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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	
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 COX COMMUNICATIONS, INC. ON FURTHER NOTICE OF PROPOSED RULEMAKING

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October 6, 1997

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ON FURTHER NOTICE OF PROPOSED RULEMAKING

Cox Communications, Inc. ("Cox"), by its attorney, hereby submits its reply comments in the above-referenced proceeding. As discussed below, the opening comments overwhelmingly support Cox's conclusion that the Commission simply lacks authority to adopt any new rules concerning the disposition of MDU inside wiring. Should the Commission nonetheless proceed with its rulemaking proposals, Cox urges it to reject suggestions from some commenters that would hinder the ability of MDU residents to make their own choices about which competitive communications services they will purchase. The Commission also should adopt refinements to its proposed rules which protect, rather than undermine, the legitimate rights and interests of incumbent service providers.

I. THE COMMISSION LACKS AUTHORITY TO ADOPT THE PROPOSED RULES.

The Further Notice reveals the Commission's strong desire, in the name of competition, to promulgate rules governing the disposition of cable wiring inside an MDU, but outside individual units, when an MDU resident terminates cable service. Cox supports the Commission's general efforts to promote competition in the multichannel video marketplace. As numerous commenters demonstrate, however, the Commission has not been given authority by Congress in the Communications Act to adopt the proposed rules.[1] In the words of NCTA, the proposed rules are "flatly inconsistent with the explicit intentions of Congress" and "are in no sense necessary to any of the Commission's statutory responsibilities."[2] Indeed, even some building owners, whom the proposed rules are designed principally to benefit, believe that the Commission has overstated the scope of its authority under Sections 623(b) and 4(i) of the Act.[3] As these commenters aptly observe, "[i]f the Commission were correct [in its jurisdictional analysis], it would have the authority to do anything that Congress has not explicitly forbidden. This cannot be true, even 'in the administrative setting.'"[4]

The record thus firmly establishes that the Commission does not have authority to adopt its proposed MDU inside wiring rules.

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[1] See, e.g., Comments of the National Cable Television Association (NCTA); Comments of Jones Intercable et al.; Comments of Tele-Communications, Inc.; Comments of Time Warner Cable; Comments of U S West, Inc.; Comments of CableVision Communications, Inc. et al.
[2] NCTA Comments at 6.
[3] Further Joint Comments of Building Owners and Managers Association International et al. (Building Owners) at 10.
[4] Id.

II. IF THE COMMISSION PROCEEDS WITH ITS PROPOSAL, IT SHOULD REJECT SUGGESTIONS THAT WOULD CURB SUBSCRIBER CHOICE

In its comments, GTE urges the Commission to eschew individual subscriber choice in order to facilitate building-by-building video competition.[5] As the Media Access Project observes, however, Congress has twice stated its intent to give "citizens the power to choose among MVPDs [multichannel video programming distributors]."[6] And, the Commission itself has recognized the importance of fostering the ability of subscribers who live in MDUs -- not their landlords -- to choose among competing service providers.[7]

Throughout this proceeding, Cox has encouraged the Commission to focus its efforts on promoting full facilities-based competition in MDUs.[8] The Commission therefore should reject requests from commenters that would modify the proposed rules in an anti-subscriber -- and anti-competitive -- fashion. Several commenters argue, for example, that the Commission should preempt state access laws which, in their view, favor the cable industry.[9] Even assuming the Commission had the necessary preemption authority (which it does not), such action would only hurt consumers by making it far more difficult for them to receive any video service, let alone competing ones. Surely consumers in right-of-access states would not agree that allowing MDU owners to

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[5]Comments of GTE at 5 ("an undue emphasis on individual subscriber choice can actually stifle competition rather than promote it").

[6] Comments of Media Access Project (MAP) and Consumer Federation of America at iii (emphasis in original).

[7] See, e.g., Further Notice at ¶¶ 25, 26.

[8] See Comments of Cox (filed March 18, 1996) at 5, 19-22; Comments of Cox on Further Notice of Proposed Rulemaking (filed September 26, 1997)("Cox Comments") at 2, 5-8.

[9] See, e.g., Comments of the Consumer Electronics Manufacturer's Association (CEMA) at 9-13; Comments of the Wireless Cable Association International, Inc. (WCA) at 3.

preclude franchised cable operators from serving their buildings -- and thereby deprive MDU residents of what may be their only multichannel video service option -- somehow serves the public interest.

The Commission similarly should reject proposals that MDU owners be permitted to enter into exclusive service arrangements with alternative service providers.[10] In Cox's view, competition is best promoted if exclusive service contracts are precluded in the future by Commission rule – regardless of whether the service provider seeking exclusivity is a new entrant or a well-established cable operator.[11] The end-game in this proceeding is to increase the competitive communications options available to MDU residents. Yet individual subscribers have no choice at all when their landlord selects a single, exclusive video provider for the building. If the Commission decides not to take up the broader issue of exclusive contracts at this time, it should, at a minimum, refuse to let an MDU owner take advantage of the proposed rules where it replaces the incumbent operator and enters into an exclusive arrangement with the new provider.[12]

The Further Notice also seeks comment on whether a landlord should be considered the "subscriber" in certain situations under the proposed rules.[13] Cox believes that decisions over whether to purchase MDU inside wiring should remain where Congress placed them – in the hands of individual MDU residents, not MDU owners.

