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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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October 6, 1997

Mr. William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

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

Dear Mr. Caton:

Pursuant to the *Further Notice of Proposed Rulemaking* issued August 28, 1997, in the above-captioned proceeding, the Community Associations Institute (CAI) submits an original and nine copies of its Reply Comments. CAI's Reply Comments are also being provided on disk in Word 7.0.

CAI appreciates the opportunity to participate in this proceeding.

Sincerely,

A handwritten signature in black ink that reads "Rodney D. Clark".

Rodney D. Clark
Vice President
Government and Public Affairs

Enclosures

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

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In the Matter of)	
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Implementation of the Cable)	
Television Consumer Protection)	MM 92-260
and Competition Act of 1992)	
)	
Cable Home Wiring)	

Reply Comments of the Community Associations Institute

Pursuant to the *Further Notice of Proposed Rulemaking* ("Further Notice") released August 28, 1997, in the above-captioned proceeding, the Community Associations Institute ("CAI") submits the following Reply Comments.

As stated in its Comments, CAI encourages the Commission's efforts to craft a rule that will enable more community associations to maximize the competitive use of inside wiring and the availability of video services while thoroughly protecting common and private property. While CAI is pleased with the generally positive direction of this Proposed Rule, some of the recommendations of certain Commenters would hinder competition and unreasonably or unlawfully restrict the rights of community associations

and other MDU owners. CAI urges the FCC's careful consideration of the modifications suggested in CAI's previous Comments as well as those discussed below so that the Commission's eventual actions may truly and appropriately foster competition among telecommunications providers and better services for MDU residents.

I. COMMUNITY ASSOCIATIONS RESPOND TO RESIDENTS' NEEDS

Several of the Comments contain false and misleading statements about MDUs, and reflect incorrect perceptions about community associations in particular. Some Commenters argue that MDU owners deny their residents telecommunications services.¹ According to these Commenters, MDU owners seek to act in ways contrary to their residents' interests.² These Commenters use these arguments to assert that MDU owners should have very limited rights in controlling access to their properties.

These Commenters appear to misunderstand the organization and operation of community associations, which comprise a great deal of MDUs. CAI would like to correct these misperceptions. In community associations, residents govern themselves. The governing board of directors is composed of owners who are elected by other owners. As a result, community associations are particularly accustomed to considering the needs and desires of their residents when determining budgetary expenditures and the use of common property.

¹ Comment of Philips Electronics North America and Thompson Consumer Electronics, Inc. ("Philips"), 8.

² Comments of the Cable Telecommunications Association ("CTA"), 15; US West Inc., 3.

If owners disagree with the decisions of their board, they have the opportunity to replace its members or seek election themselves. Board members must therefore respond to the concerns of other owners regarding access to telecommunications services and the expectation that the delivery of such services does not damage the substantial investment that owners have made in association property. If certain telecommunications providers have not gained access to community associations, it is due to a lack of demand for their services, concern over potential damage to property, the scarcity or absence of available space, incumbent providers' restrictions on inside wiring or other such legitimate concerns. It is not due to association intransigence.

Some Commenters, operating under the same misperceptions, have asserted that the FCC should require MDU owners to demonstrate proof of agency to make decisions regarding inside wiring on behalf of their residents.³ In community associations, such proof is unnecessary, since the association was created to represent the aggregate needs of all residents. Requiring the association to obtain proof of agency from every owner would be unnecessary and overly cumbersome in light of this existing representation.

II. THE FCC CANNOT FORCE ACCESS TO MDU OWNERS' PROPERTY BY TELECOMMUNICATIONS SERVICE PROVIDERS

Several Commenters have asserted that the FCC should mandate forced access to MDU property, so that all telecommunications service providers would be able to install

³ Comments of Tele-Communications, Inc. ("TCI"), 24.

telecommunications service equipment.⁴ As the FCC⁵ and other Commenters⁶ have indicated, such a rule is impractical, as it would implicate the Fifth Amendment, create major maintenance problems, and dampen competition.

As CAI has argued in other proceedings,⁷ any FCC requirement that a community association permit access to common property for the installation of telecommunications equipment without the association's consent would violate the Fifth Amendment to the United States Constitution. The type of forced access envisioned by Cox and DirecTV has already been declared unconstitutional by Loretto v. Manhattan Teleprompter.⁸ In Loretto, the statute required MDU owners to make their properties available for cable installation, providing only nominal compensation for the space occupied. The Court ruled that even the slightest physical occupation of property, in the absence of compensation, is a taking.⁹

Cox suggests in its Comments that MDU owners' somehow relinquish their property rights regarding potential future telecommunications installations once at least one other communications network is installed.¹⁰ Since Cox is apparently reading something other

⁴ Comments of Cox Communications ("Cox"), 6-8; DirecTV, I, 4; Leaco Telephone Cooperative, Inc, ("Leaco:"), 3.

