

DOCKET FILE COPY ORIGINAL

RECEIVED

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

OCT - 6 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Telecommunications Services )  
Inside Wiring )  
 )  
Customer Premises Equipment )  
 )  
In the Matter of )  
 )  
Implementation of the Cable Television )  
Consumer Protection and Competition )  
Act of 1992: )  
 )  
Cable Home Wiring )

CS Docket No. 95-184

MM Docket No. 92-260

**REPLY COMMENTS OF NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

Daniel L. Brenner  
Michael S. Schooler  
David L. Nicoll

1724 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
202-775-3664

Counsel for National Cable Television  
Association

October 6, 1997

No. of Copies rec'd  
List ABCDE

049

TABLE OF CONTENTS

SUMMARY..... i

I. THE COMMISSION HAS NO AUTHORITY TO REGULATE THE DISPOSITION OF HOME RUN WIRING..... 1

II. IF A CABLE OPERATOR INITIATES A STATE COURT PROCEEDING TO CONFIRM ITS RIGHT TO REMAIN ON THE PREMISES, THE TIMETABLES AND PROCEDURES OF THE PROPOSED RULES MUST BE STAYED PENDING A FINAL DECISION BY THE COURT..... 3

III. IF THE INCUMBENT OFFERS TO SELL ITS WIRING AT A REASONABLE PRICE, IT SHOULD HAVE NO FURTHER OBLIGATIONS..... 9

IV. THERE IS NO NEED TO INCLUDE A PENALTY PROVISION IN THE RULES..... 11

V. THE EXTENT TO WHICH INCUMBENTS THAT REMOVE THEIR WIRING AFTER TERMINATION BY THE MDU OWNER ARE RESPONSIBLE FOR RESTORATION OF THE BUILDING IS -- AND SHOULD REMAIN -- A CONTRACTUAL MATTER GOVERNED BY STATE LAW..... 12

VI. THE COMMISSION SHOULD NOT AUTHORIZE THE USE OF MOLDINGS AND CONDUITS BY ALTERNATIVE PROVIDERS WHERE INCUMBENT OPERATORS HAVE A STATUTORY, CONTRACTUAL OR COMMON LAW RIGHT TO PROHIBIT SUCH USE..... 14

CONCLUSION ..... 17

## SUMMARY

The Commission lacks authority to adopt its proposed rules -- or *any* rules -- regulating the disposition of home run wiring. Even if the Commission were to proceed, it needs to amend its proposal to achieve its objectives. Specifically, the Commission cannot preserve existing property rights or provide order and certainty to incumbents, MDU owners and alternative providers unless it affords an incumbent an opportunity to obtain a *final* adjudication of its right to remain on the MDU's premises *before* complying with the other requirements of the proposed rules.

If an operator offers to sell its wiring at a reasonable price, it should have no further obligations under the rules. If the Commission were to establish a "default" marketplace price, that price should reflect full replacement value. But since most parties agree that incumbents, MDU owners and alternative providers all have incentives to agree on a sale price, a cable operator that agrees to negotiate a sale of its wiring should not be subject to any further obligations unless the MDU owner or alternative provider demonstrates that the operator has refused to negotiate in good faith.

The Commission should not create an obligation on the part of incumbent operators to restore or pay for the restoration of an MDU following the removal of wiring where no such obligation exists under contract or state law. Nor should it authorize the use of moldings and conduits by alternative providers where incumbent operators have a statutory, contractual or common law right to prohibit such use. Finally, there is no need for the Commission to include a penalty provision in its proposed rules, since the Commission already has ample authority to enforce its rules as deemed appropriate on a case-by-case basis.

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

In the Matter of	)	
Telecommunications Services	)	CS Docket No. 95-184
Inside Wiring	)	
Customer Premises Equipment	)	
In the Matter of	)	
Implementation of the Cable Television	)	MM Docket No. 92-260
Consumer Protection and Competition	)	
Act of 1992:	)	
Cable Home Wiring	)	

**REPLY COMMENTS OF NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

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

The Commission has acknowledged that it has provided an unusually short time to reply to the initial comments in this proceeding -- comments which vary widely in scope and substance and raise complex issues of law, policy and administrative implementation. In our reply, we briefly address the principal points and issues raised by the commenting parties regarding the substance of the rules proposed in the Further Notice. In any event, we showed in our initial comments that the Commission lacks authority to adopt *any* rules regulating the disposition of MDU home run wiring -- and nothing in the comments of other parties demonstrates otherwise.

