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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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 THE
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION

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October 6, 1997

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SUMMARY

A review of the comments demonstrates widespread dissatisfaction with the Commission's proposed procedural mechanism. Virtually no industry group thinks this mechanism will work, whether it be the incumbent cable operators, the alternative video service providers, MDU owners, over-the-air broadcasters, or consumer groups. Many commenters argue that the mechanism is too complex and lengthy, does not even apply in the many states with mandatory access statutes, and provides incumbent operators with opportunities to exploit the procedures (*e.g.*, threatening to remove the wiring) so as to discourage MDU owners from switching to an alternative provider.

The incumbent cable operators have signaled their intent to challenge any unfavorable outcome resulting from the Commission's proposal as constituting a "taking" of their property. The proposal set forth in the *Further Notice* promises to involve the Commission in much worse case-by-case battles over the "taking" issues than would adopting the simpler and more elegant solution of moving the demarcation point to the same accessible point in all MDU buildings. Unlike the procedural approach, it would not require the incumbent provider to transfer ownership of the home run wiring, but merely ensure that subscribers have access to it. If a "takings" argument can prevail in this instance to stymie Commission regulation of access to and use of wire used in interstate communications to provide video programming services, then the Commission has virtually no authority under the Communications Act to regulate at all.

The Commission has ample authority under Sections 4(i) and 601 of the Communications Act to regulate cable home run wire. In addition, this cable wiring proceeding is inextricably related to the Commission's Over-the-Air Reception Device ("OTARD") proceeding implementing Section 207 of the Telecommunications Act of 1996. Section 207

mandates consumer choice in video programming services. In the OTARD context, choice requires that a view have access not only to a satellite dish or antenna, but also to the inside wiring that connects the dish or antenna to the consumers television set. CEMA also agrees with NAB that off-air reception of the digital service offerings of a local television station may be the *only* reliable method for the consumer to benefit from digital television ("DTV"). Access to cable home run wiring is therefore critical if the Commission is to achieve its goal of an expeditious transition to DTV.

The Commission should adopt a "fresh look" policy to exclusive or long-term contracts between an MDU owners and incumbent providers. Such contracts serve no purpose but to prevent competition and are thus diametrically opposed to the public interest. In GN Docket No. 96-113, the Commission deferred consideration of a "fresh look" policy in the MDU context until the cable wiring proceeding was decided. Based on the record in this proceeding, the Commission should now follow through on its statement in GN Docket No. 96-113 and adopt a "fresh look" policy for MDU buildings.

Federal preemption of state laws is critical to ensure subscriber access to cable home run wiring. Virtually all state mandatory access statutes are anticompetitive because they furnish rights of access only to the incumbent cable operator. Whatever rules the Commission adopts with respect to cable home run wiring should apply equally in each state.

CEMA shares the concern of some commenters about potential abuses by landlords that control access to inside. However, the Commission's authority to regulate MDU owners is far less clear than its authority to regulate incumbent cable operators. In this proceeding, the Commission should concentrate on removing the unfair advantages enjoyed by incumbent cable operators.

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REPLY COMMENTS OF THE
CONSUMER ELECTRONICS MANUFACTURERS ASSOCIATION

The Consumer Electronics Manufacturers Association ("CEMA") hereby replies to the comments that were filed in response to the Commission's Further Notice of Proposed Rulemaking ("*Further Notice*") in the above captioned proceedings on September 25, 1997.[1]

I. INTRODUCTION

In its initial comments, CEMA urged the Commission to move the cable demarcation point to the minimum point of entry because it is a simple and effective solution that avoids the administrative problems inherent to the procedural approach proposed in the *Further Notice*. If the Commission were to adopt the procedural approach, CEMA argued that the Commission should (1) preempt state laws that would frustrate the proposal's pro-competitive

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[1] *See Telecommunications Services Inside Wiring -- Customer Premises Equipment*, Further Notice of Proposed Rulemaking, FCC 97-304, CS Docket No. 95-184 (rel. Aug. 28, 1997) ("*Further Notice*").

objectives; (2) adopt the proposed alternatives to the procedural framework in ¶¶ 83-85 of the *Further Notice*; and (3) adopt enforcement policies to ensure against abuses of the proposed procedural mechanisms for disposition of cable "home run" wiring.

