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

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

REPLY COMMENTS IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING

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EXECUTIVE SUMMARY

In its *Further Notice of Proposed Rulemaking* (the "*FNPRM*") the Commission made the following substantive findings based on voluminous record evidence:

- Cable subscribers who live in multiple dwelling units ("MDUs") do not have adequate opportunities to select among competing multichannel video programming distributors ("MVPDs"), and thus the Commission must take action quickly to address this problem.

- One of the primary obstacles to competition in the MDU environment is the unwillingness of MDU owners to allow new service providers to run additional wiring (*i.e.*, "postwiring") to subscriber units.

- Where an MDU owner wishes to switch service providers, the incumbent cable operator often employs a wide variety of tactics (including litigation) to remain on the property at any cost. These tactics in turn raise uncertainty as to whether the new service provider will be allowed to use the existing wiring, and thereby chill the competitive environment.

On the basis of these substantive findings, the Commission proposed specific *procedural* rules which do *not* create or destroy any property rights, but instead merely bring "order and certainty" to the disposition of MDU "home run" wiring when the MDU owner terminates the incumbent cable operator's service. In their initial comments on the *FNPRM*, The Wireless Cable Association International, Inc. ("WCA") and a variety of other entities representing alternative MVPDs have expressed substantial support for the Commission's proposed rules, and, consistent with the Commission's desire to issue final rules on an expedited basis, have made constructive suggestions as to how the proposed rules might be "fine tuned" to better achieve the Commission's objectives.

By contrast, it is clear that the cable industry's sole objective is to prevent the adoption and/or enforcement of any Commission rules that would for the first time give MDU owners a meaningful choice between competing MVPDs. For example, notwithstanding the Commission's directive that parties should not repeat arguments made earlier in these proceedings, incumbent cable operators have filed voluminous comments asking the Commission to revisit the very same substantive issues it has already resolved in the *FNPRM*. Moreover, even where the cable industry chooses to address the Commission's proposed rules, it recommends that the Commission preserve the *status quo* by allowing incumbent cable operators to retain their full arsenal of tactics for remaining on MDU property against the MDU owner's wishes. The cable industry's response to the *FNPRM* is both anticompetitive and anti-consumer, and is entirely at odds with the Commission's stated objective of eliminating the *status quo* as quickly as possible.

Accordingly, for the reasons set forth herein, WCA urges the Commission to firmly reject the cable industry's efforts to stop the *FNPRM* in its tracks, and, more specifically, to clarify that (1) where there is a dispute over an incumbent cable operator's right to remain on the premises, the Commission's proposed notice periods will continue to run unless the incumbent cable operator obtains a court order establishing its right to remain; (2) the Commission's proposed rules will apply regardless of whether the incumbent cable operator is offering or intends to offer advanced video or non-video services; (3) the Commission's proposed rules will apply regardless of the economic arrangement between the MDU owner and the new service provider; (4) where an incumbent operator elects to sell its home run wiring, an MDU owner or new service provider will not be forced to choose between purchasing the wiring or losing its rights with respect to having the wiring removed altogether; (5) the Commission will allow MDU owners to establish their own arrangements with their tenants regarding the owner's authority to act as the tenant's agent when selecting a multichannel service provider; and (6) MDU owners are not required to wait until their existing contracts expire before they may give the notices necessary to take advantage of the Commission's proposed rules.

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REPLY COMMENTS IN RESPONSE TO FURTHER NOTICE OF PROPOSED RULEMAKING

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby submits its reply comments in response to the *Further Notice of Proposed Rulemaking* ("*FNPRM*") released by the Commission on August 28, 1997 in this proceeding.[1]

I. INTRODUCTION.

In the *FNPRM* the Commission made the following substantive findings based on voluminous record evidence:

- Cable subscribers who live in multiple dwelling units ("MDUs") do not have adequate opportunities to select among competing multichannel video program-

[1] *Telecommunications Services: Inside Wiring; Customer Services Equipment*, CS Docket No. 95-184, FCC 97-304 (rel. Aug. 28, 1997)[hereinafter cited as "*FNPRM*"].

ming distributors ("MVPDs"), and thus the Commission must take immediate remedial action.[2]

- One of the primary obstacles to competition in the MDU environment is the unwillingness of MDU owners to allow new service providers to run additional wiring (*i.e.*, "postwiring") to subscriber units.[3]

- Where an MDU owner wishes to switch service providers, the incumbent cable operator often employs a wide variety of tactics to remain on the property against the wishes of the MDU owner. These tactics in turn raise uncertainty as to whether the new service provider will be allowed to use the existing wiring and thereby chill the competitive environment.[4]

- The Commission has jurisdiction under the Communications Act of 1934, as amended, to adopt rules governing the disposition of "home run" wiring (*i.e.*, that wiring running from the riser cable to the subscriber's unit, up to the demarcation point for "cable home wiring").[5]

Accordingly, given the need for expedited Commission action, the Commission did *not* request comment on jurisdictional issues or any other substantive matters already resolved in the *FNPRM*. Instead, the Commission requested comment on proposed *procedural* rules which are intended to bring "order and certainty" to the disposition of MDU "home run" wiring when the MDU owner terminates the incumbent cable operator's service.[6] As noted by the Commission,

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[2] *FNPRM* at ¶¶ 2, 25.

