

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

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FEDERAL COMMUNICATIONS COMMISSION  
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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 DIRECTV, INC.**

Eager to ensure that the Commission will not upset their cozy arrangements with MDU owners, the cable industry's comments discuss at length the numerous anticompetitive tactics that they employ to maintain their market power, all the while applauding the Commission's decision not to apply its rules to their long-term and exclusive contracts with MDU owners nor their exclusive easement rights.<sup>1</sup> While urging the Commission to maintain the uncompetitive status quo, the cable industry also unwittingly bolsters DIRECTV's argument that the Commission's proposals will be effective only if they embrace all MDUs, not just those no longer subject to a cable contract.

<sup>1</sup> See, e.g., *Comments of Jones Intercable et. al.* ("Joint Commenters") at 14-16.

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**I. THE COMMISSION HAS AMPLE AUTHORITY TO ADOPT THE PROPOSED RULES**

Fearful of losing their privileged position in the MDU market, and therefore unwilling to support the adoption of rules that may promote competition, the incumbent providers have largely chosen to ignore the Commission's substantive proposals and instead have devoted the greater part of their comments to the argument that the Commission does not have the authority to adopt the rules it proposes in the *Further Notice*. This analysis is unpersuasive. The Commission's authority to adopt its proposed rules is firmly grounded in Section 4(i) of the Communications Act of 1934,<sup>2</sup> Section 16 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act")<sup>3</sup> and Section 207 of the Telecommunications Act of 1996 ("1996 Telecommunications Act").<sup>4</sup>

As DIRECTV and others pointed out in their initial comments,<sup>5</sup> Section 207 of the 1996 Telecommunications Act provides the necessary statutory authority for the Commission to adopt the regulations proposed in the *Further Notice*. Section 207 requires the Commission to preempt restrictions that impair a viewer's ability to receive certain specified video programming services, including direct broadcast satellite ("DBS"), through over-the-air reception devices. When it adopted Section 207, Congress did not intend for the Commission to confine itself only to striking down municipal ordinances and private agreements that restrict a viewer's ability to

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<sup>2</sup> 47 U.S.C. § 154(i)

<sup>3</sup> 47 U.S.C. § 544(i).

<sup>4</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996) § 207, *reprinted in* 47 U.S.C.A. § 303 note (1997) ("Restrictions on Over-the-Air Reception Devices").

<sup>5</sup> *See, e.g., DIRECTV Comments at 3-4; Comments of Philips Electronics North America Corporation and Thomson Consumer Electronics, Inc. at 2-4.*

install a DBS, MMDS or broadcast antenna or, in the case of MDUs, to provide relief only to unit owners who have exclusive access to areas suitable for antenna installation, such as a south-facing patio or balcony.<sup>6</sup> Rather, Congress expected that the Commission would take all the steps necessary to enable a DBS provider to deliver its signal from the dish to a subscriber's TV set. This means that the Commission must extend its rules to renters as well as owners, must adopt new rules ensuring that a DBS operator will be able to obtain access to an MDU rooftop and must give competitive MVPDs access to the riser cable, home run and home wiring. The statutory authority that Congress granted to the Commission under Section 207 amply empowers the Commission to adopt the rules proposed in the *Further Notice*.

Even if Section 207 had never been enacted, the Commission would still have had the authority to adopt these rules under Section 4(i) of the 1934 Communications Act. The cable operators argue that Section 624(i) limits the reach of Section 4(i) and precludes the Commission from adopting any regulations governing the disposition of cable wiring *outside* an individual subscriber's unit.<sup>7</sup> This argument ignores the language of Section 624(i) and the purpose underlying it, as well as the principle that the Commission's sweeping regulatory powers under Section 4(i) can be limited only by express statutory prohibitions.<sup>8</sup>

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<sup>6</sup> See generally *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, *Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, CS Docket No. 96-83.

<sup>7</sup> See, e.g., *Comments of the Cable Telecommunications Association* ("CATA") at 6; *Comments of National Cable Television Association, Inc.* ("NCTA") at 7.

<sup>8</sup> See *Further Notice* at ¶ 54.

As the Commission correctly pointed out in the *Further Notice*,<sup>9</sup> the consumer's right to purchase his or her cable home wiring is not the 1992 Cable Act's goal; rather, the object is to promote consumer choice and competition in the MVPD marketplace.<sup>10</sup> Moreover, Section 624(i) does not purport to limit the Commission's general authority. By its terms it was not designed to empower the Commission to do something for which it otherwise lacked authority, but rather it served an exhortative role, requiring the Commission to do something it already had the power to do. Thus, Section 624(i) in no way limits the Commission's authority under Section 4(i) to adopt the proposed rules.