A review of the comments demonstrates widespread dissatisfaction with the Commission's proposed procedural mechanism (which is based on a proposal from the Independent Cable and Telecommunications Association ("ICTA")). Virtually no industry group thinks this mechanism will work, whether it be the incumbent cable operators, the alternative video service providers, multiple-dwelling-unit ("MDU") building owners, over-the-air broadcasters, or consumer groups. The incumbent cable operators predictably argue that the procedural mechanism is unauthorized under Section 624(i) of the Communications Act and will result in unconstitutional "takings" of their property. The alternative video service providers argue that the mechanism is too complex and lengthy, does not even apply in the many states with mandatory access statutes, and provides incumbent operators with opportunities to exploit the procedures (*e.g.*, threatening to remove the wiring) so as to discourage MDU owners from switching to an alternative provider. Furthermore, the proposed rules provide the incumbent cable operator with a large "loophole" to remain exempt from the rules, by alleging some sort of amorphous "legally enforceable right" (such as an exclusive long-term contract) to remain on the MDU building premises. The broadcasters and consumer groups argue that the proposed rules are woefully inadequate to ensure that consumers have access to the broad range of video programming services that Congress intended by enacting Section 207 of the Telecommunications Act of 1996. Without competitive access to inside wire, the pro-competitive policies underlying the 1996 Act (*e.g.*, subscriber choice in video programming services) will not be realized and the expeditious deployment of digital television will be jeopardized.

Perhaps the most contentious issues before the Commission in this proceeding are those of its constitutional and statutory authority to enact rules governing access to home run wiring. The incumbent cable operators have signaled their intent to challenge any unfavorable outcome resulting from the Commission's proposal as constituting a "taking" of their property. In fact, the proposal set forth in the *Further Notice* promises to involve the Commission in much worse case-by-case battles over the "taking" issues than would adopting the simpler and more elegant solution of moving the demarcation point to the same accessible point in all MDU buildings, such as CEMA has proposed. As noted in CEMA's initial comments, moving the demarcation is a time-tested solution that has been successfully implemented in the telephone context. Unlike the procedural approach, it would not require the incumbent provider to transfer ownership of the home run wiring, but merely ensure that subscribers have access to it.

The lack of consensus in the comments should compel the Commission to devise a simpler and more effective solution that ensures subscriber access to cable home run wiring. By changing the demarcation point, the Commission will achieve its objective of consumer choice in video programming services while avoiding credible legal challenges erected by incumbent operators involving alleged violations of the Fifth Amendment, state mandatory access statutes, or "exclusive use" contracts.

II. THERE IS SUBSTANTIAL SUPPORT FOR REGULATING CABLE INSIDE WIRE BASED ON A CHANGE IN THE DEMARCATION POINT.

Many commenters agree with CEMA that moving the demarcation point is a far preferable solution to the proposed procedural mechanism.[2] Philips and Thomson argue that moving the demarcation point will best ensure subscriber access to cable wiring and such access

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[2] *See, e.g.*, DIRECTV Comments at 9; Joint Comments of Philips Electronics and Thomson Consumer Electronics at 10; Echostar Comments at 1.

is mandated by the pro-competitive policy underlying Section 207 of the Telecommunications Act of 1996. DIRECTV argues that the procedural mechanism would merely transfer control from the incumbent operator to the MDU owner, whereas moving the demarcation point would give the MDU resident the right to choose his video provider. Furthermore, the procedural approach does not foster the sharing of cable wiring, but simply replaces one provider with another, whereas moving the demarcation point could allow for two providers to simultaneously compete for customers in the same MDU building.[3] Even ICTA, upon whose proposal the procedural mechanism sets forth in the *Further Notice* is based, states the "best means to advance competition in the MDU marketplace [is] to authorize a wholesale movement of the demarcation point to the junction where the common wire meets the individual wire dedicated to a particular residential unit."[4]