[3] *Id.* at ¶ 25.

[4] *Id.* at ¶ 31.

[5] *Id.* at ¶¶ 50-69.

[6] *Id.* at ¶ 32.

the proposed rules do *not* create or destroy any property rights held by MDU owners, incumbent cable operators or alternative MVPDs.[7]

In their initial comments on the *FNPRM*, WCA and a variety of other entities representing alternative MVPDs expressed substantial support for the Commission's proposed rules.[8] Consistent with the Commission's desire to issue final rules on an expedited basis, alternative MVPDs generally have limited their comments to specific portions of the Commission's proposals and recommended limited modifications that would better achieve the Commission's objective of ensuring a seamless transition to a new service provider and, more specifically, would prevent incumbent cable operators from using local court litigation as a means of tolling the Commission's "notice" periods;[9] shorten the time frames within which

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[7] *Id.*

[8] *See,* Comments of The Wireless Cable Association International, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 1-3 (filed Sept. 25, 1997) [the "WCA Comments"]; Comments of EchoStar Communications Corporation, CS Docket No. 95-184 and MM Docket No. 92-260, at 1-3 (filed Sept. 25, 1997) [the "EchoStar Comments"]; Comments of Ameritech, CS Docket No. 95-184 and MM Docket No. 92-260, at 1-2 (filed Sept. 25, 1997) [the "Ameritech Comments"]; Comments of Independent Cable & Telecommunications Association, CS Docket No. 95-184 and MM Docket No. 92-260, at 2 (filed Sept. 25, 1997) [the "ICTA Comments"]; Comments of SBC Communications Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 1 (filed Sept. 25, 1997) [the "SBC Comments"]; Comments of OpTel, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 1 (filed Sept. 25, 1997) [the "OpTel Comments"]; Comments of Heartland Wireless Communications, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 2 (filed Sept. 25, 1997) [the "Heartland Comments"]; Comments of RCN Telecom Services, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 1-2 (filed Sept. 25, 1997) [the "RCN Comments"]; Comments of GTE, CS Docket No. 95-184 and MM Docket No. 92-260, at 1-2 (filed Sept. 25, 1997); Comments of Summit Communications, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 1 (filed Sept. 25, 1997).

[9] *See, e.g.*, WCA Comments at 8-11; Heartland Comments at 5; RCN Comments at 12.

"home run" wiring must be removed, abandoned or sold upon notice of termination;[10] extend the cable home wiring demarcation point to the junction box if the existing demarcation point is "physically inaccessible";[11] prohibit an incumbent cable operator from removing its wiring before the new provider has commenced service;[12] and impose substantial forfeitures on incumbent cable operators who fail to comply with the Commission's rules.[13] WCA reiterates its support for these modifications as set forth in WCA's initial comments, and again urges that they be included in the Commission's final rules.

It must be emphasized, however, that the Commission's proposed rules, even if fully implemented with the modifications suggested above, will only provide limited (albeit welcome) relief for alternative MVPDs. Incumbent cable operators will still enjoy enormous competitive advantages in the MDU environment by virtue of state mandatory access statutes and/or long-term contracts with MDU owners which effectively allow incumbents to stake a permanent claim

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10/ *See, e.g.,* ICTA Comments at 7-8; WCA Comments at 12-13; RCN Comments at 13; Heartland Comments at 4; Ameritech Comments at 3-4; SBC Comments at 2; Further Joint Comments of Building Owners and Managers Association International *et al.*, CS Docket No. 95-184 and MM Docket No. 92-260, at 7 (filed Sept. 25, 1997) [the "BOMA Comments"].

11/ *See, e.g.,* WCA Comments at 14; RCN Comments at 2-3; EchoStar Comments at 1; Heartland Comments at 6-7.

12/ *See, e.g.,* WCA Comments at 12 n.23; ICTA Comments at 3-5; EchoStar Comments at 2; Comments of DIRECTV, Inc., CS Docket No. 95-184 and MM Docket No. 92-280, at 14 (filed Sept. 25, 1997). *See also,* Comments of Philips Electronics North America Corporation and Thomson Consumer Electronics, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 5 (filed Sept. 25, 1997).