⁵ *Further Notice*, paragraph 62.

⁶ Comments of GTE Service Corporation ("GTE"), 13; Comments of OpTel, Inc. ("OpTel"), 3.

⁷ See CAI Comments and Reply Comments in the consolidated proceeding *In the Matter of Preemption of Local Zoning Regulation of Satellite Earth Stations: IB Docket No. 95-59 and In the Matter of 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*.

⁸ 458 U.S. 419 (1982).

⁹ Loretto, at 427.

¹⁰ Cox, 8.

than the U.S. Constitution, CAI reiterates that any mandatory access requirements would be a taking of MDU property. Installation of any wiring without the MDU owner's consent would be a constitutional violation, since it would be a physical intrusion onto property that the telecommunications service provider does not own. Just as all dry cleaners or sandwich shops may not force their way onto common property to sell their services simply because an MDU has contracted with other such entities, neither can a telecommunications provider take over property it does not own simply because other providers are already there. Without the consent of the MDU owner, there is a physical intrusion, which is a prohibited taking unless justly compensated.¹¹

Moreover, the FCC has no authority to provide just compensation for property taken by any contemplated forced access rule. According to Bell Atlantic v. FCC,¹² any taking of private property must be expressly authorized by statute.¹³ None of the statutes upon which the FCC or others are relying in this rulemaking proceeding authorize such takings of MDU property. Throughout the *Further Notice*, the FCC has refrained from taking property, whether it be that of telecommunications service providers or of MDU owners. The FCC should continue this policy of restraint.

Any rule providing for mandatory access would also impose immense maintenance burdens upon MDU owners as wiring installation and repair activity is not just a mere "inconvenience."¹⁴ Wiring installation usually involves removing or drilling through

¹¹ Loretto, at 427.

¹² 24 F.3d 1441 (D.C. Cir. 1994)

¹³ Bell Atlantic, at 1445.

¹⁴ US West, 7.

walls, floors, and ceilings. This activity often causes damages, requiring additional expense to restore the property. With its authority to permit or deny access to its common property, an association can insure that any damage to common property is repaired and paid for by the service provider causing the damage. With mandated access, cable providers have less of an incentive to prevent damage to common property because their lack of care cannot be a basis for exclusion from the property. The association and its owners, the potential subscribers, will be required to bear the financial burden of repairs.

Furthermore, mandatory access laws are anti-competitive. They favor the first telecommunications service provider to install wiring in an MDU. The incumbent has little incentive to provide competitive service, since it cannot be dislodged. While some incumbent cable providers suggest that the FCC should accommodate existing state mandatory access laws, CAI urges the Commission to do nothing in this rulemaking that would support such poor public policy. Rather, competition would benefit if such laws were further limited or removed.

For the above reasons, the FCC should not require MDU owners to permit telecommunications service providers access to MDU property. The Proposed Rule outlined in the *Further Notice* provides telecommunications service providers and MDU owners additional flexibility and opportunity without effecting the constitutional takings issues that would accompany any mandatory access proposals.

**III. THE FCC MUST CLARIFY ITS DEFINITION OF
“ENFORCEABLE LEGAL RIGHT”**

CAI agrees with most of the other Commenters that the FCC must clarify its definition and procedures to determine when incumbents have an “enforceable legal right” to remain on MDU property. CAI understands that there will be situations in which state law or private contracts may provide incumbents with either ownership rights in the wiring or rights to remain on the property. If such rights are not acknowledged, takings and impairment of contracts issues could apply.¹⁵

CAI also understands that many of these issues must be resolved in state court, rather than by the FCC, because they deal with state law. At the same time, incumbent providers should not be permitted to chill competition and stall the Proposed Rule’s transition process by merely claiming some right. There must be some affirmative obligation on the incumbent to demonstrate that the right exists.

Many Commenters suggest that incumbent providers must inform MDUs of their intention to seek determination of this right within 30 days after the MDU owner informs the incumbent of its intention to terminate service or permit competition.¹⁶ Other Commenters go further, proposing that incumbents must either initiate litigation within 30 days¹⁷ or obtain a court order within 30 days.¹⁸ While these proposals do not

¹⁵ Unlike some other Commenters, CAI recognizes the validity of the takings issues raised by all parties in this proceeding -- MDU owners and telecommunications providers alike.

¹⁶ Comments of Cox, 10; National Cable Television Association (“NCTA”), 30; TCI, 13-14.

¹⁷ Cox, 10.

¹⁸ Comments of RCN Telecom Services (“RCN”), 12.

eliminate the chilling effect of threatened litigation on competition,¹⁹ CAI would support a requirement that any litigation to establish an enforceable legal right must be initiated within the initial 30 days from the date of first notice by the MDU owner.

