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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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	)	

To: The Commission

REPLY COMMENTS OF MEDIA ACCESS PROJECT AND CONSUMER FEDERATION OF AMERICA

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REPLY COMMENTS

Media Access Project and Consumer Federation of America ("MAP/CFA") respectfully submit reply comments in the above captioned proceedings. The reply comments specifically address comments filed by incumbent cable companies and their trade association, NCTA (collectively referred to as the "cable industry," or "the industry").

INTRODUCTION AND SUMMARY

In their initial comments filed in this proceeding, MAP/CFA expressed their dissatisfaction with the Commission's newest proposal for the disposition of inside wiring. But the recommendations of incumbent cable monopolists would only make a bad situation worse.

The cable industry demonstrates in its comments that its feigned desire for a "two wire world" is a mere strategem. Their own actions belie their words.

First, they reheat their stale jurisdictional argument that the Commission has no authority to promulgate rules for wiring other than that inside a subscriber's apartment. But there is really

nothing new here - the Commission has already properly rejected their claim that the plain language and legislative history of Section 624(i) does not prohibit rules governing home run wiring. Indeed, such rules are fully "consistent" with, and are "necessary" for, the proper functioning of Section 624(i). Equally as important, yet ignored entirely by the industry, is the necessity of such rules to the execution of Section 207 of the 1996 Act, which prohibits restrictions on viewer's use of over-the-air reception devices.

Second, the industry threatens to minimize the impact, and to delay, implementation of any rules that the Commission might adopt. Not content that the application of the Commission's proposal is limited to MDUs where an incumbent has no contractual or statutory right to remain on the premises, the industry also wants to forestall the rules on the basis of common law. Moreover, it asks the Commission to stay the rules for what could be years of delay while its members engage in protracted litigation in multiple jurisdictions to determine their legal right to remain. All this proves is that the Commission's proposal to limit its rules where an incumbent has "no legally enforceable right to remain" is unworkable. The Commission can, and should, preempt statutes and private contracts that prohibit MVPD competition in MDUs.

Finally, the industry opposes the sharing of moldings and conduits that is necessary if facilities-based competition is ever to be achieved. As the cable industry knows, MDU owners and tenants are unlikely to permit two moldings or conduits in hallways.

This is not to say that MAP/CFA support the Commission's proposal as it stands. The current proposal is flawed, *inter alia*, because it does not put the power to choose an MVPD in the hands of viewers. As MAP/CFA showed in their initial comments in this proceeding, the Commission's best option for ensuring viewer choice is to move the demarcation point for home

wiring to the point where it first becomes distinguishable from common wiring. But rather than give up the exercise entirely - as the cable industry would have it - MAP/CFA recommend the following changes to the Commission's proposal:

- place control of the disposition of any home run and home wiring in the hands of viewers, and not landlords;
- preempt mandatory access statutes and exclusive contracts that give incumbents competitive advantage; and
- permit removal of home run wiring only if the subscriber, the MDU owner, and the alternative provider each decline to purchase it.

In addition, the Commission should permit shared use of molding and conduit; set a default price for wiring commensurate with its depreciated cost; shorten the time period starting from when a subscriber gives an incumbent notice of an intention to change MVPDs to when the incumbent elects to sell, remove or abandon home run wiring; and require a performance bond as collateral for either an incumbent's failure to restore an MDUs premises to prior condition, or for failing to remove wiring as promised.

I. THE COMMISSION HAS JURISDICTION TO PROMULGATE HOME RUN WIRING RULES BECAUSE SUCH RULES ARE NOT INCONSISTENT WITH SECTION 624(i) AND ARE NECESSARY TO EFFECTUATE ITS OBLIGATIONS UNDER BOTH SECTION 624(i) AND SECTION 207 OF THE 1996 ACT.