**I. THE COMMISSION HAS NO AUTHORITY TO REGULATE THE DISPOSITION OF HOME RUN WIRING.**

In our initial comments, we demonstrated that, as a threshold matter, the Commission lacks statutory authority to regulate the disposition of wiring installed by cable television

operators inside multiple dwelling unit ("MDU") buildings but outside the premises of individual subscribers -- which is precisely what the Commission, in its Further Notice, proposes to regulate. While the comments of several cable operators support and amplify our arguments,<sup>1</sup> most of the parties supporting the proposed rules make little effort to support or bolster the Commission's reliance on Section 4(i) of the Communications Act as a basis for asserting jurisdiction over home run wiring. Nor do they suggest any other source of authority to regulate such wiring.

Some parties suggest that Section 207 of the Telecommunications Act of 1996 would give the Commission jurisdiction to ensure that individual subscribers in MDUs have the ability to choose alternative, over-the-air providers on a unit-by-unit basis.<sup>2</sup> As these parties recognize, however, the rules proposed in the Further Notice are *not* aimed at facilitating individual subscribers' access to over-the-air services. They are particularly designed to facilitate the transfer of home run wiring to MDU owners for use by a single, alternative provider *in lieu* of the incumbent operator. Changing the entity that is authorized by the MDU owner to provide service to the entire building does not give individual subscribers any additional choice among providers. Thus, even if Section 207 authorized the Commission to adopt rules that allowed each

---

<sup>1</sup> See, e.g., Comments of Cable Telecommunications Association at 3-8; Comments of Telecommunications, Inc. at 4-8; Comments of U S West, Inc. at 4-6; Comments of Cox Communications, Inc. at 3-5; Comments of Jones Intercable, *et al.* at 2-7; Comments of Time Warner Cable at 49-67.

<sup>2</sup> See, e.g., Comments of DirectTv, Inc. at 3-4; Comments of Media Access Project, *et al.* at 4-7. Section 207 directs the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."

resident to choose its provider of video programming,<sup>3</sup> it would not provide a jurisdictional basis for the rules proposed in the Further Notice.

In any event, nothing in Section 207 is meant to authorize the regulation of MDU home run wiring. As the legislative history makes clear, Congress intended the provision

to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of *antennae* designed for off-the-air reception of television broadcast signals or *satellite receivers* designed for receipt of DBS services. Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section.<sup>4</sup>

Section 207 was thus aimed at governmental and quasi-governmental restrictions on the use of outdoor antennae and satellite dishes to receive programming. To the extent that Congress intended to regulate the use and disposition of MDU inside wiring, it did so in Section 624(i), which -- as we have shown -- limits such regulation to wiring *within the premises* of individual residences *after termination* of service. Nothing in Section 207 of the 1996 Act indicates any intention to supersede or supplement Section 624(i).

**II. IF A CABLE OPERATOR INITIATES A STATE COURT PROCEEDING TO CONFIRM ITS RIGHT TO REMAIN ON THE PREMISES, THE TIMETABLES AND PROCEDURES OF THE PROPOSED RULES MUST BE STAYED PENDING A FINAL DECISION BY THE COURT.**

---

Even assuming the FCC has jurisdiction to address the disposition of home run wiring, as we showed in our initial comments, something is missing from the proposed regulatory framework. Specifically, the rules need a mechanism for resolving disputes as to whether or not

---

<sup>3</sup> NCTA's *ex parte* proposals at an earlier stage of this proceeding applied only where individual subscribers retained the ability to choose their own provider. See NCTA Comments at 6 n.5.