Many Commenters assert that the FCC should not create a presumption that no enforceable legal right exists, since that presumption would preclude an incumbent's ability to demonstrate such a right in state court.²⁰ While CAI does not suggest that the FCC limit the rights of any provider or MDU owner, CAI does support a presumption by the FCC that the incumbent, not the MDU owner, would have the burden of producing evidence that an enforceable legal right exists. The presumption would not destroy incumbents' ability to demonstrate the existence of an enforceable legal right in state court; it would merely prevent frivolous acts by incumbents that possess no right but who threaten litigation to prevent the MDU owner from terminating service. Since such a presumption would not prevent incumbents from asserting their rights in court, the FCC should adopt this presumption.

IV. INCUMBENTS SHOULD NOT BE PERMITTED TO REMAIN ON MDU PROPERTY IF THE MDU OWNER DOES NOT PURCHASE WIRING

Some Commenters have proposed that the FCC should permit incumbents to remain on MDU property and continue providing telecommunications service in cases where an

¹⁹ See, CAI Comments at 9.

²⁰ Cablevision Systems Corporation ("Cablevision"), 5; CTA, 10; Cox, 11; NCTA, 21.

MDU owner does not purchase the wiring.²¹ This continued presence in opposition to an MDU owner's wishes and legal rights would be a trespass at best and a taking at worst.

These Commenters assert that MDU owners have no incentive to negotiate with the incumbent to purchase wiring.²² These Commenters fail to recognize that community associations that have the available resources will negotiate for the purchase of inside wiring to avoid disruption in service and to avoid the expense and damage associated with any additional removal or installation of wiring on common property. Community associations that are unable or unprepared to purchase wiring are able to defer to alternate providers to negotiate a sale of the wiring. Alternate providers have both the resources and a strong incentive to purchase existing wiring to facilitate and expedite the delivery of their services while minimizing the difficulty and cost associated with new installations. Incumbent providers should not be allowed to use an MDU owner's decision to forgo the purchase of wiring as an excuse to avoid the wiring disposition process.

V. THE NEGOTIATION PERIOD SHOULD BE LENGTHENED,

NOT SHORTENED

Several Commenters have suggested that the wiring disposition timeline should be shortened, particularly for the unit-by-unit disposition of home run wiring.²³ Others have

²¹ Cox, 14, TCI, 4; US West 12-13.

²² Cox, 14, TCI, 3; US West 12-13

²³ Echostar Communications ("Echostar"), 2; Heartland Wireless Communications ("Heartland"), 4; Independent Cable and Telecommunications Association ("ICTA"), 7; Leaco, 4

argued that incumbents should have shorter deadlines.²⁴ While CAI supports efficient procedures, the negotiation and decision requirements for MDU owners as initially proposed already present difficulty for community associations and any reduction in this aspect of the timeline would further prevent associations from exercising the procedures outlined in the Proposed Rule.

As CAI explained in its Comments,²⁵ community associations are governed by a volunteer board of directors that meets once a month and which may be unable to meet in accordance with the timeline proposed for decisions and negotiations. Any compression of the negotiation period will prevent a large number of MDUs that are community associations from participating effectively in the wiring disposition process. CAI urges the FCC to examine and adopt the proposals outlined in CAI's Comments

VI. THE MARKET, NOT REGULATION, SHOULD DETERMINE WIRING PRICES

In response to the *Further Notice*, Commenters have offered various pricing alternatives: the actual replacement cost, a cost based on the number of units passed;²⁶ the actual replacement and labor costs;²⁷ or the market price.²⁸ The market price is the most

²⁴ Building Owners and Managers Association et al. ("BOMA"), 7.

²⁵ CAI, 11-14.

²⁶ CTA, 12, Cablevision, 14; TCI, 3, 18.

²⁷ Cox, 14.

²⁸ BOMA, 8; ICTA, 6; OpTel, 4.

appropriate price for inside wiring. There are numerous variables -- from the age of the wiring and size of the property to the number of subscribers and physical arrangement of the building -- which could impact the cost of wiring. No formula is going to adequately address all such factors. Therefore, the cost of wiring should be negotiated among the parties, on a case-by-case basis, according to the marketplace.

At least one Commenter has asserted that the incumbent always owns the wiring.²⁹ In many states and associations, this is not the case. In some states, fixture laws transfer ownership of the wiring to the MDU owner at some point. In other cases, association documents identify inside wiring as part of common property. In such circumstances, the incumbent cannot assert wiring ownership.