13/ *See, e.g.,* WCA Comments at 4-8; ICTA Comments at 5-6; RCN Comments at 14; Heartland Comments at 5-6; OpTel Comments at 4; Ameritech Comments at 5-6.

on MDU property and thereby require MDU owners to choose between postwiring their buildings to accommodate competitors or turning those competitors away altogether. As recognized in the *FNPRM*, MDU owners are far more likely to select the latter option, and WCA again respectfully submits that the Commission must therefore move with equal speed to preempt state mandatory access statutes and adopt a "fresh look" policy for long-term MDU service contracts, as proposed in WCA's earlier comments in these proceedings.[14]

Not surprisingly, and apparently without regard to the Commission's admonition that commenting parties should not repeat comments submitted during earlier phases of this proceeding,[15] the cable industry has submitted extensive comments which repeat almost *verbatim* its contention that the Commission has no authority under the Communications Act to govern the disposition of home run wiring.[16] Moreover, it is quite apparent that incumbent cable

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[14] As a general matter, WCA does not disagree with the suggestion by Cox Communications, Inc. that the simplest and most effective way to address the problems faced by alternative MVPDs in obtaining access to MDU properties is to require MDU owners to permit installation of additional inside wiring. Comments of Cox Communications, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 6 (filed Sept. 26, 1997) [the "Cox Comments"]. As demonstrated in WCA's prior comments in these proceedings, however, this proposal is not workable because (1) MDU owners are responsible for the security and maintenance of common areas and therefore must maintain control over who has access to those areas, and (2) each MDU building has unique physical limitations, and thus it would be impossible for the Commission to determine how many competitors should be allowed in each and every MDU building in the United States. *See*, Reply Comments of The Wireless Cable Association International, Inc., MM Docket 92-260, at 4-15 (filed April 17, 1996).

[15] *FNPRM* at ¶ 2.

[16] *See, e.g.,* Comments of Jones Intercable, *et al.*, CS Docket No. 95-184 and MM Docket No. 92-260, at 2-4 (filed Sept. 25, 1997) [the "Jones Comments"]; Comments of National Cable Television Association, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 6-10 (filed

(continued...)

operators are not content with the substantial competitive advantages they will retain by virtue of state mandatory access statutes and long-term service contracts. Rather, they seek to strengthen their monopoly position by advocating loopholes that would give the Commission's proposed rules virtually no effect whatsoever where a cable operator makes *any* sort of claim that it has a legal right to remain on the property, regardless of whether that claim is even legitimate. In other words, the cable industry supports the Commission's proposed rules only if the Commission allows incumbent cable operators to retain their full arsenal of tactics for remaining on MDU property when an MDU owner wishes to switch service providers. This, of course, is precisely the opposite of what the Commission is trying to achieve in the *FNPRM*. Accordingly,

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[16] (...continued)
Sept. 25, 1997) [the "NCTA Comments"]; Comments of Time Warner Cable, CS Docket No. 95-184 and MM Docket No. 92-260, at 49-68 (filed Sept. 25, 1997) [the "Time Warner Comments"]; Comments of Tele-Communications, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 4-8 (filed Sept. 25, 1997) [the "TCI Comments"]. As noted in the *FNPRM*, the Commission has jurisdiction under Section 4(i) of the Communications Act of 1934, as amended, to regulate the disposition of home run wiring on MDU property upon termination of the incumbent provider's multichannel service. *FNPRM* at ¶¶ 54-56. Section 4(i) permits the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). As interpreted by the federal courts, the Commission's authority under Section 4(i) is very broad where, as here, the Commission has determined that the proposed rules in question are necessary to achieve the Commission's statutory mandate to promote competition. *Id.* at ¶¶ 55-57, 59 (noting that the Commission cannot discharge its obligation to promote competition under Sections 601 or Section 624(i), or under the Congressional policies underlying the Telecommunications Act of 1996, without regulating the disposition of home run wiring). Alternatively, the Commission's obligation to ensure that rates for basic cable service are "reasonable" under Section 623(b) is another basis for Commission's jurisdiction here, since the rules governing the disposition of home run wiring will facilitate market entry by new service providers and thereby promote head-to-head competition that invariably restrains basic cable rates. *Id.* at ¶¶ 58-59.

WCA urges the Commission to stay the course and adopt its proposed rules as quickly as possible, subject to the minor modifications discussed in WCA's initial comments on the *FNPRM*.

II. DISCUSSION.

A. The Commission Should Not Adopt Any Cable Industry Proposal That Would Allow An Incumbent Cable Operator To Remain on MDU Property Merely By Claiming A Legally Enforceable Right To Stay On The Premises.