The cable industry disputes the Commission's determination that it has the authority to adopt rules for the disposition of home run wiring. *E.g.*, NCTA Comments at 7-13; Time Warner Comments at 49-60; Jones Intercable, *et al.* Comments at 2-7. Sweeping aside the Commission's ancillary jurisdiction under Sections 4(i)[1] and 303(r)[2] of the Communications Act to prom-

[1]That section reads, in its entirety, "The Commission may 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 USC §154(i).

ulgate rules and regulations that are "not inconsistent" with the Act, and that are "necessary" to carry out the Act's provisions, the industry argues that home run wiring rules are both inconsistent with the Communications Act and unnecessary to the execution of a specific Commission mandate or function. But this argument rests on the misguided premise that Congress expressed an intent in the 1992 Cable Act to prevent the Commission from promulgating rules governing the disposition of cable wiring outside MDU dwelling units.

A. Commission Rules Governing Home Run Wiring Would Not Be Inconsistent With The Language And Legislative History Of Section 624(i).

The industry argues, as it did in the Commission's 1996 inside wiring proceeding, that the proposed home run wiring rules would be inconsistent with Section 624(i) of the Act[3] because the language and legislative history of Section 624(i) apply only to wiring inside a subscriber's premises. *E.g.*, NCTA Comments at 6-7; Cable Telecommunications Association (CATA) Comments at 5-6; TCI Comments at 4-6. It claims that this demonstrates Congress' intention to prohibit the Commission from adopting rules for wiring outside the premises, such as home run wiring. *E.g.*, NCTA Comments at 7; Time Warner Comments at 49-60; TCI Comments at 4-8.

This argument is based on a distorted reading of Section 624(i) and its legislative history. Section 624(i) directs specific Commission action to remediate one specific problem, *i.e.*, wiring inside a dwelling unit after the subscriber has terminated service. Far from prohibiting additional,

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[2]That section gives the Commission the power to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act...." 47 USC §303(r).

[3]That section states, in relevant part, "the Commission shall prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber." 47 USC §544(i)

unspecified actions to fulfill the goal of maximizing customer choice, the Commission has already observed that "[n]othing in the language of Section 624(i) prohibits the Commission from adopting rules concerning wiring outside the subscriber's premises." *FNOPR* at ¶63. Absent indications that Congress wished to preclude such further steps, the Commission has broad discretion to take additional steps to effectuate the statutory goals. Thus, the statute's silence as to the wholly separate case of wiring outside the dwelling, *i.e.* home run wiring, and Congress' use of the phrase "within the premises" does not itself imply that the Commission is powerless to adopt rules relating to wire outside the premises. Had Congress meant to create such a prohibition, it could have added words such as "only" or "limited to" to Section 624(i).

The legislative history of Section 624(i) certainly shows no clear intent to prohibit rules governing home run wiring.[4] If anything, it indicates just how essential such rules are. The House Report stated that the intention of the home wiring provisions, *inter alia*, was to "enable consumers to utilize their wiring with an alternative multichannel video delivery system." H.R. Rep. 102-628, 102d Cong., 2d Sess. at 118 (1992). As MAP/CFA and others have demonstrated, rules governing the disposition of home run wiring are a necessary prerequisite to the ability of MDU dwellers to access alternative MVPDs. MAP/CFA Comments at 5-6; Philips/Thomson Comments at 11-12.

The industry claims to find Congressional intent to prevent the promulgation of rules applying to wiring outside the dwelling in the House Report's language that "in the case of

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[4]Where, as here, the plain language of the statute and its legislative history are ambiguous as to the precise question at issue, the Commission's interpretation of that statute is entitled to great deference. *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

multiple dwelling units, this section is not intended to cover common wiring within the building, but only the wiring within the dwelling unit of individual subscribers." *E.g.,* NCTA Comments at 7; Time Warner Comments at 53, citing H.R. Rep. 102-628 at 119. *See also*, S. Rep. 102-92, 102d Cong., 1st Sess. at 23 (1991).

