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**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

**REPLY COMMENTS OF TELE-COMMUNICATIONS, INC.**

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October 6, 1997

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## SUMMARY

The record overwhelmingly demonstrates that the Commission lacks the jurisdiction to regulate the disposition of home run wiring. Accordingly, TCI continues to believe that the Commission may not adopt the procedures proposed in the Further Notice.

If the Commission nonetheless adopts rules in this area, it must reject the proposals of certain alternative MVPDs that are designed solely to further skew the home run wiring procedures to guarantee them a competitive advantage. The worst example of such self-serving proposals is DirecTV's request that the Commission allow MDU owners to unilaterally abrogate, at any time, an existing MVPD's contract to serve the building, but at the same time preserve the sanctity of DirecTV's MDU contracts.

TCI reiterates that the best way to eliminate the current unfair bargaining advantage afforded MDU owners and new MVPDs under the Commission's proposed procedures is to: (1) establish a range of default prices for the home run wiring; and (2) terminate the Commission's procedures if the MDU owner and the new MVPD reject an incumbent's offer to sell the home run wiring at or below the default price. Moreover, the default price should be based on the replacement cost of the wiring, i.e., the cost that the MDU owner or the new MVPD would incur if it installed its own wiring.

Finally, if the Commission decides to move the demarcation point in cases where it is "physically inaccessible," it must define this term in such a way that it truly reflects those rare situations in which the demarcation point is buried beneath cinder blocks, concrete, metal conduit, or other comparably impenetrable structures, and not simply hallway molding.

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**REPLY COMMENTS OF TELE-COMMUNICATIONS, INC.**

Tele-Communications, Inc. ("TCI"), by its attorneys, hereby files its reply comments on the Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

## I. THE RECORD OVERWHELMINGLY DEMONSTRATES THAT THE COMMISSION LACKS THE JURISDICTION TO REGULATE HOME RUN WIRING IN MDUS.

TCI and the majority of other commenters provided compelling arguments refuting the analysis presented in the Further Notice of

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[1] In the Matter of Telecommunications Services Inside Wiring, Customer Premises Equipment; and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, Further Notice of Proposed Rulemaking, FCC 97-304 (released August 28, 1997) ("Further Notice").

the Commission's jurisdiction to regulate the disposition of the home run wiring in MDUs. These commenters made clear that Congress' specific directive in Section 624(i) of the Communications Act and its legislative history not to adopt rules regarding the disposition of the wiring outside an individual unit in an MDU preclude the Commission from implementing the procedures proposed in the Further Notice.[2]

Only two parties offered more than mere conclusory assertions regarding the Commission's alleged jurisdiction to regulate the disposition of home run wiring. Neither of these commenters, however, is able to find a jurisdictional basis for the Commission's proposed actions. GTE's assertion that section 623 of the Act -- which directs the Commission to ensure that subscriber's cable rates are reasonable -- somehow provides the requisite jurisdictional basis was soundly refuted in the Comments of NCTA,

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[2] See Comments of TCI at 4-8; Comments of NCTA at 6-10; Comments of Time Warner Cable at 49-67; Comments of Cox Communications, Inc. at 3-5; Comments of the Cable Telecommunications Association at 3-8; Comments of Adelphia Cable Communications, The Arizona Cable Telecommunications Association, Cable One, Inc., Insight Communications Company, LP, The Pennsylvania Cable and Telecommunications Association, State Cable TV Corporation, and Suburban Cable TV Co. Inc. at 2-3; Comments of Jones, Marcus Cable, Century Communications Corp., Charter Communications, Inc., Cable Television Association of Georgia, Cable Telecommunications Association of Maryland, Delaware and the District of Columbia, Florida Cable Telecommunications Association, New Jersey Cable Telecommunications Association, Ohio Cable Telecommunications Association, Oregon Cable Telecommunications Association, South Carolina Cable Television Association, Tennessee Cable Telecommunications Association, Texas Cable & Telecommunications Association, Virginia Cable Telecommunications Association at 2-7; Comments of U S West, Inc. at 4-6.