1. Claims Based on State Mandatory Access Statutes.

Under the Commission's proposed rules, the procedures for disposition of home run wiring upon termination of service (whether on a building-by-building or unit-by-unit basis) only apply where the incumbent cable operator has a "legally enforceable right" to remain on the premises after the applicable notice period. It is clear, however, that the Commission fully recognizes how incumbent cable operators often assert rights under state law solely to prevent MDU owners from switching to new service providers.[17] Indeed, for this very reason, WCA noted that the "legally enforceable right" exception potentially represents a powerful loophole that will allow incumbent cable operators to remain on MDU property indefinitely pending resolution of local litigation over the incumbent's right to remain.[18] Accordingly, WCA urged the Commission to clarify that in the event of a dispute between the MDU owner and the incumbent over the incumbent's right to remain on the premises, the Commission's rules

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[17] *FNPRM* at ¶ 31.

[18] WCA Comments at 8-9.

governing building-by-building and unit-by-unit disposition of home run wiring will continue to apply until a court either rules upon the dispute or temporarily enjoins displacement of the incumbent.[19]

Of course, WCA's proposal will not have as strong a pro-competitive effect as full federal preemption of state mandatory access statutes, which absent preemption will continue to be an enormously valuable weapon for incumbent cable operators seeking to exclude competitors from MDU property by any means necessary.[20] The cable industry is well aware of this, and thus various cable operators and state cable television associations have gone so far as to ask the Commission to "pronounce that [its] proposed rules would not apply in access states under any circumstances," regardless of whether those statutes give incumbent cable operators any legal right to remain on MDU property after termination of service.[21] Alternatively, the cable industry favors a very broad application of the "legal right to remain" exception that would stay the Commission's proposed notice periods indefinitely where an incumbent cable operator

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[19] *Id.* at 10.

[20] The need for a preemption of state mandatory access laws is reinforced by the comments submitted by the New York State Department of Public Service ("NYDPS"), in which NYPDS contends that the rules proposed in the *FNPRM* should be inapplicable in New York and other mandatory access states. Comments of State of New York Department of Public Service, CS Docket No. 95-184 and MM Docket No. 92-260, at 2-3 (filed Sept. 25, 1997). The unwillingness of NYPDS to allow its residents to benefit from pro-competitive home run wiring rules is curious indeed. Not surprisingly, NYDPS makes no effort whatsoever to explain how its approach serves the interest of MDU residents in New York.

[21] Comments of Adelphia Cable Communications *et al.*, CS Docket No. 95-184 and MM Docket No. 92-260, at 14 (filed Sept. 25, 1997) [the "Adelphia Comments"].

merely *believes* that it has such a right and notifies the MDU owner that it intends to commence a legal action within 30 days.[22]

The cable industry's self-serving proposals are nothing more than an attempt to distort the real issue here. Neither WCA nor the Commission has suggested that incumbent cable operators should lose whatever rights they have under state mandatory access statutes if they do not obtain relief in local court within the relevant notice period.[23] Rather, the issue is how an incumbent's enforcement of its legal right to remain should be accommodated in view of the Commission's overriding objective to "provide all parties sufficient notice *and certainty* of whether and how the existing home run wiring will be made available to the alternative video service provider *so that a change in service can occur efficiently*."[24]

Clearly, certainty and efficiency are lost where a new service provider cannot provide service unless and until an incumbent cable operator obtains a determination of its legal rights in local court. Under these circumstances, the only way for the new service provider to begin service during the pendency of litigation is to postwire the premises, which, as already recognized by the Commission, is precisely what the MDU owner wishes to avoid. Further, where an incumbent cable operator does in fact have a legitimate claim that it has a legal right

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[22] NCTA Comments at 20-21. *See also*, Time Warner Comments at 27-28; TCI Comments at 13-14; Adelphia Comments at 15; Cox Comments at 10; Jones Comments at 15.

[23] Indeed, WCA specifically noted that any displacement of the incumbent under WCA's proposed approach would be without prejudice to the rights of the incumbent should its position ultimately be upheld in court. WCA Comments at 10. *See also, FNPRM* at ¶ 32.

[24] *FNPRM* at ¶ 33 (emphasis added).

to remain, there is no evidence in this proceeding which suggests that the incumbent would be unable to obtain a temporary restraining order or other injunctive relief within the notice periods to be afforded under the Commission's proposed rules. WCA thus submits that the cable industry's claims of prejudice are illusory and do not outweigh the Commission's very legitimate concern that incumbents will use state mandatory access statutes as a pretext for preventing timely, efficient entry by alternative MVPDs onto MDU properties.[25]

2. *Claims Based on Private Contracts or State Common Law Rights.*

The cable industry further alleges that an incumbent cable operator may also have a "legal right to remain" by virtue of an existing contract with the MDU owner, an easement on the MDU owner's property or a more general right under common law.[26] The Commission, however, has recognized these "rights" are the source of the very same mischief which the Commission is trying to eliminate in this proceeding:

> The record indicates that, where the property owner or subscriber seeks another video service provider, instead of responding to competition through varied and improved service offerings, the incumbent provider often invokes its alleged ownership interest in the home run wiring. Incumbents invoke written agreements providing for continued service,

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[25] A number of cable operators have suggested that where the incumbent elects to sell its wiring and the parties cannot agree on a price, the Commission should require the parties to submit to arbitration or alternative dispute resolution. Adelphia Comments at 28. This presents the same opportunity for delay as litigation over an incumbent's "legal right to remain," and thus should not be required of the parties absent their mutual consent at the close of the 30-day negotiation period. Moreover, the Commission's rules should provide that, unless the parties agree otherwise, the relevant notice period will continue to run regardless of whether the matter is sent to arbitration or some other forum, and that the initiation of arbitration or other alternative proceedings will not stay the effect of the Commission's rules under any circumstances.

[26] NCTA Comments at 16-20.

> perpetual contracts entered into by the incumbent and the previous owner, easements emanating from the incumbent's installation of the wiring, assertions that the wiring has not become a fixture and remains the personal property of the incumbent, or that the incumbent's investment in the wiring has not been recouped, and oral understandings regarding the ownership and continued provision of services. Written agreements are frequently unclear, often having been consummated in an era of accepted monopoly, and state and local law as to their meaning is vague. Invoking any of these reasons, incumbents often refuse to sell the home run wiring to the new provider or to cooperate in any transition. The property owner or subscriber is frequently left with an unclear understanding of why another provider cannot commence service. The litigation alternative, an option rarely conducive to generating competition, while typically not pursued by the property owner or subscriber, can be employed aggressively by the incumbent. The result is to chill the competitive environment.[27]

Accordingly, for the reasons set forth above with regard to state mandatory access statutes, WCA reiterates that the Commission should adopt WCA's proposal requiring an incumbent cable operator to *establish* via a permanent or temporary court order within the applicable notice period that it has a right under a contract, an easement or common law that it has a right to remain on the MDU owner's property.

Finally, WCA also recommends that the Commission reject two additional cable industry proposals relating to existing contracts. First, certain cable operators have suggested that the Commission's proposed procedures should not apply where the existing contract between the incumbent cable operator and MDU service provider already addresses the disposition of home run wiring upon termination of service.[28] As noted above by the Commission, many existing

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[27] *FNPRM* at ¶ 31.

[28] *See, e.g.*, Cox Comments at 11-12; Comments of U S WEST, Inc., CS Docket No. 95-184 and (continued...)

MDU service contracts were negotiated when MDU owners did not have a choice of service providers, and thus do not contemplate that the incumbent's home run wiring will be made available to the MDU owner or the incumbent's competitor under the terms set forth in the Commission's proposed rules. Accordingly, the Commission should clarify that existing contractual provisions regarding disposition of home run wiring will remain in force only to the extent that they are not inconsistent with the Commission's rules (*e.g.*, where the parties have already agreed that the MDU owner may purchase the wiring upon termination of service, the existing contract cannot prohibit the MDU owner from assigning his right to purchase the wiring to the new service provider).

In addition, certain cable operators have suggested that the Commission abandon its proposals in favor of a generic "private contract" rule that would only require that all future MDU service contracts contain provisions relating to the disposition of home run wiring upon termination of service.[29] This proposal clearly comes too late in the day, since many incumbent cable operators have already locked up MDU properties with existing long-term contracts, and thus will be unaffected by such a rule for the foreseeable future. Moreover, allowing the cable industry to govern itself via private contracts has not promoted competition in the MDU

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[28] (...continued)
MM Docket No. 92-260, at 11 (filed Sept. 25, 1997) [the "U S WEST Comments"]..

[29] Adelphia Comments at 5. It appears that the cable industry's position on this issue is not unanimous: though other cable operators urge the Commission to respect their rights under existing contracts, they have not suggested that the Commission should abandon its proposals in favor of a generic "private contract" rule for all future agreements. *See, e.g.,* TCI Comments at 10-12.

environment, and it is beyond debate that cable operators are unlikely to abandon their anticompetitive tactics unless the Commission adopts specific requirements that they do so. Simply stated, a "private contract" rule is nothing more than a cable-friendly loophole in sheep's clothing and should be rejected in favor of specific, across-the-board rules as proposed in the *FNPRM*.

B. The Commission's Proposed Rules Should Apply Regardless Of Whether The Incumbent Cable Operator Is Offering or Intends to Offer Advanced Video or Non-Video Services.