## **II. A CABLE OPERATOR CONFIRMS DIRECTV'S PREDICTION THAT THE REMOVAL OPTION WILL BE ABUSED**

In its comments, a cable operator, Time Warner, has confirmed DIRECTV's prediction that if incumbent cable operators are able to exercise a removal option (without being required first to offer to sell the wiring at nominal cost) they will use it strategically to deter MDU owners from electing to open their buildings to competition. In urging the Commission to adopt a different rule, Time Warner acknowledges how cable operators are likely to behave if given such a removal option:

[I]f the MDU owner fails to offer a satisfactory price, the MVPD can always tear out the home runs. After the incumbent actually follows through with this a few times, *the MDU owners will learn their lesson* and agree to fair prices in the future.<sup>11</sup>

Unfortunately, the lesson that MDU owners will learn is that they dare not open their doors to competition for fear of the disruption of video service and damage to the physical structure of the

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<sup>9</sup> See *Further Notice* at ¶ 56.

<sup>10</sup> *Id.*

<sup>11</sup> *Comments of Time Warner* at 38 (emphasis supplied).

MDU that the incumbent cable operator will be able to inflict upon them. Therefore, based on Time Warner's own acknowledgment that the cable industry will employ the removal option strategically to deter MDU owners from opening their buildings to competition, the Commission should permit the incumbent cable operator to remove its wiring only after it has first offered to sell it at nominal cost.

### **III. THE CABLE OPERATORS' PROPOSALS WOULD SERVE ONLY TO MAINTAIN THE STATUS QUO**

In the scant few pages they devote to the Commission's substantive proposals, the cable operators reveal their unwillingness to embrace any move towards open competition in the MVPD market within MDUs. Instead, they propose variations on the Commission's rules that, if adopted, would ensure that competition will be slow in coming to MDUs.

The Commission should reject out of hand the proposals made by some cable operators<sup>12</sup> to include a "fourth option" permitting an incumbent cable operator to challenge in state court an MDU owner's decision to terminate its access to the building. The purpose of the *Further Notice* is to permit MDU owners to replace incumbent cable providers without legal liability (other than the requirement of just compensation); thus there should no legal basis for an injunction to issue. Moreover, this proposal is superfluous. Cable operators already possess the ability to ask a state court to enjoin an MDU owner from terminating an incumbent's access to the building. In essence, the cable operators are asking the Commission to supplant the state courts and prejudice in their favor their future requests for an injunction. Clearly the Commission should not do so.

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<sup>12</sup> See, e.g., *NCTA* at 20; *Comments of Cox Communications, Inc.* at 10.

In addition, the proposals by several cable operators to establish a default price on the basis of units passed, which would enable them to recover far more than the salvage value of the coaxial cable, also should be quickly dismissed by the Commission.<sup>13</sup> Nowhere in their comments do the cable operators acknowledge that in the *Cable Wiring Order* the Commission rejected these very arguments. In that proceeding, which produced rules that the cable industry has never challenged, the Commission found that “just compensation” for the wire was simply the replacement price of the coaxial cable.<sup>14</sup> It does not include any allowance for items such as “original installation costs . . . large expenses to maintain and upgrade the facilities, provide customer service, and maintain goodwill” as requested by Adelphia Cable and other cable operators.<sup>15</sup> Indeed, if the Commission establishes too high a default price there will be no competition for multichannel video services within MDUs since the cost of entry will be prohibitive.

#### IV. CONCLUSION

For the reasons stated in DIRECTV’s initial and reply comments, the Commission should move the demarcation point to the lockbox. This would make the home run wiring part of the home wiring thereby disposing of the need to distinguish between the home run and home wiring at all. Moreover, moving the demarcation point to the lockbox also would avoid the problems inherent in the removal option. If the Commission is not inclined at this time to move

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<sup>13</sup> See, e.g., *CATA* at 12; *Comments of Cablevision Systems* at 14.

<sup>14</sup> *Report and Order*, MM Docket No. 92-260, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, 8 FCC Rcd 1435 (1993) (“*Cable Wiring Order*”).

<sup>15</sup> See, e.g., *Comments of Adelphia Cable Communications et. al.* at 28.

the demarcation point, it should instead ensure that the rules it adopted in the *Cable Wiring Order* apply to all cable wiring within MDUs.

Respectfully submitted,



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