If the Commission can resolve to address inside wire issues definitively by means of a change in the demarcation point, this action would best serve the Commission's overall competitive purposes. As set forth below, the approach advocated by CEMA also promises the best way to surmount the legal hurdles that opponents of any change in the status quo will inevitably raise for any Commission action in this area.

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[3] DIRECTV Comments at 2.

[4] ICTA Comments at 2.

III. APPROPRIATE REGULATION OF CABLE INSIDE WIRE DOES NOT INVOLVE AN UNCONSTITUTIONAL TAKING.

Several commenters have argued that various aspects of the Commission's proposal could result in a "taking" proscribed under the Fifth Amendment.[5] The procedural approach could presumably result in requirements that an incumbent operator abandon inside wire or sell it to an MDU owner at a prescribed price. CEMA believes that the Commission should be mindful of any constitutional infirmities such outcomes may effect, but it is no solution to hold that pre-existing property or contractual rights should dominate over the national policy imperative to promote competition in the delivery of multichannel video programming through competitive access to inside wiring. Rather, the Commission should adopt a regulatory approach which will avoid constitutional "takings" claims but remain true to its pro-competitive goals.

Moving the cable service demarcation point to a position either at the minimum point of entry into a MDU building or to where the inside wire becomes dedicated to ingress to an individual subscriber's premises would avoid such constitutional obstacles. Incumbents would retain ownership of home run wiring, and would be free to seek cost-based compensation for its use from MDU owners or, at their own election, to sell such wiring to building owners. Access to and use of the wire on the non-network side of the demarcation point, however, would be determined by subscribers and MDU building owners. Existing easements or other real property rights would not be disturbed.

This resolution would not violate incumbents' rights under the Fifth Amendment. No physical occupation of real property need be effected, so no rights would be affected under

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[5] *E.g.*, Time Warner Comments at 47; CableVision Communications, Classic Cable and Comcast Cable Comments at 26; National Cable Television Association ("NCTA") Comments at 25-26.

the Supreme Court's *Loretto* holding.[6] Nor would the regulation result in any total deprivation of economic rights, as incumbents would still be entitled to compensation for use of the wire, and thus no taking would be implicated under the *Lucas* holding.[7] Applying the three-factor test of the *Penn Central* holding,[8] it becomes apparent that a change in the demarcation point would likewise not result in an unconstitutional taking. Such regulation is well within the Commission's authority. If a "takings" argument can prevail in this instance to stymie Commission regulation of access to and use of wire used in interstate communications to provide video programming services, then the Commission has virtually no authority under the Communications Act to regulate at all. As for the economic aspects of the three-factor test, the expectations of the incumbent cable operator are to provide cable service, not to run a monopoly bottleneck inside wire business. To the extent that the cable operators' legitimate business expectations are frustrated, that is the result of the choices by subscribers and MDU owners as to their service provider, not the effect of any change in the demarcation point that would be prescribed by Commission rule. Similarly, any negative economic impact on incumbents would result from a change in service operators, not from changes in the rules governing access to inside wire. No analysis of any of the three factors set forth in *Penn Central* points toward a conclusion of an impermissible taking if no transfer of ownership of inside wire is required by the Commission's rules or procedures. No taking would be involved if the demarcation point were moved in the manner that CEMA has suggested.

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[6] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[7] *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

[8] *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-24 (1978). The three factors are the character of the governmental action, the regulation's interference with investment-backed expectations, and the economic impact.

IV. THE COMMUNICATIONS ACT, INCLUDING SECTION 207, CLEARLY GIVES THE COMMISSION AUTHORITY TO REGULATE CABLE HOME RUN WIRING.