But the industry ascribes far too much meaning to this legislative history. The House Report's language speaks only to the Commission's responsibilities under "this section," meaning Section 624(i), not the entire Communications Act, and in no event prohibits other actions taken to effectuate Section 624(i). Congress could have explicitly said that the Commission was otherwise prohibited from crafting rules governing common wiring. It did not.[5]

The Commission has cited many cases where courts have upheld its jurisdiction under Section 4(i) even though Congress had been silent or ambiguous on the subject matter. *FNOPR* at ¶55 and n. 125, *citing, e.g., Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (The *expressio unius* maxim - that the expression of one is the exclusion of others - "'has little force in the administrative setting' where [the Court] defer[s] to an agency's interpretation of a statute unless Congress has 'directly spoken to the precise question

[5]Incumbent providers cite three cases for the proposition that the Commission lacks jurisdiction here, *i.e.*, *Iowa Utilities Board v. FCC*, 120 F.3d 753, 805 (8th Cir. 1997); *California v. FCC*, 905 F.2d 1217, 1240 n. 35 (9th Cir. 1990); *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976). *E.g.*, CATA Comments at 5; NCTA Comments at 10 n. 16. These cases each addressed what is ***not*** present here - an ***express prohibition***. They found that the Commission lacked jurisdiction to promulgate certain rules concerning local telecommunications services on the basis that 47 USC §152(b) ***expressly prohibits*** the Commission from exercising jurisdiction over "charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communications services." As discussed *supra*, there is no similar express statutory prohibition on Commission regulation of home run wiring.

at issue.'")("*MTel*");[6] *New England Telephone & Telegraph v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987). *See also*, *Texas Utilities Electric Co. v. FCC*, 997 F.2d 925, 932 (D.C. Cir. 1993)(Congressional silence about cable TV pole attachments used for nonvideo communications did not clearly show intent to prohibit FCC jurisdiction).

Some industry commenters attempt to distinguish this Commission's proposal from *MTel* by asserting that Congress ***has*** spoken directly on this issue and prohibited regulation of home run wiring. *E.g.*, NCTA Comments at 9; Time Warner Comments at 58-59; Jones Intercable Comments at 6-7. But this distinction is based on the same flawed premise discussed above. Neither the language nor the legislative history of the 1992 Act specifically address the precise question of rules governing home run cable wiring in MDUs.[7]

B. Home Run Wiring Rules Are Necessary To The Execution of, *inter alia*, Section 624(i) and Section 207 of the 1996 Act, as Well As The Express Goals Of Both The 1992 Cable Act And The 1996 Telecommunications Act.

The industry also claims that the proposal is outside the Commission's ancillary jurisdiction under Sections 4(i) and 303(r) because it is not necessary to the "execution of some explicit Commission mandate or function." NCTA Comments at 10. *See also* TCI Comments at 6-8; Time Warner Comments at 55-56.

But as the Commission has already addressed in great detail, FNOPR at ¶¶56-69, home

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[6]The Commission has already discussed the *MTel* case at length, and MAP/CFA will not repeat that discussion here. *See, FNOPR* at ¶55.

[7]NCTA's attempt to distinguish *New England Telephone & Telegraph v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), is unavailing. NCTA argues that, unlike the present case, the refunds under rate-of-return regulation upheld in *New England* were consistent with and absolutely necessary for the Commission's authority. NCTA Comments at 8-9. But as MAP/CFA demonstrate at 7-9 *supra*, the proposed home run wiring rules are fully consistent with, and necessary to, promoting the competitive goals of the 1992 and 1996 Acts.

run wiring rules are necessary for the execution of a number of explicit Commission mandates, not the least of which is Section 624(i). As MAP/CFA and others discuss at length, effective rules for the disposition of home run wiring are absolutely necessary to make the Commission's home wiring rules work. *E.g.*, MAP/CFA Comments at 4-7; NAB Comments; Philips/Thompson Comments at 2-3, 10-11; DIRECTV Comments at 3-4. As the Commission recognizes, owners in many MDUs are reluctant to permit the alternative providers from running a second set of home run wiring to reach the demarcation point. *FNOPR* at ¶25. Thus, unless alternative MVPDs have access to home run wiring and the demarcation point, the fact that viewers control the wiring within their units is virtually meaningless.[8]

Moreover, the cable industry completely ignores the necessity of these rules for the proper implementation of Section 207 of the 1996 Act. Section 207 orders the Commission to "prohibit restrictions that impair a viewer's ability to receive video programming services" through over-the-air reception devices. 1996 Act, §207. But, just as access to home run wiring is necessary to allow viewers choose among alternative MVPDs, access to home run wiring is also necessary so that viewers can attach their over-the-air reception devices. MAP/CFA Comments at 4-5. *See also*, Philips/Thomson Comments at 2-3, attached diagrams.