<sup>4</sup> H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 124 (1995).

a cable operator has an enforceable legal right to remain on the premises *before* the operator is required to elect between removing, abandoning, or offering to sell its home run wiring. Such a mechanism is necessary because the proposed rules, which are not intended to disturb or preempt existing statutory, contractual or common law rights, apply only to operators who have *no* enforceable right to remain on the premises. It is also necessary because the purpose of the proposed rules is to “bring[]order and certainty to the disposition of the MDU home run wiring upon termination of service.”<sup>5</sup> So long as the operator’s right to remain on the premises remains in doubt, the required election will not be effective in reducing or eliminating uncertainty as to whether the incumbent’s wiring will be available for use by an alternative provider.

The Independent Cable & Telecommunications Association (“ICTA”), whose *ex parte* proposal provided the basis for the Commission’s proposed rules,<sup>6</sup> appears to agree that where the right to remain on the premises is in dispute, a resolution by a state court (and not by the Commission) is necessary before the rules can be applied. ICTA urges the Commission to “creat[e] a presumption that the incumbent provider does not have an enforceable legal right to remain on the premises.”<sup>7</sup> But this presumption would apply only where the operator has not sought a judicial declaration of its right to remain: “Such a presumption would place the burden squarely upon the incumbent provider claiming an enforceable legal right to remain on the premises to initiate whatever judicial proceeding is appropriate to prove the merits of such a right. *In the absence of any actual enforcement action surrounding the access claim, the*

---

<sup>5</sup> Further Notice, ¶ 32.

<sup>6</sup> *Id.*, ¶ 2.

<sup>7</sup> ICTA Comments at 3.

Commission's rules would have full force and effect."<sup>8</sup> Where the incumbent *has*, however, initiated a judicial proceeding, according to ICTA, the rules presumably would *not* have full force and effect while that proceeding is pending.

This is wholly consistent with NCTA's comments. We similarly proposed that where the right of a cable operator to remain on the premises is in dispute, the operator should nevertheless be subject to the procedures and deadlines of the proposed rules unless it initiates a judicial proceeding to confirm its right. Indeed, we were more specific than ICTA in proposing that the operator be required to notify the MDU owner 30 days after receiving notification of termination of its intention to initiate a court proceeding within 30 days -- and to initiate such a proceeding during that time period -- in order to suspend operation of the rules. We do not oppose a procedural presumption that places the burden on the cable operator to initiate a judicial proceeding where there is a dispute as to the applicability of the rules.

We strongly oppose a *substantive* presumption that would, as suggested in the Further Notice, subject the cable operator to the rules absent a finding, by the Commission or by a court, of a "*clear* contractual or statutory right to remain."<sup>9</sup> As demonstrated in our initial comments, the statutory, contractual and common law issues surrounding the right to remain on the premises are often complex and *unclear* -- which is precisely why they need to be fully considered and adjudicated by state courts. To the extent that a "presumption" adopted by the Commission would in any way preempt or alter the outcome of such adjudications, we strongly oppose it.

---

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> Further Notice, ¶ 34 (emphasis added).

RCN Telecom Services, Inc. (“RCN”), like NCTA and ICTA, seems to recognize that whether an operator has a right to remain on the premises is an issue that must be decided by state courts (and not by the Commission). But its proposal that, where such rights are in dispute, the operator be “required to obtain a court order that it has the right to retain control of the facilities, either final or *pendente lite*, within thirty (30) days” of receiving notice of termination is doubly flawed.<sup>10</sup> First, absent a state statutory right, of which we are unaware, there is no way for an operator to force a court to rule within 30 days or any other time period. To impose a forfeiture on the operator because a court not subject to federal jurisdiction has failed to act within 30 days would do nothing to expedite the court’s resolution of the matter and would punish the operator for something over which it had no control. Its only effect would be to deter operators from seeking to vindicate their rights.