Some in the cable industry suggest that their ability to provide advanced video or non-video services (*e.g.*, interactive pay-per-view, Internet access, local telephony) will be jeopardized if the Commission were to adopt a presumption that an incumbent cable operator has no legal right to remain unless that right is clearly set forth under state law or in a private agreement with the MDU owner.[30] As recognized by the Commission in the *FNPRM*, this is a business issue, not a legal one.[31]

For example, if in a unit-by-unit situation the tenant is aware that the cable operator may eventually provide alternative services through the operator's home run wiring, he or she will do what all consumers do when they choose among providers of video and non-video services: evaluate the options and determine which one will provide the highest quality service at the

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[30] *See, e.g.*, Comments of Cablevision Systems Corporation, CS Docket No. 95-184 and MM Docket No. 92-260, at 7-11 (filed Sept. 25, 1997) [the "Cablevision Systems Comments"]. By contrast, TCI, which has been very active in developing its existing cable plant to provide such alternative services, apparently has no such concern. TCI Comments at 8-9.

[31] *See, FNPRM* at ¶ 46.

at the lowest price. The tenant places a high value on receiving telephone service from the incumbent cable operator, then the tenant will require the new service provider to make whatever arrangements are necessary to ensure that its connection allows the tenant to receive the cable operator's telephone service. Conversely, if the tenant places a low value on receiving telephone service from the cable operator, then he or she will simply elect to take that service from the local exchange carrier (if he or she is not doing so already). In either case, the Commission should allow the marketplace to determine the final result. Otherwise, the intended beneficiaries of the proposed rules will be held hostage to the cable operator's multichannel video service simply because the cable operator may offer local telephone service or other non-video services at some point in the future, at a price and/or quality level that may or may not be desirable.[32]

C. The Commission's Procedures for Disposition of Inside Wiring Should Apply Irrespective of the Economic Arrangement Between the MDU Owner and the New Service Provider.

A recurring theme throughout the cable industry's comments is the suggestion that MDU owners are "gatekeepers" and thus are the true barriers to competition in the MDU environment.[33] This argument is somewhat ironic, given that in the vast majority of cases incumbent cable operators are already inside the gate and presumably would benefit substantially

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[32] It should be remembered that by the cable industry's own admission, widescale cable telephony appears to be at least several years off. *See, e.g.,* "Is Cable Telephony Here Yet?", *Cable World* , p.37 (March 25, 1996). Thus, the cable industry is asking the Commission to structure its inside wiring rules to the detriment of existing alternative broadband technologies in favor of cable-delivered non-video services which will not be available to many subscribers for the foreseeable future.

[33] *See, e.g.,* Jones Comments at 7-10; Time Warner Comments at 8-13.

from whatever tendencies MDU owners allegedly have toward excluding competitors from their properties. Moreover, it appears once again that incumbent cable operators are not of the same mind on this issue: the nation's largest cable operator, TCI, *supports* the Commission's proposal to allow the MDU owner to purchase the incumbent's home run wiring.[34]

What the cable industry is actually complaining about here is the inescapable fact that a multichannel service provider cannot serve MDU subscribers without placing its facilities in the building's common areas, and thus an MDU owner *must* enjoy some degree of control over which providers will have access to his or her property. As previously noted by MDU owners themselves:

> Because apartment residents are more transient and do not have a long-term financial interest in either their apartments or common areas, it is essential for the owner of the building to have full control over the property. Not only has the owner made a very large investment to acquire the property, but the "problem of the commons" means that apartment residents may be less concerned with maintaining common areas (and even their units) in good condition. The building owner is the only person with an interest in the long-term well-being of the entire building and all its residents as a group.[35]

34/ TCI Comments at 8-9.

35/ Joint Comments of Building Owners and Managers Association International, MM Docket No. 92-260, at 7-8 (filed March 18, 1996). For this reason, the Commission should reject Time Warner's proposal that the Commission's proposed rules apply only where the MDU owner elects to allow unit-by-unit competition in a particular MDU building. Time Warner Comments at 39-40. The general principle that an MDU owner must maintain control over common areas applies in both the building-by-building and unit-by-unit context, and thus MDU owners must have the same right to select (or exclude) multichannel service providers in both cases.

More specifically, however, and with little evidentiary support, the cable industry argues that an MDU owner is apt to disregard the needs of his or her tenants and will base the selection of a service provider solely on whether the provider is willing to give the owner a premium in exchange for the right to enter the owner's property.[36] The cable industry thus argues that an incumbent cable operator should not be required to comply with the Commission's proposed rules where an MDU owner has received any financial incentives from a new service provider.[37]

It should be noted that the cable industry's position here cannot be reconciled with its more general argument that the Commission should rely on marketplace forces wherever possible to ensure robust competition in the MDU environment.[38] If marketplace forces are as efficient as the cable industry suggests, then those forces will create substantial disincentives for MDU owners to risk losing tenants by disregarding their preferred choice of multichannel video service providers. Again, the comments of MDU owners themselves are instructive:

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[36] *See, e.g.*, Jones Comments at 7-10; Time Warner Comments at 8-13; Adelphia Comments at 18-20; Comments of CableVision Communications, Inc. *et al.*, CS Docket No. 95-184 and MM Docket No. 92-260, at 3-9 (filed Sept. 25, 1997).