A. The Commission Has Jurisdiction Over Home Run Wiring Under Sections 4(i) and 601 of the Communications Act.

Some commenters contest the Commission's jurisdiction to regulate home run wiring. These commenters suggest that pursuant to *expressio unius* maxim -- that the expression of one is the exclusion of the other -- Congress limited the Commission's authority to regulate inside wire when it adopted Section 624(i) of the Communications Act in 1992 solely to wiring inside individual subscribers' premises.[9] NCTA contends that Section 624(i) "fixes" the demarcation point, and if the Commission were to move it, the Commission would have to preempt several state and common law contract and property rights.[10]

This is an erroneous reading of Section 624(i). The text of 624(i) makes no mention of where the Commission should set the demarcation point, but simply directs the disposition of the cable home wiring as defined by the Commission. Furthermore, the fact that Section 624(i) addresses the issue of subscriber-side cable wiring in no way precludes the Commission from promulgating separate rules for home run wiring. As the Commission aptly points out in the *Further Notice*, the D.C. Circuit Court of Appeals recently ruled that the *expressio unius* maxim "has little force in the administrative setting."[11] Section 624(i) does not *preclude* the Commission from promulgating rules on home run wire. Section 624(i) does not apply -- and was not intended to apply -- to home run wire.

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[9] *See, e.g.*, NCTA Comments at 2; U S West Comments at 4; Time Warner Comments at 49; Comments by Cable Operators Represented by Cole, Raywid & Braverman at 2.

[10] NCTA Comments at 2-3.

[11] *Further Notice* at ¶ 55; *Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir.), *cert. denied*, 117 S. Ct. 81 (1996).

The Commission has ample authority over home run wire under Sections 4(i) and 601 of the Act. Section 601 calls for a "national policy" that will, *inter alia*, "promote competition in cable communications." Section 4(i) of the Act gives the Commission authority to promulgate rules "not inconsistent with this Act." NCTA contests the Commission's jurisdiction to regulate home run wiring pursuant to Section 4(i) of the Act, differentiating between the language "not inconsistent with this Act" and the Commission's assertion of authority to regulate in a manner "not expressly prohibited by the Act."[12] Given the clear intent of Congress to foster competition in the telecommunications industry, the distinction drawn by NCTA is insignificant. Although the Communications Act directs the Commission to regulate many specific attributes of telecommunications and cable services, such as subscriber-side wiring in Section 624(i), the Act also includes general pro-competition goals and leaves the decision of how best to achieve these goals to the Commission's expertise. Facilitating subscriber access to cable home run wiring falls squarely within the Commission's authority under Section 4(i) precisely because of the general mandate under Section 601 and other provisions of the Communications Act to promote competition in cable communications and other video programming services.

B. The Commission Has Authority To Regulate Home Run Wiring Under Section 207 of the Communications Act.

Several commenters correctly note that this cable wiring proceeding is inextricably related to the Commission's Over-the-Air Reception Device ("OTARD") proceeding implementing Section 207 of the Telecommunications Act of 1996.[13] Section 207 mandates consumer choice in

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[12] NCTA Comments at 6.

[13] *See, e.g.,* DIRECTV Comments at 3; National Association of Broadcasters ("NAB") Comments at 3; Philips and Thomson Comments at 10; Media Access Project ("MAP") Comments at 1-5.

video programming services. As the Media Access Project points out, many commenters in CS Docket No. 96-83 have proposed "antenna farms" on top of MDU buildings in order to address concerns about the aesthetics of each tenant installing his own dish or antenna on the side of an MDU building. The antenna farm proposal will only work, however, if tenant connecting to a common antenna have access to cable home run wiring.[14] Similarly, Philips and Thomson states:

> If residents in MDUs are to be able to receive off-air digital broadcast signals and DBS services as envisioned by Section 207, they must be able to request placement of a receiving apparatus on the roof or on a balcony and be able to receive those signals in their living units. Section 207 explicitly covers the first leg of the journey of these services to the MDU dweller, i.e., the receipt of the satellite or broadcast transmission by antenna. The Commission's inside wiring rules govern the second leg of the journey from the receiving apparatus on the roof of the MDU directly down to the individual apartment or condominium units. A viewer must have access to the signals at both points, for one without the other equates to an effective denial of service.[15]

CEMA also agrees with NAB that off-air reception of the digital service offerings of a local television station "may be, for the near and perhaps long term, the *only* reliable method for the consumer to benefit from digital television."[16] If, as NAB envisions, incumbent cable operators do not possess the technology to allow the complete passthrough of DTV signals, access to cable home run wiring becomes all the more critical because MDU subscribers will have access to true DTV only if they can connect to antenna farms on the top of the MDU. The expeditious transition

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[14] MAP Comments at 5-6 ("[T]his solution would be rendered nugatory if, in the instant proceeding, viewers are not given the flexibility to attach to these common antennas in the first place.").

[15] Philips and Thomson Comments at 2-3.

[16] NAB Comments at 6.

to DTV is a top Commission priority and facilitating subscriber access to cable home wiring is one of the best steps that can be taken to achieve this goal.

Section 207 mandates preemption of anticompetitive state and local laws. Indeed, in CS Docket No. 96-83, the Commission decided to preempt certain local zoning ordinances based on its understanding that "section 207 evidences Congress's recognition that the federal interests at stake here warrant preemption of inconsistent state and local regulations, even when those regulations address a traditionally local subject such as land use."[17] Preempting state mandatory access laws and "exclusive use" contract provisions would be consistent with the federal objectives underlying Section 207, namely "to ensure that consumers have access to a broad range of video programming services, and (b) to foster full and fair competition among different types of video programming services."[18]

V. THE RECORD CLEARLY DEMONSTRATES THE NEED FOR THE COMMISSION TO APPLY A "FRESH LOOK" POLICY TO THE LONG-TERM AND/OR EXCLUSIVE CONTRACTS MDU OWNERS HAVE SIGNED WITH INCUMBENT PROVIDERS.

NCTA, Time Warner and CableVision all argue that where the incumbent provider has contracted with the MDU owner for exclusive use of a conduit or molding, any Commission requirement that the incumbent provider share its conduit or molding with an alternative provider would constitute an illegal "taking" of property.[19] That incumbent cable arguments would make

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[17] *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 11 FCC Rcd 5809, 5812 (1996).

[18] *Preemption of Local Zoning Regulation of Satellite Earth Stations; In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996*, 11 FCC Rcd 19276, 19281 (1996).

[19] NCTA Comments at 25-26; Time Warner Comments at 47; CableVision, *et al.* Comments at 26.

such an argument underscores the strong incentives on the part of incumbent providers to prevent competition in MDU buildings.[20] Exclusivity provisions are not property rights but contractual agreements that are subject to Commission review under the public interest standard. As the Commission found in its decision implementing Section 207:

> [P]reemption of nongovernmental restrictions does not conflict with the Fifth Amendment. . . . The government may abrogate restrictive covenants that interfere with federal objectives enunciated in a regulation.[21]

Courts have also ruled that a taking does not occur when government agencies abrogate restrictive contracts that they find to be contrary to the public interest.[22]

CEMA agrees with the Wireless Cable Association and Optel that the Commission should adopt a "fresh look" policy[23] to exclusive or long-term contracts between an MDU owners

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[20] *See* Comments of Wireless Cable Association at 9 ("[T]he issue of whether the incumbent has a `clear' right to remain is often the subject of litigation, especially since the cable industry has found that it can gain competitive advantage by forcing MDU owners and alternative MVPDs into expensive, protracted litigation.").

[21] *Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996*, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276, 19302 (1996).