Second, applying the rules unless an operator is able to obtain an order “*pendente lite*” -- *i.e.*, a temporary restraining order or a preliminary injunction -- is wholly inappropriate and counterproductive. There is no basis for concluding that merely because an operator is unable to obtain temporary or preliminary injunctive relief, it will not ultimately prevail on the merits of its claim that it has a right to remain on the premises. This is because

[t]he application for such an injunction does not involve a final determination on the merits; in fact, *the purpose of an injunction pendente lite is not to determine any controverted right, but to prevent a threatened wrong or any further*

---

<sup>10</sup> RCN Comments at 12. The Community Associations Institute (“CAI”) agrees with ICTA, NCTA, RCN and others that disputed rights to remain on the premises should be adjudicated by courts (in proceedings initiated by the incumbent operator), but, like RCN, argues that “any action to establish an enforceable legal right should not stay the disposition procedures outlined in the *Further Notice*.” CAI Comments at 9.

perpetration of injury, or the doing of any act pending the final determination of the action . . . until the issues can be determined after a full hearing.<sup>11</sup>

Indeed, “[i]t frequently is observed that a preliminary injunction is an extraordinary and drastic remedy” and “these shorthand formulations aptly express the courts’ general reluctance to impose an interim restraint . . . before the parties’ rights have been adjudicated.”<sup>12</sup> Temporary restraining orders are even further removed from an ultimate determination on the merits; whether or not they are issued depends, for the most part, on the imminence and nature of the harm that might ensue before the court has even had time to consider a preliminary injunction: “The issuance of an ex parte temporary restraining order is an emergency procedure and is appropriate only when the applicant is in need of immediate relief.”<sup>13</sup> Obtaining one is subject to a host of ex parte issues, including the availability of judges to hear them.

Applying the rules to an operator before its rights are finally adjudicated could permanently and adversely affect the exercise of those rights. Forcing the operator to choose between removing and abandoning the wire will constrain or preempt its ability to exercise its rights after they are finally adjudicated.

If the operator elects to leave the wiring in place in the belief that its right to remain would be vindicated, and the court subsequently holds that it has no right to remain, the operator will have lost his right to remove the wiring. If, on the other hand, the operator chooses to remove the wiring because it does not want to risk abandoning it to an alternative provider, the

---

<sup>11</sup> *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 696 (8th Cir. 1948) (emphasis added). *See also United States v. School Dist. of Omaha*, 367 F. Supp. 179 (D. Neb. 1973).

<sup>12</sup> Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2948 (1995).

<sup>13</sup> *Id.*, § 2951.

court proceeding will essentially become moot -- because the right to remain on the premises will be meaningless after the operator has already removed the wiring. In other words, the threat of having to abandon the wiring if the operator has no right to remain on the premises may effectively preclude the operator from vindicating that right in court -- *unless the procedures and timetables of the rules are held in abeyance pending a final judicial adjudication.*

The prospect of recovering monetary damages for having been wrongly forced to abandon or remove the wiring hardly justifies requiring operators to comply with the proposed rules before their legal rights have been fully adjudicated. First of all, calculating damages so as to make the incumbent whole in such circumstances would be virtually impossible. If the incumbent elects to remove the wiring, its damages will not be limited to the costs of such removal but will also include the costs of reinstalling wiring either to provide video programming again at some later date or to provide services other than video programming, such as telephony or internet services (assuming the operator can regain access to the building). And they will include lost revenues that could have been obtained by the cable operator had it not removed its wiring -- the precise amount of which will be extremely difficult to prove. If the incumbent elects to abandon the wiring, its damages will include all these same incalculable costs -- unless, in lieu of damages, it is permitted to regain ownership and control of its wiring, in which case it will not have to incur the costs of rewiring the building.

But wholly apart from the difficulty of measuring damages, forcing operators to accept such damages as a substitute for their right to maintain their wiring on the premises is precisely what the Commission, in its Further Notice, committed *not* to do. It is no different from forcing an incumbent to transfer its wiring to the MDU owner in return for some measure of "just compensation." In each case, even if the incumbent is deemed to have been made whole, its

property rights have been fundamentally altered in a way that exceeds the Commission's jurisdiction, affects and infringes Fifth Amendment rights -- and is at odds with the Commission's intention not to "create or destroy any property rights" in this proceeding.<sup>14</sup>