Nor does the industry discuss how inside wiring rules are necessary for the promotion

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[8]Time Warner makes a parallel argument that home run wiring rules are not "necessary" because the "Commission can achieve its goal of promoting competition in the MVPD marketplace by encouraging competing MVPDs to install their own wiring in MDUs,..." Time Warner Comments at 56. This argument disregards the obstacles to MVPD competition in MDUs that can be found throughout the record in this proceeding, including exclusive contracts, mandatory access statutes, and landlord obstinence. It also ignores the industry's own efforts at keeping competition at bay, *e.g.* refusing to share molding or conduit space. *See* discussion at 15, *infra*.

of Congress' goals, expressed in the 1992 and 1996 Acts, to promote video competition and viewer choice by removing barriers to entry by alternative providers. For example, in the 1992 Act, Congress stated that it intended to promote the availability to the public of a diversity of views "through cable television and other video distribution media," to "ensure that consumer interests are protected" where there is no effective competition, and to ensure that cable television operators "do not have undue market power vis-a-vis" programmers and consumers. 1992 Act, §§2(b)(1),(4),(5). In enacting the 1992 Act, it specifically examined ownership concentration in the cable industry, and found that it had created, *inter alia*, barriers to entry and competition from other voices. 1992 Act, §§2(a)(4),(5). The 1996 Act encompassed similar goals, *i.e.*, "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition...." H.R. Rep. 104-458, 104th Cong., 2d Sess. at 1 (1996).

Finally, NCTA argues that the Commission may not rely on Section 601 of the Act "as a general directive" giving it "general authority or responsibility to adopt whatever rules it may deem necessary or appropriate to promote...competition." NCTA Comments at 11. But NCTA cannot have it both ways. It argues on the one hand that the Commission's ancillary jurisdiction must rest on "an explicit Commission mandate or function," *id.* at 10, but then attempts to pick and choose which mandates are "real" ones worthy of that jurisdiction. Section 601 is a specific statutory command, which states that the purposes of Title VI of the Communications Act include promoting "competition in cable communications and minimiz[ing] unnecessary regulation...." It is wholly proper for the Commission to rest its jurisdiction on that section.

II. THE COMMISSION CAN, AND MUST, PREEMPT STATE LAW AND PRIVATE AGREEMENTS THAT IMPINGE UPON VIEWERS' ACCESS TO HOME RUN WIRING.

The cable industry's insistence that it be able to use state law to delay indefinitely any sale of home run wiring demonstrates the unworkability of the Commission's proposal to apply the inside wiring rules only where an incumbent MVPD has no "legally enforceable right" to remain in an MDU. The industry self-servingly agrees with the Commission's determination not to apply its home run wiring rules where the incumbent operator has a "legally enforceable right" to remain on the premises. *E.g.*, NCTA Comments at 15-19; Time Warner Comments at 28-33; Adelphia Cable, *et al.* Comments at 8. In fact, it seeks to expand the definition of a "legally enforceable right" to include common law, as well as statutes and private contractual agreements. *E.g.*, NCTA Comments at 15-19; TCI Comments at 12-13; US West Comments at 9-10. The industry takes particular note of the fact that whether the incumbent enjoys such a right is often a subject of complex state litigation, *e.g.*, NCTA Comments at 16-20, and "can only be properly addressed and adjudicated by the courts." TCI Comments at 12. In that vein, the industry seeks to stay indefinitely any requirement that an incumbent provider either sell, abandon or remove home run wiring until after a court resolves whether the incumbent has a right to remain on the premises. *E.g.*, NCTA Comments at 14-22; Jones Intercable Comments at 15; Adelphia Cable Comments at 14-16.