Time Warner, and others.[3] TCI agrees with NCTA's analysis that attempting to base the Commission's jurisdiction for the proposed procedures on section 623 "does not pass the straight-face test."[4]

The only other party to offer an analysis of the Commission's jurisdiction in this area was the Consumer Electronics Manufacturers Association ("CEMA"). CEMA argues that the Commission has authority under Title I of the Communications Act to preempt state mandatory access laws.[5] CEMA cites the Supreme Court's decision in Capital Cities Cable, Inc. v. Crisp[6] as support for this assertion. However, the Crisp case provides no basis for the Commission either to preempt state mandatory access laws or to regulate the disposition of home run wiring in MDUs. In that case, the Supreme Court held that because Congress had conferred broad authority on the Commission to regulate in the area at issue, namely cable signal carriage, the Commission was authorized to occupy the field and to preempt state laws which attempted to regulate in this area.[7] Neither CEMA, any other commenter, nor the Commission has demonstrated that Congress conferred upon the

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[3] See, e.g., Comments of NCTA at 12-13; Comments of Time Warner at 59-60.

[4] Comments of NCTA at 12.

[5] Comments of CEMA at 11-13.

[6] 467 U.S. 691 (1984).

[7] See id. at 699 ("The power delegated to the FCC plainly comprises authority to regulate the signals carried by cable television systems.").

Commission a similarly broad grant of authority in the cable wiring area. In fact, TCI and numerous other commenters have demonstrated just the opposite -- that Congress expressly limited the Commission's authority to regulating the disposition of wiring within the subscriber's home or individual dwelling unit.[8]

Because there is no sustainable support in the record for the Commission's assertion that it has the authority to regulate home run wiring, the Commission should not attempt to extend its cable wiring rules beyond a point which Congress expressly directed it not to venture.

## II. THE COMMISSION SHOULD REJECT THE PROPOSALS OF CERTAIN COMMENTERS TO FURTHER SKEW THE HOME RUN WIRING PROCEDURES TO GUARANTEE THEM A COMPETITIVE ADVANTAGE.

Assuming the Commission has jurisdiction to adopt the procedures proposed in the Further Notice, these procedures must facilitate an orderly transition to a new MVPD on the one hand and protect the property and other interests of the incumbent on the other hand. TCI believes that the Commission's proposed procedures represent a commendable attempt to achieve this balance. With the minor modifications and clarifications suggested by TCI in its initial comments (and discussed briefly in section III, infra),

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[8] The Crisp court also noted that preemption in that case was required because the state law at issue "plainly conflicted" with three specific federal regulations, 467 U.S. at 705, which is clearly not the case here.

these procedures will go a long way toward resolving the competitive issues raised in this proceeding.

Several commenters suggest modifications to the Commission's procedures that fail to recognize the delicate balance of interests at stake in this proceeding. The most notable example is DirecTV's remarkable suggestion that the Commission should allow MDU owners to unilaterally abrogate, at any time, an existing MVPD's contract to serve the building and to trigger the Commission's cable wiring procedures.[9] As if DirecTV's suggestion that MDU owners should be afforded a federal right to breach their freely negotiated, arms-length agreements were not sufficiently overreaching, DirecTV goes further: It seeks to ensure that all MDU contracts entered into by "alternative MVPDs" (such as DirecTV) will be "guaranteed access to the building for the duration of their terms."[10] In other words, contract sanctity is an inalienable right when it comes to DirecTV but taboo when it comes to DirecTV's competitors. The Commission should waste no time in rejecting this "stick it to them but not to us" proposal.[11]

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[9] Comments of DirecTV at 5-7. See also Comments of RCN at 16 (arguing that bulk services contracts should not supersede the Commission's procedures).

[10] Comments of DirecTV at n. 19.

[11] In this regard, TCI reiterates its earlier comments that nothing in the Commission's procedures should affect or preempt any of an MVPD's statutory, contract, or common law rights under state law. See Comments of TCI at 10-14. In particular, TCI notes that its primary business strategy for MDUs is based on competing for MDU contracts and often signing an exclusive contract for a term of years with the MDU owner in the buildings in which TCI's bid has

(continued . . .)

DirecTV also suggests that the Commission alter the proposed procedures so that the incumbent would initially elect either to abandon its wiring or to "sell" it to the new MVPD for pennies (i.e., for a "nominal per-foot cost"[12]); only if the MDU owner and new MVPD refuse to purchase the incumbent's wiring at this ridiculously low price would the incumbent have the option of removing the wiring. Aside from its lack of substantiation or balance, this proposal would also substantially undermine the Commission's taking analysis, since the Commission's argument that no taking will occur is predicated on the incumbent's ability at the outset to elect to remove the wiring.[13]