[37] *See, e.g.*, Comments of Cablevision Systems Comments, at 17; Comments of the Cable Telecommunications Association, CS Docket No. 95-184 and MM Docket No. 92-260, at 14-15 (filed Sept. 25, 1997) [the "CATA Comments"]; Jones Comments at 10-11; Cox Comments at 8-9; Adelphia Comments at 20-26.

[38] *See, e.g.*, NCTA Comments at 26-27; Time Warner Comments at 20-21; Adelphia Comments at 6 ("As part of its deregulatory mission, the FCC should prefer private contract solutions over government regulation.").

> We support the goal of introducing competition for the delivery of video programming services. Indeed, as our earlier comments indicate, many building owners are actively seeking to offer such competition. In time, the market will deliver MDU residents the services they want because building owners know that they are in the business of serving and pleasing tenants. Advanced telecommunications and video programming are fast becoming ubiquitous, and building owners must adapt to survive.[39]

Moreover, there is no sound public policy reason for the Commission to interfere in negotiations between MDU owners and MVPDs by conditioning its inside wiring procedures on the financial terms of an MDU owner's private contractual arrangement with a new service provider. Indeed, as noted by TCI:

> There is no need or basis for the Commission to intervene between the freely negotiated and arms-length agreements between MDU owners and MVPDs. The Commission is required to respect these private contractual rights.[40]

Thus, in the *FNPRM* the Commission only proposes to adopt *procedural* rules designed to ensure an efficient transition to a new service provider *after* that provider has entered into a service contract with the MDU owner. Quite sensibly, the Commission has left the substantive terms of such contracts to be negotiated by the provider and the MDU owner. The cable industry's unsupported suggestion that the Commission must now do otherwise is merely

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39/ BOMA Comments at 3. Moreover, as certain cable operators and state cable associations have pointed out, the question of whether an MDU owner may receive a financial incentive from a new service provider is already regulated as a matter of state law. Jones Comments at 10-11.

40/ TCI Comments at 10.

another attempt by cable operators to strengthen their stranglehold over the MDU market by throwing every roadblock imaginable in front of MDU owners and alternative MVPDs who wish to introduce competition.

D. The Commission's Procedures For Disposition of Home Run Wiring Should Continue to Apply Where A New Service Provider Elects Not To Purchase The Wiring.

Under the Commission's proposed rules, where an incumbent cable operator elects to sell its home run wiring to the MDU owner or the new service provider, the incumbent must elect to remove or abandon its wiring if the parties are unable to negotiate a sale price within thirty days.[41] NCTA and others argue that MDU owners and new service providers can force incumbent cable operators to sell their home run wiring at less than fair market value, on the theory that the incumbent will find it even less economical to remove or abandon the wiring and thus will have no choice but to sell the wiring at whatever price the MDU owner or new service provider demands.[42] Accordingly, some in the cable industry request that the Commission amend its proposed rules to provide that an incumbent cable operator who elects to sell its home run wiring will have no obligation to comply with the Commission's rules if the new service

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[41] *FNPRM* at ¶¶ 37-40.

[42] Cablevision Systems Comments at 12-13; CATA Comments at 11-12; Jones Comments at 18-19; TCI Comments at 15-17; NCTA Comments at 23-24.

provider declines to pay a "default price,"[43] or, alternatively, a "reasonable price" dictated by the incumbent cable operator.[44]

Of course the predicate of the cable industry's argument is flawed, since under the Commission's proposed rules an incumbent cable operator would never be forced to sell its home wiring: the incumbent may instead elect to remove the wiring and thereby force the new service provider to postwire the property. Indeed, as recognized by the Commission and set forth repeatedly in voluminous comments submitted by cable's competitors in these proceedings, the mere threat of postwiring is incentive enough for MDU owners to slam the door on alternative MVPDs, and thus the removal option always gives the incumbent cable operator a "trump card" which can be played to defeat competition at any time.[45] Further, even where the incumbent cable operator elects to sell its wiring, it still has the power to force a postwiring by refusing to offer a fair price to the MDU owner or new service provider and removing its wiring

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[43] *See* TCI Comments at 19-20; NCTA Comments at 24; Jones Comments at 18-19. It is worth noting that the cable industry actually is in considerable disarray on the question of whether the Commission should adopt a "default price" for home run wiring. *Compare, e.g.*, Time Warner Comments at 41-45; Adelphia Comments at 28 (opposing the "default price" concept) The comments submitted by Time Warner and Adelphia *et al.* on this issue are particularly ironic. While Time Warner and Adelphia complain mightily that the MDU owner will have little incentive to pay fair market value for installed home run wiring (Time Warner Comments at 13-15, Adelphia Comments at 26-27), Time Warner and Adelphia oppose having the Commission address the issue by setting a default price. The obvious inconsistency in Time Warner's and Adelphia's argument indicates that their real agenda here is to prompt as much confusion as possible over the issue and thereby further delay the issuance of Commission rules that will promote competition in the MDU environment.

