving tenants off such landlord access to such service....* (emphasis added).

The court held, *inter alia*, that the MDU owner and the alternate provider violated the Virginia Act, entered an injunction that enjoined the MDU owners from continuing to provide the alternate provider with exclusive access under the agreement and allowed the MDU owners thirty days to either (1) disgorge the fees that they already received from the alternate provider, or (2) terminate the alternate provider's right of access under the exclusive provider agreement. 65 F.3d at 1118.

The MDU owner and alternate provider challenged the district court's judgment under the Virginia Act, claiming that the Act amounted to a regulatory taking of their right to obtain compensation in exchange for another's use of their property in violation of the Fifth and Fourteenth Amendments to the United States Constitution. *Id.* at 1123. The Fourth Circuit Court of Appeals held that the Virginia Act "merely prohibits a use of the property, not a physical invasion, thus the regulation at issue is dramatically less offensive than a physical taking." *Id.* Moreover, the court held that the Act does not "deny[] the MDU owners all economically viable use of their land, [it] merely prohibits a use (i.e., accepting fees in the nature of kickbacks for providing nothing more than access to their tenants)...." *Id.*

Consequently, in order to promote competition and increase consumer choice, a similar prohibition as found in the Virginia Act is suggested in order to trigger the operation of the procedural mechanisms for the disposition of cable home wiring.

Finally, CableVision, Classic and Comcast also suggest that the Commission examine the implementation of an access provision in order to ensure that cable operators have the ability to serve all residents within MDUs. A mandatory access provision is the only certain way to ensure that all consumers living within MDUs have true choice between MVPDs. In order to enact procedures for such access for cable operators and to demonstrate the constitutionality of such a provision, the Cable Operators refer the Commission to any number of court-tested state access statutes.

VI. Conclusion

CableVision, Classic and Comcast believe that the inside wiring rules work well for single family dwelling units whether they are owner-occupied or tenant-occupied. CableVision, Classic and Comcast believe that the inside wiring rules should not apply to MDUs, of whatever type, except for condominiums in which no bulk service agreement is in effect. Retention of inside wiring ensures that individual residents of MDUs, particularly, those in rental MDUs, will be able to select from different MVPDs should the premises owner decide to obtain a new service. However, based upon the proposed rules presented, the only way for the Commission to reach its goal of maximized consumer choice is to require only a unit-by-unit disposition without long-term, exclusive contracts. The building-by-building disposition scenario simply will not lead to consumer choice at all. Thus, these Rules will have the unintended result of frustrating Congress' goal of offering consumers a choice.

The Cable Operators conclude that the Commission must look at such issues as access to premises and restraint of long-term exclusive contracts before it can truly reach its goal of maximized consumer choice.

Respectfully submitted,

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