Furthermore, applying the procedures and timetables of the proposed rules before a court has finally adjudicated the incumbent's rights would undermine the Commission's objective of bringing "order and certainty" to the disposition of home run wiring after termination<sup>15</sup>. This is because the wiring might ultimately be deemed the incumbent's. If the incumbent elects to abandon the wiring while the court proceeding to adjudicate its rights is still pending, that election will provide no certainty at all to the MDU owner and its chosen alternative provider regarding the ultimate availability of the wiring or the risk of substantial damages. In other words, applying the rules before there is a final judicial determination may adversely affect the property rights of incumbent operators but furnishes no order and certainty as to the ultimate disposition of the home run wiring. In both respects, this result is precisely the opposite of the Commission's objectives in this proceeding.

**III. IF THE INCUMBENT OFFERS TO SELL ITS WIRING AT A REASONABLE PRICE, IT SHOULD HAVE NO FURTHER OBLIGATIONS.**

Many commenting parties agree that incumbent operators and MDU owners (or alternative providers) should be encouraged to reach a negotiated agreement for the sale of the incumbent's home run wiring at a reasonable price. ICTA, for example, contends that in a marketplace environment, incumbents have incentives to sell at a reasonable price rather than

---

<sup>14</sup> Further Notice, ¶ 32.

<sup>15</sup> It would also undermine prospects for a "seamless transition" for subscribers, as requested by some parties. *See, e.g.*, RCN Comments at 14.

remove or abandon the wiring and MDU owners and alternative providers have incentives to pay a reasonable price for the incumbents' wiring rather than incur the costs and inconvenience of rewiring the building.

But, as we showed in our initial comments, the proposed rules would artificially *interfere* with the marketplace incentives described by ICTA and would give MDU owners and alternative providers incentives *not* to negotiate a reasonable price. The problem with the rules, as proposed, is that if the parties are unable to reach agreement on a sale price in the compressed time period afforded by the rules, the incumbent must then elect between removing and abandoning its wiring. In those circumstances, MDU owners and alternative providers will have incentives not to reach a negotiated agreement until after the incumbent is forced to make its election. At that point, unless the operator elects to remove the wiring, the MDU owner and alternative provider will obtain use of the wiring at *no* cost.

There is a way to avoid this unfair windfall and preserve incentives to negotiate a marketplace price: If the incumbent elects to offer to sell at a reasonable price, its obligations under the rules should terminate and it should have no further obligation to elect between removal and abandonment, whether or not the MDU owner accepts the offer. If, as ICTA (and several other parties) contend, incumbent operators, MDU owners and alternative providers all have marketplace incentives to agree on a reasonable sale price, then it may not be necessary for the Commission to establish a "default" price that would be deemed "reasonable" in all circumstances. Instead, as we proposed in our initial comments, the rules should provide that if an incumbent elects to offer to sell its home run wiring, it has no further obligations under the rules -- even if no agreement is reached -- unless the MDU owner or alternative provider

demonstrates that the incumbent failed to negotiate in good faith. This is the best way to encourage a marketplace result in each case.

If the Commission nevertheless chooses to establish a “default” price, that price should take into account all the factors that would affect marketplace negotiations. This means that the price should not merely reflect the salvage value of the wiring to the incumbent, as some suggest.<sup>16</sup> It must reflect the replacement value of the wiring -- *i.e.*, the cost that the MDU owner or the alternative provider would incur to install its own wiring or that the incumbent would incur were it to regain access to the building. Establishing a default price on this basis minimizes the likelihood of either an unfair windfall for MDU owners or the economically inefficient removal of existing wiring by incumbent operators. Several cable operators have indicated (with supporting evidence) what a reasonable, default estimate based on this approach might be.<sup>17</sup>

**IV. THERE IS NO NEED TO INCLUDE A PENALTY PROVISION IN THE RULES.**

Several parties suggest that a cable operator’s election to remove its wiring should be irrevocable and that the rules should impose substantial penalties on an operator that fails to remove its wiring after making such an election. To do so would be unwise and unnecessary.

There is no reason to preclude an operator that has elected to remove its wiring from subsequently agreeing with an MDU owner or alternative provider to sell or leave the wiring. The rules are intended to provide advance notice to MDU owners and alternative providers of

---

<sup>16</sup> See DirectTV Comments at 11.