[44] NCTA Comments at 22-25.

[45] *See, e.g., FNPRM* at ¶¶ 25-26, and the comments cited therein.

after negotiations have terminated.[46] Simply stated, the cable industry will still retain substantial leverage over MDU owners under the Commission's proposed procedures for the sale of home run wiring, and thus it would be entirely inequitable for the Commission to increase that leverage by forcing a new service provider to either pay the cable industry's price for the wiring or risk losing its rights to having the wiring removed altogether.[47]

46/ Time Warner attempts to throw yet another curve ball at the Commission by recommending that the Commission abandon its current "remove/abandon/sell" proposal and instead require that *the MDU owner* elect to either purchase the home run wiring at fair market value, remove the wiring at its own expense or allow the incumbent cable operator to retain exclusive ownership and use of its home run wiring on the property. Time Warner Comments at 38. The fundamental absurdity of this is obvious: home run wiring is the *cable operator's* property, and thus it is not incumbent upon the MDU owner to tell the operator how he should dispose of that property upon termination of service. Indeed, the Commission's proposed rules are grounded in the basic principle that if a cable operator wants to retain its wiring, it must make an affirmative election to remove it. Moreover, even assuming that an MDU owner would in most cases elect to purchase the wiring at fair market value, the fact remains that an incumbent cable operator's first priority in *all* cases is to remain in the building at any cost, and thus incumbents have no incentive whatsoever to pay a fair price for home run wiring. Conversely, under the Commission's current proposal (*i.e.*, where *the incumbent* makes the election to sell), an MDU owner has every incentive to pay a fair price for the wiring, since the MDU owner's first priority is to *remove* the incumbent from the building as quickly as possible and thereby facilitate a smooth transition to the new service provider.

47/ Though there may be instances where reliance on a default price might accommodate the needs of all parties, it is clear from the cable industry's comments that it will be extremely difficult for the Commission to establish a single default price that will reflect fair market value in all situations. *Compare, e.g.,* Cablevision Systems Comments at 14-15 (recommending default price of no less than $150 per unit and suggesting that price of up to $600 per unit might be appropriate); TCI Comments at 18 (proposing default prices of $72, $115 and $184 per unit); Cox Comments at 14 (setting the default price at "replacement cost"); US WEST Comments at 13 (recommending that the default price "reflect what it would cost the new provider to put in its own wiring in terms of labor and materials"). Moreover, none of the parties cited above take into account depreciated value. It would be absurd to require the new service provider to pay full price for wiring that has already been in place for some or all of the twelve year period typically utilized to depreciate inside wiring. The Commission thus should not assume that it

(continued...)

E. The Commission Should Allow MDU Owners To Establish Their Own Arrangements With Their Tenants Regarding The Owner's Authority To Act As the Tenant's Agent When Selecting A Multichannel Service Provider.

The Commission has proposed that where an MDU owner agrees to allow unit-by-unit competition within a single building, the Commission will presume that the MDU owner or new service provider may act as the subscriber's agent in providing notice of a subscriber's desire to change services and purchasing the home run wiring as authorized under the Commission's rules.[48] Various cable operators have objected to this proposal on the grounds that it would give rise to the practice of "slamming' (*i.e.*, switching the subscriber's service without the subscriber's consent).[49] As noted in the *FNPRM*, however, the Commission already allows subscribers to allow a new service provider to purchase cable home wiring on their behalf.[50] There is no evidence in this proceeding that this procedure has led to "slamming." WCA thus submits that there is no reason for the Commission to assume that a similar procedure for home

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47/ (...continued)
could set a default price for home run wiring that would be equitable in all or even most cases. Finally, in no event should the Commission adopt Time Warner's suggestion that the price of home run wiring should be tied to the "business value" of the wiring on a building-by-building basis. Time Warner Comments at 43. A competitor's acquisition of an incumbent's home run wiring is not akin to a condemnation of the incumbent's business; rather, it merely is a sale of the incumbent's home run wiring pursuant to the MDU owner's decision to terminate the incumbent's service. There is no "taking" of the incumbent's business under these circumstances, and thus the incumbent is entitled to nothing more than the depreciated value of the wiring itself.

48/ *FNPRM* at ¶ 39.

49/ Jones Comments at 11-12.

50/ *FNPRM* at ¶ 39, n. 105.