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(. . . continued)

been successful. TCI strongly opposes any suggestion that the Commission has the authority to alter these contracts or to constrain TCI's or any other MVPD's ability to enter into such arms-length agreements in the future. Such restrictions would be particularly unwarranted given that some of the principal supporters of changes to the Commission's cable wiring rules, such as Optel, also oppose any efforts by the Commission to limit the flexibility of MVPDs to enter into contracts with MDU owners, including exclusive contracts. See, e.g., Ex Parte Letter of Optel, Inc., filed on June 25, 1997, in CS Docket No. 95-184, at 6 ("Given the economics of the MDU marketplace, the ability of competing service providers and MDU owners to negotiate for exclusive right of entry agreements is essential to the development of competition in this market. Service providers need exclusivity to recover their investment in plant and equipment that is needed to serve an MDU and MDU owners need it to tailor the best package of video and telecommunications services for MDU residents."); Ex Parte Letter of Optel, Inc., filed on November 20, 1996, in CS Docket No. 95-184, at 2 (same).

12 Comments of DirecTV at 13.

13 See Further Notice at ¶ 72.

Similarly, certain parties suggest that the incumbent should be required to post a performance bond if it elects to remove the wiring.[14] This proposal should be rejected as little more than an attempt to make the removal option so unattractive that the incumbent is effectively forced to abandon its property, thereby allowing the new MVPD to free ride on the incumbent's substantial infrastructure investment.

Finally, several commenters suggest that the Commission's procedures should not be tolled when the incumbent seeks a judicial determination that it has a right to remain on the premises,[15] and RCN proposes that if the incumbent is unable, within the Commission's 90-day notice period, to obtain a court order regarding its right to maintain its home run wiring on the premises, that it be subject to forfeitures for each day past the end of the notice period until such a court order is obtained.[16] Again, the transparent objective of each of these proposals is to subjugate the rights and property interests of the incumbent to the commercial benefit of the new MVPD.[17]

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[14] See Comments of RCN at 15; Comments of the Community Associations Institute at 14-15.

[15] See, e.g., Comments of Heartland Wireless at 5; Comments of Wireless Cable Association at 8-11.

[16] See Comments of RCN at 12-13.

[17] The proposals that the Commission should presume that the incumbent does not have an enforceable right to remain on the premises and should avoid tolling the procedures if the incumbent seeks a court determination on this issue are additionally problematic from a Fifth Amendment takings perspective. The

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Such proposals are particularly unjustified in light of the fact that as both Congress and the Commission have previously recognized, the MDU marketplace is a uniquely dynamic environment in which the cable operator faces direct and vigorous competition.[18] Both MMDS and SMATV operators have long tailored their service offerings to MDU subscribers, engaging in highly aggressive marketing and pricing strategies designed to win subscribers and entire MDUs from their cable competitors.[19] In addition, DBS operators have begun to act on their own ambitious plans to enter the MDU market.[20] As a result, in the 1996 Act, far from finding any competitive problem in the MDU marketplace caused

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Commission's tentative conclusion that the proposed procedures do not effect a taking of the incumbent's property is expressly predicated on the fact that "the procedures apply only where the incumbent does not have a contractual, statutory or other legal right to maintain its wiring on the premises." See Further Notice at ¶ 72. If the Commission were to allow the procedures to go forward before it is clear that the incumbent no longer has any enforceable right to maintain its wiring on the premises, the Commission's taking analysis would be substantially undermined.

[18] See, e.g., H.R. Rep. No. 204, 104th Cong., 1st Sess. 109 (1995) (recognizing that discounted offerings to MDUs by cable operators is necessary due to the presence of other providers offering the same service); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Third Order on Reconsideration, 9 F.C.C.R. 4316, at ¶ 20 (1995) (noting that competitors in the MDU market have become "important footholds for the establishment of competition to incumbent cable systems").

[19] See "Latest Battleground: Cable Fighting For MDUs," Multichannel News, July 17, 1995, at 16.

[20] See "DBS Makers Target MDUs," Multichannel News, March 4, 1996, p. 5 (describing industry-wide DBS efforts to compete in the MDU market).

by cable operators' contracting practices, Congress specifically afforded cable operators greater pricing flexibility to enable them to respond more effectively to the lower prices and sizable competitive pressures posed by alternative MVPDs in the MDU marketplace.[21] Seen in this light, the foregoing proposals by alternative MVPDs for a government-mandated competitive edge in the MDU marketplace are both wholly unwarranted and inconsistent with Congress' latest statement on the issue. The Commission should accordingly reject these proposals.