Thus, incumbent cable operators have made clear that they will exhaust any and all legal recourse to determine whether they have a right to remain in an MDU. They also seek to stay the application of the rules while they proceed this litigation, possibly frustrating the viewer's desire to exercise choice for months or maybe even years. As these incumbents note, a viewer

seeking to choose between MVPDs must run a legal gauntlet consisting of private easements, contractual restrictions (many of which were created before the era of MVPD competition), state access statutes, and state common law. *E.g.*, NCTA Comments at 14-22; Time Warner Comments at 28-33; Cablevision Comments at 4-5. In many cases these will be insurmountable roadblocks. In others, the mere perception that they are insurmountable will dissuade the viewer from switching. Either way, the Commission's current proposal will fail to promote either viewers' First Amendment rights or Congress' repeated preference for a competitive MVPD market.

Rather than permit competition to be sacrificed at the altar of protracted litigation, the Commission must act decisively and preempt state access statutes and private contracts that limit alternative MVPD's access to home run wiring in MDUs. As discussed below, it has the authority to preempt both.

A. State Access Statutes

It is indisputable that a "federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *Louisiana Public Service Commn. v. FCC*, 476 U.S. 355, 369 (1986). *See also, Capital Cities Cable v. Crisp*, 467 U.S. 691, 698-700 (1984); *Fidelity Federal Savings and Loan Association v. De La Cuesta*, 458 U.S. 141, 154 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes. When Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.") Moreover, the Supreme Court has clarified that the delegation of power need not be explicit, but may be part of a "broad grant of authority to reconcile conflicting policies." *City of New York v. FCC*, 486 U.S. 57, 64 (1988). *See also, Fidelity Federal Savings and Loan Asso-*

ciation v. De La Cuesta, supra, ("a narrow focus on Congress' intent to supersede state law [is] misdirected...[a] preemptive regulation's force does not depend on express congressional authorization to displace state law.") The agency is entitled to considerable deference in executing this broad authority. As the Court stated in *City of New York*, "if the agency's choice to preempt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 64.

In *City of New York*, the Supreme Court examined FCC regulations that established technical standards governing signal quality for different classes of cable television channels and that forbade local franchising authorities from imposing their own standards on any of these classes of channels. *Id.* at 61. The Court noted that the Commission had preempted local regulation of technical standards since 1974, because the multiplicity of nonuniform local requirements would undermine the ultimate workability of its overall system of regulation and could have a deleterious effect on the development of new cable services and equipment. *Id.* at 60. The Court found that, in enacting the Cable Act of 1984, Congress was aware of, and sanctioned, these national technical standards. *Id.* at 66-67. Although the 1984 Cable Act contained no "clear manifestation of Congressional intent" to preempt, *Id.* at 63, the Court found it significant that there was no indication of explicit disapproval, either. *Id.* at 67. Instead, given the history of trouble the Commission had faced stemming from inconsistent technical standards, it held that Congress' silence authorized preemption. *Id.* at 68.

The situation facing the Commission here is nearly identical. The necessity for preemption is as strong here as it was for the technical standards. The current patchwork quilt of access

statutes and private contracts will stifle viewer choice and competition and indeed the overall scheme of the 1992 and 1996 Acts. There is ambiguity surrounding the 1992 Act's authorization of national home run wiring standards, but it is clear that the Act did not explicitly forbid those standards. *See* discussion at 3-7, *supra*. Furthermore, the very next time Congress spoke to the issues of competition and choice in the 1996 Act, it was well aware of the proposal to move the inside wiring demarcation point for MDUs, and it not only did not prohibit the Commission from acting, it made those rules ***even more*** necessary by enacting Section 207. *See* discussion at 8, *supra*.