**VII. MDU OWNERS SHOULD DECIDE THE NEW LOCATION OF ANY
PHYSICALLY INACCESSIBLE DEMARCATION POINT**

Many Commenters agree with CAI that the demarcation point should be in a location which is generally accessible without drilling or sawing through common area walls, floors, ceilings, or conduits³⁰ since MDU owners are more likely to permit access to telecommunications service providers when common property will not be damaged.³¹ As CAI stated in its Comments, MDU owners should determine the point at which wiring becomes physically accessible in order to preserve the integrity of the property. Such

²⁹ Cox, 14.

³⁰ DirecTV, 16; Philips 5, 15; RCN, 3.

³¹ Consumer Electronics Manufacturers Association ("CEMA"), 5.

determinations will vary on a case-by-case basis and the MDU owner is best suited to establish the new demarcation point since it will remain on common or private property and the MDU owner is responsible for making all determinations relating to the use and protection of such property.

VIII. TRANSFER OF OWNERSHIP OF NEW WIRING

SHOULD NOT BE MANDATED

CAI agrees with other Commenters that the FCC should not require the transfer of new wiring to MDU owners.³² While some associations may be able to assume and professionally manage wiring infrastructure, others do not have the necessary resources to purchase the wiring, and may not obtain the percentage of votes required for collecting a special assessment for that purpose. In addition, many community associations will not have the staff or resources necessary for maintaining and repairing the wiring. Therefore, MDU owners should retain their marketplace option to negotiate for the purchase of newly installed wiring but should not be labored with such an obligation.

IX. MDU OWNERS, NOT INCUMBENT PROVIDERS, TYPICALLY

OWN CONDUITS

Some incumbent providers assert that alternative providers should not be permitted access to MDU conduits without compensation because the incumbents own the conduits.³³ While this may be the case in isolated instances, conduits generally belong to the MDU owner – at least in most community associations where documents specifically

³² GTE, 18; Heartland, 7.

³³ NCTA, 5, 26; TCI, 4, 21.

identify conduits as the common property of the association and not that of any service provider. In such cases, incumbents should not be able to prevent an alternative provider from installing its wiring in conduits, provided that the MDU owner has approved such installation and space permits.³⁴

X. THE PROPOSED RULE SHOULD APPLY IN ALL STATES

At least one Commenter suggests that the Proposed Rule should not apply in states that have mandatory access statutes.³⁵ The FCC should dismiss this suggestion as it would create a patchwork of inside wiring rules throughout the nation. In addition, adoption of such a proposal would contradict the Commission's efforts to promote increased competition among the various telecommunications service providers since mandatory access laws favor incumbents to the detriment of all other service providers.

CONCLUSION

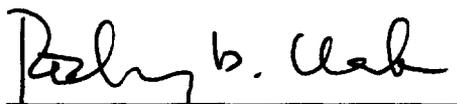
Community associations are self-governing organizations operated by residents on behalf of residents. As such, community associations are particularly responsive and seek to provide their residents with advanced, competitive and affordable telecommunications services. CAI applauds the Commission's progress in this proceeding and reminds the FCC that it does not have the authority to regulate property owned or controlled by community associations nor to mandate a taking of community associations' private

³⁴ If the incumbent has a contract right or an exclusive easement, it may be able to preclude access to alternate providers. However, such rights are different from ownership rights.

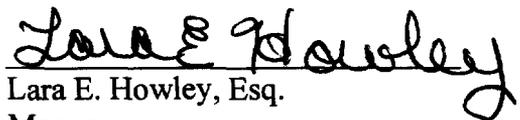
³⁵ US West, 10.

property under the Telecommunications Act of 1996. To improve the Proposed Rule, the FCC should clarify its definition of "enforceable legal right" to require incumbent providers to prove that such a right exists. Furthermore, incumbent providers should not be permitted to retain their wiring on MDU property simply because an MDU owner chooses not to purchase their wiring. The rule should provide ample time to allow community associations to negotiate and decide a purchase price for wiring – a price based on market forces. To adequately protect common and private property, MDU owners should determine any new location for physically inaccessible demarcation points. MDU owners should not have the obligation to purchase newly installed wiring but should retain the marketplace option to do so. MDU owners must also retain their rights to manage conduit space according to private contracts. Finally, the rule should apply in all states. Collectively, these recommendations and those outlined in CAI's Comments will ensure that the Proposed Rule positively impacts the state of competition among video providers and the availability of affordable services to MDU residents.

Respectfully submitted,



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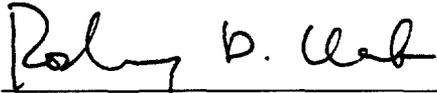


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October 6, 1997

CERTIFICATE OF SERVICE

I, Rodney D. Clark, hereby certify that copies of the foregoing "Reply Comments of the Community Associations Institute" have been mailed by first class United States mail, postage prepaid, to all parties of record on this 6th day of October 1997.

A handwritten signature in cursive script that reads "Rodney D. Clark". The signature is written in black ink and is positioned above a horizontal line.

Rodney D. Clark