## III. THE COMMISSION SHOULD ESTABLISH A RANGE OF DEFAULT PRICES AND TERMINATE THE PROCEDURES IF THE MDU OWNER AND THE NEW MVPD REJECT AN INCUMBENT'S OFFER TO SELL THE HOME RUN WIRING AT OR BELOW THE DEFAULT PRICE.

As TCI described in detail in its initial comments, the fundamental problem with the Commission's proposed procedures is that MDU owners and new MVPDs will have no incentive to accept an incumbent's offer to sell the home run wiring, even at a reasonable price, because they have nothing to lose and everything to gain by forestalling negotiations until they know whether the incumbent is really willing to remove the wiring. Stated another way, by giving the MDU owner and the new MVPD the leverage and the incentive to refuse to agree on a reasonable price until they have forced the incumbent to reveal whether it will abandon its wiring at no charge

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[21] See 47 U.S.C. § 623(d), amended by section 301(b)(2) of the 1996 Act.

or remove it, the proposed procedures unjustifiably stack the deck in favor of the buyer.[22] To rectify this problem, TCI's initial comments proposed that the Commission should: (1) establish a range of default prices for the home run wiring; and (2) have its procedures automatically terminate where the MDU owner and the new MVPD refuse to buy the incumbent's wiring at or below the default price.[23] Based on an internal analysis of the costs to install wiring in new MDUs, TCI proposed a default price per unit for each of the three typical MDU wiring configurations: $72, $115, and $184.

TCI continues to believe that adoption of this modification to the Commission's procedures is required to create a more balanced and streamlined transition to the new MVPD. A default price is

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[22] For example, assume under the current procedures that the incumbent elects the sale option and asks for a reasonable price of $150 per unit for the home run wiring. Assume also that the MDU owner and new MVPD refuse to pay this amount. The incumbent is then forced to reveal whether it will remove or abandon the wiring. If the incumbent elects abandonment, the new provider gets the wiring for free. If instead the incumbent elects removal, the MDU owner and the new MVPD will still have the opportunity to negotiate to purchase the wiring. The advantage for the MDU owner and new MVPD in this scenario is that they have nothing to lose and everything to gain by refusing to accept the initial sales price. They have nothing to lose because they can always say they will purchase the wiring <u>after</u> the incumbent is forced to reveal that it will remove the wiring. They have everything to gain because in many cases an incumbent whose sales price is rejected will likely feel compelled to elect the abandonment option lest it elects removal and the MDU owner and new MVPD still refuse to purchase the wiring in which case the incumbent would be required to undertake the significant expense of removing the wiring and restoring the building.

[23] <u>See</u> Comments of TCI at 17-21.

especially necessary in order to establish a benchmark that identifies when the incumbent's asking price is reasonable, so that termination of the Commission's procedures would then be justified if the MDU owner and new MVPD refuse to buy the wiring at this price. Perhaps most importantly, TCI's default pricing proposal will give the Commission's procedures a chance to work with minimal delay and litigation. This is because rather than instituting legal action to fight over its right to maintain its wiring on the MDU premises, the incumbent may instead prefer to trigger the Commission's procedures at the outset in the hope that it will obtain the compensation represented by the default price.[24]

Of course, the benefits of TCI's default price proposal -- namely, reduced litigation, fairer compensation for the incumbent, a smoother transition to the new MVPD, and minimal disruption to subscriber service[25] -- will only be realized to the extent the Commission sets the default price based on replacement cost. As several commenters correctly explained, a replacement cost standard (which is the standard TCI used in proposing its range of default

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[24] See also Comments of Cablevision Systems at 13 ("With such a [default] price, a cable operator may also have less reason to litigate its continued right to maintain its wire in the building."). TCI's proposed modifications made clear that nothing prevented an incumbent from seeking a sales price for the home run wiring that is higher than the default price. However, if the MDU owner and the new MVPD refuse to purchase the wiring at this above-default price, the procedures would not automatically terminate. See Comments of TCI at 19-20.