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[10] See Comments of Community Associations Institute (CAI) at 17; MAP Comments at 11.
[11] The Commission does not have authority, however, to abrogate existing exclusive arrangements. Cox Comments at 11-12.
[12] Id. at 9-10.
[13] The Commission proposes that, when an entire building is being switched from one service provider to another, the MDU owner should be considered the terminating "subscriber" for home wiring that is not owned by the MDU residents. Further Notice at ¶ 76. Under similar proposals, the landlord would be considered the "subscriber" with regard to bulk service contracts (id.) and, with respect to the unit-by-unit

Finally, numerous commenters assert that alternative providers should be able to share conduits and moldings with incumbent operators.[14] Cox supports this proposal as long as the incumbent has not bargained for, and received, the exclusive right to use the conduits and/or moldings. It is not for the Commission to upset a lawful business arrangement that pre-dates the new rules. By the same token, shared use should be permitted where any exclusive rights enjoyed by the incumbent have expired. The key policy objective is to encourage the build-out of multiple broadband networks in MDUs. That objective would be squarely promoted by a Commission rule that allowed shared use of conduits and moldings in the absence of existing, enforceable exclusive rights.[15]

III. THE COMMISSION SHOULD PROTECT, NOT UNDERMINE, THE RIGHTS OF INCUMBENT OPERATORS

In their zeal to promote their own self-interest, some commenters ask the Commission to modify its proposed rules to make it even more difficult for incumbent operators to protect their legitimate property and contractual rights. DirecTV, for example, argues that the Commission should permit MDU owners to walk away from existing exclusive contracts with 90 days' notice.[16] Other alternative providers urge the Commission to shorten the already tight time periods set forth in the Further Notice pursuant to which incumbent service providers would have to make elections about, and actually dispose of, their internal MDU wiring.[17] WCA opines that those same time periods should continue to run regardless of whether the incumbent cable operator makes

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disposition of home wiring, where an individual MDU resident who does not own his unit declines to purchase the cable wiring inside those premises. Id. at ¶¶ 80-81.

[14] See Comments of DirecTV at 15-16; Further Comments of OpTel, Inc. at 7-8; MAP Comments at 20.

[15] See also Time Warner Comments at 47.

[16] DirecTV Comments at 5-7.

a claim that it has a legal right to remain on the property.[18] And both building owners and alternative service providers request that incumbent operators be required to continue providing service until the new provider is up and running – even where the incumbent's service contract has expired, it no longer has an enforceable right to be in the building and it has opted to remove its wire from the building.[19]

These efforts to compromise the rights of incumbent operators must be rejected. First, as Cox already has demonstrated, the Commission has no authority to abrogate existing contracts, nor would abrogation serve the public interest, particularly where the terms of the contract are themselves quite reasonable.[20] Second, the time periods proposed in the Further Notice are the minimum needed; making them shorter would ignore the business realities of running a complex video programming business. In particular, it is simply not practical to shorten the time given operators to remove home run and home wiring inside an MDU.[21]

Third, WCA's suggestion that the time periods should not be tolled while the cable operator pursues its rights in court is based on an erroneous assumption – i.e., that any displacement of the incumbent would be "without prejudice" to its rights should those rights ultimately be upheld in court. In many cases, a cable operator will simply not be able to secure court action within 30 days. By the time it does have its rights

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[17] See Comments of Independent Cable and Telecommunications Association (ICTA) at 7-8; WCA Comments at 13.
[18] WCA Comments at 8-11.
[19] ICTA Comments at 3-5; Building Owners Comments at 7-8.
[20] See Cox Comments at 11-12.
[21] The Further Notice proposes that, under a building-by-building disposition, an incumbent operator would have between 30 and 60 days to remove all home run wiring (depending on whether the parties first negotiated over price), and 30 days to remove all home wiring. Under a unit-by-unit disposition, the

affirmed by a court, it may well have been forced to take some action (sale, removal or abandonment) pursuant to the FCC's rules that it was not required by state law to take. Since it would be impossible to make the operator whole in these circumstances, its court victory would be a hollow one indeed. The Commission thus should require incumbents to pursue their rights in a timely fashion, and then toll the remaining time periods until a final resolution has been reached.[22]

Fourth, requiring the incumbent to continue providing service beyond the term of its contract smacks of having one's cake and eating it, too. Once it is clear that the incumbent no longer has a legal right to remain in the building[23] and it has opted to remove its wiring,[24] it is up to the MDU owner and the new service provider, not the incumbent who has just been ejected, to ensure that the MDU residents receive seamless video service.

Rather than embracing these proposals, therefore, the Commission should make clear that any new rules governing the disposition of MDU inside wiring will not affect adversely incumbents' contract and property rights.

IV. CONCLUSION

The opening comments establish that the Commission lacks jurisdiction to adopt its proposed rules governing the disposition of MDU inside wiring. Should the Commission nonetheless proceed with its proposals, it should reject requests made by

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incumbent would have 7 days in which to remove its home run wiring and its home wiring. See Further Notice, Appendices B and C.

[22] See Cox Comments at 10.

[23] Cox would not object to a requirement that the operator continue to serve the MDU while it prosecutes its right to remain in the building in court.

[24] There should be no break in service where the operator either agrees to sell its wiring to the MDU owner, alternative provider or subscriber, or where it decides to abandon it.

some commenters that would dilute the rights of either individual MDU residents or incumbent service providers.

Respectfully submitted,

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October 6, 1997