<sup>17</sup> See, e.g., Comments of Tele-Communications, Inc. at 17-19 (proposing default prices of \$72 per-unit for MDUs with 50 or fewer units, \$115 per-unit for MDUs with 50 or more units without molding, and \$184 per-unit for MDUs with 50 or more units and where molding is required); Comments of Cablevision Systems Corporation at 14-16 (proposing a default price of at least \$150 per unit passed).

the incumbent's intentions. If, after receiving notice of an intention to remove the wiring, the MDU owner does not insist on such removal or is willing to negotiate to buy the wiring, there is no reason why the Commission should insist that the wiring be removed.

Moreover, there is no reason to decide at this point what the penalty should be for failing to remove wiring after electing to do so -- or even that there must be a penalty. We agree with SBC Communications, Inc. that incumbent operators, once they have made an election pursuant to the Commission's rules, will "have little incentive to renege on their decision" and to thus "jeopardize their relationship with MDU owners and potential customers."<sup>18</sup> We also agree with SBC that the Commission's existing complaint procedures are fully adequate to deal with rule violations and assess appropriate penalties on a case-by-case basis, and that, in any event, "[i]f circumstances demonstrate the need for express regulation, the Commission can reopen the issue of enforcement and penalties in further rulemaking."<sup>19</sup>

**V. THE EXTENT TO WHICH INCUMBENTS THAT REMOVE THEIR WIRING AFTER TERMINATION BY THE MDU OWNER ARE RESPONSIBLE FOR RESTORATION OF THE BUILDING IS -- AND SHOULD REMAIN -- A CONTRACTUAL MATTER GOVERNED BY STATE LAW.**

---

The procedural mechanisms proposed in the Further Notice are not meant to "create or destroy any property rights," but are simply intended to bring "order and certainty to the disposition of the MDU home run wiring upon termination of service."<sup>20</sup> Some parties, however, urge the Commission to require not only that incumbents give MDU owners advance notice of

---

<sup>18</sup> SBC Comments at 5.

<sup>19</sup> *Id.*

<sup>20</sup> Further Notice, ¶ 32.

whether they will exercise their right to remove their wiring upon termination but also that incumbents, if they choose to remove wiring, either restore the building to its original condition or reimburse the MDU owner for the restoration of the building.<sup>21</sup> Others ask the Commission to require incumbents to post a bond “to guarantee that an incumbent provider does not damage or abuse the property as wiring is extracted.”<sup>22</sup>

There is no reason for the Commission to create a duty on the part of incumbents to restore buildings to their original condition where they have no statutory, contractual or common law obligation to do so. Nor is it appropriate for the Commission to supersede state courts in determining the extent to which an MDU owner is entitled to recover for any damage that may have been caused by the installation or removal of wiring. It is easy to imagine circumstances in which requiring operators to restore a building or pay the MDU owner for restoration would be wholly unreasonable. Rewiring the building could itself cause damage and require restoration by the MDU owner or an alternative provider. It would make no sense to force the incumbent to incur the costs of restoring the building to its original condition *before* new wiring is installed. And it would make no sense to require the incumbent to pay for damage that would, in any event, have been incurred in connection with the rewiring of the building.

In any case, state courts are wholly capable of determining whether and in what circumstances incumbents have a duty to restore a building after termination of a service agreement and whether and to what extent damages are appropriate. Tenant and vendor liability for damages to MDUs is a bread-and-butter issue for state courts across the land. There is no

---

<sup>21</sup> See, e.g., Comments of DirecTV, Inc. at 14-15.

<sup>22</sup> CAI Comments at 14-15.

need for the FCC to become the Federal Condominium Commission to adjudicate, either by rule or on a case-by-case basis, these issues.