[25] See Comments of TCI at 20-21.

prices from $72-$184/unit) would fully account for the cable operator's considerable investment in labor, plant, and equipment associated with the home run wiring. Moreover, any lesser amount would result in a windfall to the buyer. That is, if the incumbent were to remove its home run wiring (which is its right under the Commission's proposed procedures), the new MVPD would have to install the MDU wiring by itself and would have to pay the full replacement cost.[26]

Not surprisingly, new MVPDs urge the Commission not to adopt a default price but rather to let "marketplace negotiations" determine the proper price.[27] However, as NCTA properly points out, because the Commission's proposed procedures afford MDU owners and new MVPDs the opportunity to forestall negotiations until after they know whether an incumbent is committed to remove or abandon

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[26] See Comments of CATA at 12-13; Comments of Cox at 14; Comments of Cablevision at 14-16 ("It would be even more unjust to not compensate the outgoing provider for the replacement value of sold wiring where that operator may, in the near future, be faced with rewiring the building at replacement cost either because of a statutory obligation of universal service or a desire to offer tenants a choice in Internet access, other two-way services, or telephony."); Comments of CableVision Communications, Inc., Classic Cable, Inc., and Comcast Cable Communications, Inc. at 17 ("[T]he most reasonable formula is one that would be equal to the cost for the alternate provider to install a second home wire, including labor and material costs."); Comments of SBC at 5 (arguing that if the Commission sets a default price, it should "define replacement cost to include materials cost, labor costs, and other out-of-pocket costs associated with the installation of cable wiring."); Comments of U S West at 13.

[27] See, e.g., Comments of ICTA at 6-7; Comments of Optel at 4; Comments of Heartland Wireless at 6.

the home run wiring, "their bargaining leverage will be unfairly enhanced and the outcome will not reflect 'market forces.'"[28] Stated another way, the cable competitors' proposal to allow marketplace negotiations to govern in this context is simply a veiled attempt to have the Commission codify a new entrant advantage into its rules. There is no sound legal or policy basis for such regulatory handicapping.

TCI is unclear why ICTA believes that a default price could somehow subject the Commission's procedures to "a potential challenge on takings grounds."[29] A default price could only pose a potential compensation problem if the Commission's procedures effect a "taking" under the Fifth Amendment. The Further Notice tentatively concludes, however, that the procedures as crafted do not effect such a taking.[30] If the Commission continues to believe that there is no taking here, then, by definition, the issue of just compensation never arises.[31] And if the just compensation issue never arises, there can be no "potential challenge" to a default price on takings grounds. Furthermore, even if the procedures do effect a taking under Fifth Amendment jurisprudence,

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[28] Comments of NCTA at 23 (emphasis added).

[29] Comments of ICTA at 7. See also Comments of Building Owners and Managers Association at 8.

[30] See Further Notice at ¶ 72.

[31] See, e.g., Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

it is unclear how a default price would be problematic but leaving the determination of the sales price to "marketplace negotiations" would not be equally problematic, especially since under such circumstances just compensation would appear to have to be determined in an adjudicatory proceeding.[32] In short, the establishment of a default price is not constitutionally problematic.

## IV. RESPONSE TO COMMENTS REGARDING THE MOVEMENT OF THE MDU DEMARCATION POINT.

Despite the fact that the Further Notice clearly requests that parties not raise old arguments or proposals, several parties re-argue their earlier proposals to have the Commission move the demarcation point back to the lock box.[33] The Commission should reject these proposals as beyond its jurisdiction under the Communications Act and also beyond the scope of the Further Notice.

If the Commission nevertheless decides to move the demarcation point in situations where this point is "physically inaccessible,"[34] it must define this term in such a way that it truly reflects those rare situations in which the demarcation point

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[32] See Florida Power Corp. v. FCC, 772 F.2d 1537, 1546 (11th Cir. 1985), rev'd on other grounds, 480 U.S. 245 (1987) (if a taking has occurred, just compensation must be determined by adjudication).

[33] See, e.g., Comments of DirecTV at 9.

[34] See Further Notice at ¶ 84.

is buried beneath cinder blocks, concrete, metal conduit, or other comparably impenetrable structures, and not simply hallway molding.

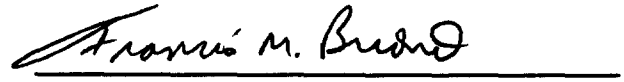
Finally, the Commission should make clear that if it does move the demarcation point in those cases where the point is physically inaccessible, the point should move either towards the lock box or towards the unit depending solely on which direction will provide access to the first point where the wiring becomes physically accessible.

**CONCLUSION**

If, notwithstanding the jurisdictional deficiencies raised by TCI and other commenters, the Commission nevertheless adopts the procedures set forth in the Further Notice, TCI respectfully urges the Commission to modify these procedures consistent with the specific recommendations and clarifications set forth in these reply comments and in TCI's initial comments.

Respectfully submitted,

**TELE-COMMUNICATIONS, INC.**



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