[22] *See, e.g., Seniors Civil Liberties Ass'n v. Kemp*, 761 F. Supp. 1528, 1558-59 (M.D. Fla. 1991), *aff'd*, 965 F.2d 1030 (11th Cir. 1992); *Connolly Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-24 (1986); *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987); *United States v. Midwest Video Corp.*, 406 U.S. 649, 674 n.31 (1972).

[23] A "fresh look" policy means a policy that makes it easier for an incumbent provider's established customers to consider taking service from a new entrant. In particular, the policy would limit the charges the incumbent provider could impose on the MDU owner who wants to terminate an exclusive or long-term contract to an amount that would place both the incumbent provider and the MDU owner in the same position they would have been in had the MDU owner chosen a shorter term arrangement from the beginning of the term. *Cf. Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd 5154, 5207 (1994).

and incumbent providers.[24] A fresh look at such contracts would serve a significant pro-competitive purpose. As Optel stated in GN Docket No. 96-113, adopting a fresh look policy "would make it easier for an incumbent provider's established customers to consider taking service from new entrants and obtain the benefits of a new, more competitive environment."[25]

The Commission has adopted "fresh look" policies many times in the past in many different contexts.[26] The Commission has rightly determined that it has ample authority under section 4(i) of the Communications Act to adopt such a policy.[27] Courts have held that "the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful . . . and to modify other provisions of private contracts when necessary to serve the public interest."[28] In its review of the *Local Competition Order*, the Eighth Circuit Court of Appeals expressly upheld Section 51.717 of the Commission's rules, which incumbent LECs to renegotiate interconnection contracts with CMRS providers.[29]

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[24] Wireless Cable Association Comments at 9; *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, GN Docket No. 96-113, FCC 97-164, at ¶ 170 (rel. May 8, 1997) ("*Section 257 Report*") (*citing* the comments filed by Optel).

[25] *Section 257 Report* at ¶ 170.

[26] *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 16045 nn.2635-36 (1996) ("*Local Competition Order*") (*citing* examples of FCC cases where a "fresh look" policy has been adopted).

[27] *Id.* at 16045; *see also* 47 U.S.C. § 154(i).

[28] *Western Union Telephone Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).

[29] *See* Public Notice, "Summary of Currently Effective Commission Rules For Interconnection Requests By Providers of Commercial Mobile Radio Services," FCC 97-344 (rel. Sep. 30, 1997).

In GN Docket No. 96-113, the Commission deferred consideration of a "fresh look" policy in the MDU context until the cable wiring proceeding was decided.[30] Based on the record in this proceeding, the Commission should now follow through on its statement in GN Docket No. 96-113 and adopt a "fresh look" policy for MDU buildings.

VI. THE COMMENTS SHOW THAT FEDERAL PREEMPTION OF STATE MANDATORY ACCESS STATUTES IS CRITICAL TO ENSURE SUBSCRIBER ACCESS TO CABLE HOME RUN WIRING.

As the Commission noted in its *Further Notice*, several states have laws that affect a video service provider's access rights to MDUs. If the Commission is attempting to ensure a competitive video services market on a nation-wide basis, its cable inside wire rules must apply in all states.

As some commenters noted, the rights of access and scope of laws regulating access in each state varies.[31] NCTA, for example, documents several disputes between MDU owners and cable operators, citing eleven cases in nine different states.[32] If the Commission's proposed rules were to apply only in states which have not enacted mandatory access or other applicable statutes, or where individual rights under state law would be affected, the exceptions will inevitably swallow the rule. CEMA's analysis of the futility of the non-preemptive rules finds support even among those commenters who oppose federal preemption in this matter. The comments presented by Building Owners and Managers Association ("BOMA"), *et al.*, note "we suspect that the

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[30] *Section 257 Report* at ¶ 172.