**VI. THE COMMISSION SHOULD NOT AUTHORIZE THE USE OF MOLDINGS AND CONDUITS BY ALTERNATIVE PROVIDERS WHERE INCUMBENT OPERATORS HAVE A STATUTORY, CONTRACTUAL OR COMMON LAW RIGHT TO PROHIBIT SUCH USE.**

---

In the Further Notice, the Commission proposed 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.”<sup>23</sup> DirectTV not only supports this proposal but suggests that “[t]o the extent that an MDU owner invites an alternative provider to install its wiring within existing molding or conduit, the incumbent provider should be powerless to prevent it, *even if it has a contract that purportedly grants it the right to exclusive use of the molding or conduit.*”<sup>24</sup>

Even RCN, the party that initially proposed such a rule, concedes that the Commission should not preempt any contractual or property rights to exclude alternative providers. In its view, the Commission’s proposed rule would apply only “in the absence of an express exclusive agreement or conveyance.”<sup>25</sup> CAI agrees that the proposed rule “should not interfere with an MDU owner’s ability to consider exclusive contracts of any sort, . . . since such options are a right of private ownership.”<sup>26</sup> As a threshold matter, the Commission should not preempt the

---

<sup>23</sup> Further Notice, ¶ 83.

<sup>24</sup> DirectTV Comments at 15 (emphasis added).

<sup>25</sup> RCN Comments at 8.

<sup>26</sup> CAI Comments at 17.

contractual obligations and conveyances of MDU owners and the corresponding rights of incumbents to limit access to their moldings and conduits.

RCN contends that alternative providers should have access to moldings and conduits in the absence of an express exclusive contract or conveyance, because it is “unaware of any statute or regulation which would convey a right to an incumbent cable provider or other MVPD to exclude others from empty space inside of a molding or conduit solely because the molding or conduit may have been installed by, or even owned by, the owner.”<sup>27</sup> Presumably, even RCN would agree that if there *were* such a statute or regulation (or a common law right to exclude), it should not be preempted by the Commission’s rule. There is no reason for the Commission to presume that no such statute, regulation or common law right exists. If it adopts its proposed rule, the Commission should make clear that alternative providers will have access to an incumbent’s moldings and conduits, only upon consent of the MDU owner -- *and only where the incumbent has no statutory, contractual or common law right to exclude or limit such access.*

As RCN concedes, incumbents should be entitled to compensation from alternative providers that use their moldings and conduits “in recognition and consideration of the initial investment made by the incumbent,”<sup>28</sup> even when such use does not interfere with existing property rights and does not entail a Fifth Amendment taking. If the Commission were to preempt contractual, statutory or common law rights in granting access to alternative providers, this would, of course, entail a taking. As we explained in our initial comments, such a taking

---

<sup>27</sup> RCN Comments at 8.

<sup>28</sup> *Id.* at 9. *See also* SBC Comments at 6-7.

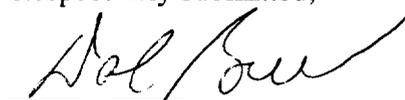
would be impermissible even if accompanied by compensation insofar as Congress has nowhere authorized -- much less mandated -- such access.

## CONCLUSION

The Commission lacks authority to adopt its proposed rules -- or *any* rules -- regulating the disposition of home run wiring. Even if the Commission were to proceed, it needs to amend its proposal to achieve its objectives. Specifically, the Commission cannot preserve existing property rights or provide order and certainty to incumbents, MDU owners and alternative providers unless it affords an incumbent an opportunity to obtain a *final* adjudication of its right to remain on the MDU's premises *before* complying with the other requirements of the proposed rules. If an operator offers to sell its wiring at a reasonable price, it should have no further obligations under the rules.

The Commission should not create an obligation on the part of incumbent operators to restore or pay for the restoration of an MDU following the removal of wiring where no such obligation exists under contract or state law. Nor should it authorize the use of moldings and conduits by alternative providers where incumbent operators have a statutory, contractual or common law right to prohibit such use. Finally, there is no need for the Commission to include a penalty provision in its proposed rules, since the Commission already has ample authority to enforce its rules as deemed appropriate on a case-by-case basis.

Respectfully submitted,



---

Daniel L. Brenner  
Michael S. Schooler  
David L. Nicoll

1724 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
202-775-3664

Counsel for National Cable Television  
Association

October 6, 1997