[31] *See, e.g.*, New York State Department of Public Service Comments at 2; NCTA Comments at 19 (stating "[t]he point is that neither the incumbent cable operators nor the MDU owners are always the winners in state common law disputes, that the issues in such disputes are diverse and complex, and the outcomes vary from state to state and case to case.").

[32] NCTA Comments at 18-19.

proposed rules will be ineffective simply because they apply to a relatively small number of cases."[33] Federal preemption is not only appropriate but necessary if the Commission is to adopt effective pro-competitive rules for inside wire.

Virtually all state mandatory access statutes are anticompetitive because they furnish rights of access only to the incumbent cable operator. US WEST makes the curious -- and totally unsupported -- statement that "competition already exists as a result of this state statutory authority," alleging that mandatory access statutes provide both incumbent cable operators and alternative providers a right of access to MDUs.[34] All one has to do is read the language of the statutes U S WEST cites to discover that they protect only *franchised* cable operators. Clearly, the prevalence of state mandatory access statutes which benefit only incumbent cable operators provide the Commission with a compelling reason to preempt.

VII. THE COMMISSION SHOULD MONITOR ABUSES BY MDU OWNERS DUE TO THEIR CONTROL OF BOTTLENECK INSIDE WIRE, BUT FOCUS IN THIS PROCEEDING ON CREATING A "LEVEL PLAYING FIELD" IN ACCESS TO INSIDE WIRING FOR INCUMBENT AND ALTERNATIVE PROVIDERS.

Some parties to this proceeding point out that the Commission's proposal set forth in the *Further Notice* leaves the MDU owner as the "gatekeeper" that will control the access of competing service providers to MDU inside wire and, ultimately, the availability to viewers resident in MDU building of the video programming services provided by these competitors.[35]

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[33] BOMA, *et al.* Comments at 3. Additionally these commenters suggest that state law could have a different procedural framework for deciding disputes between MDU owners and MVPD operators, which are likely to differ from those procedures the FCC ultimately instills. Id., at 7.

[34] U S WEST Comments at 10.

[35] Philips and Thomson Comments at 7-9; CableVision, *et al.* Comments at 3-8.

CEMA is similarly concerned about the potential abuses by landlords that control access to the inside wire necessary for alternative service providers to reach potential subscribers. Unlike the situation regarding regulation of entities engaged in cable communications and other forms of interstate communications -- where the Commission's authority is clear -- the issues raised by MDU owners' property rights and their legal relationships with their tenants create a dense legal thicket. MDU owners have already signaled their intent to resist any attempt to exercise "jurisdiction over building owners as building owners," however that should be interpreted.[36] While CEMA rejects the MDU owners' position that the Commission has no authority to preempt state laws and abridge contracts that are inconsistent with federal rules governing access to and use of inside wire used in interstate communications, the Commission should be wary of entering too deeply into conflicts with property owners over questions of its statutory authority and the Fifth Amendment.

The Commission should instead monitor the conduct of MDU owners and, if a pattern of anti-competitive, anti-consumer abuses emerges, seek clear authority from Congress to regulate MDU owners with regard to their provision of inside wire and access to video programming services to subscribers. In the instant proceeding, the Commission should concentrate on removing the unfair advantages enjoyed by incumbent providers and ensuring equal legal status among incumbent and alternative providers of video programming services.

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[36] BOMA, *et al.* Comments at 9.

VIII. CONCLUSION

For the reasons set forth above and in its initial comments, CEMA strongly supports the Commission's intent to transfer control of cable wiring in MDU buildings from incumbent operators to consumers and MDU owners. Rather than adopt the proposed procedural approach, however, CEMA urges the Commission to consider the simple and effective solution of moving the demarcation point in MDU buildings to either: (1) the point at which the line becomes dedicated to an individual subscriber's use; or (2) the "minimum point of entry." In any event, the Commission should adopt pro-competitive federal rules for MDU inside wire which preempt state mandatory access laws and any contractual obligations that are inconsistent with such rules.

Respectfully submitted,

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October 6, 1997