B. Private Contracts.

A number of the cable industry commenters urge the Commission not to interfere with private contracts that they may have with MDU owners, but none appear to contest the Commission's authority to preempt those contracts where they run contrary to statutory mandates and goals. *See, e.g.*, US West Comments at 9; Adelphia Comments at 5-7; Time Warner Comments at 20-22.

That is because an agency's power to preempt contracts under the authority granted to them by Congress is clear. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986); *Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988) (Treasury Department regulations prohibiting U.S. nationals from performing contracts with Libya permissible under the authority of the International Emergency Economic Powers Act.) In *Connolly*, the Supreme Court held that

> Contracts may create rights of property, but when contracts deal with a subject matter that lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

> If a regulatory statute is otherwise within the powers of Congress...its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking.

Id. at 224.

Certainly, viewer access to alternative MVPDs is a matter upon which Congress has legislated. Thus the Commission may, pursuant to the authority delegated to it by Congress, preempt private contracts that restrict that access.

The FCC has itself invalidated certain contract terms where they have conflicted with its duty to regulate in the public interest, even where those contracts predated a specific Congressional mandate. In *Teleprompter Corp and Teleprompter Southeast, Inc. v. Florida Power Corporation*, File No. PA 81-0008 et al., 1984 FCC LEXIS 1874 (October 3, 1984), *rev'd on other grounds*, *Florida Power Corp. v. FCC*, 772 F.2d 1537 (11th Cir. 1985), *rev'd on other grounds*, *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), the Commission affirmed a Common Carrier Bureau determination that under the Pole Attachment Act, 47 USC §224, certain rates in Florida Power's pole attachment contracts were unreasonable. In rejecting the utility's argument that the Bureau's decision unconstitutionally abrogated contracts that predated the enactment of the Pole Attachment Act, the Commission noted:

> It is well established that contracts made in areas of governmental regulation are subject to modification by subsequent legislation...The ability of Congress to react to changing conditions and to legislate in the public interest cannot be restricted by private agreements. Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution.

Id. [citations omitted].

III. FACILITIES-BASED COMPETITION IS ADVANCED, AND NOT FRUSTRATED, BY HOME RUN WIRING RULES.

While many industry commenters admit that the 1996 Act does require MVPD competition, they argue that Congress insisted on ***facilities-based*** competition, and that "any rule that frustrates [facilities-based competition] must be rejected." Time Warner Comments at 15. *See, e.g.*, Adelphia Comments at 23-26. Time Warner, for example, claims that Congress expressed a preference for multiple, overlapping broadband networks inside MDUs. *Id.* at 15-16. For support, it looks to the general findings of the Conference Report to the 1996 Act, which supported "deployment of advanced telecommunications and information technologies," and the expectation that telephone local exchange carriers would enter the video services market. *Id.*

As a preliminary matter, MAP agrees with these commenters that, in a perfect MVPD market devoid of years of monopoly domination by a single industry, a two wire solution might is preferable. The term "facilities-based" is not in the statute or in the legislative history Time Warner cites, and cannot possibly be described as a requirement. While Congress may have professed a preference for two wires as an ultimate ***goal***, there is nothing in the legislative history that ***limits*** the Commission to two-wire solutions for the purpose of promoting competition.

As discussed in the *FNOPR* and MAP/CFA's earlier comments, there remain many obstacles to facilities-based competition, including, but not limited to, MDU owners resistance to the installation of multiple sets of wiring, molding, and conduit, limited resources of competitive MVPDs to build a second, redundant set of wiring, and the anticompetitive actions of incumbent MVPDs. *FNOPR* at ¶25; MAP/CFA Comments at 8-16.

The latter problem is highlighted by the industry's comments. Even as they promote the "two wire world," they urge the Commission to limit further the number of cases where the home

run wiring proposal would apply (arguing, for example, that "legally enforceable rights" should include common law), *see* discussion at 9-11, *supra*, and reject sharing of hallway molding and conduits as a "takings" problem. *E.g.*, NCTA Comments at 25-26; Jones Intercable Comments at 15.[9]

To the extent that the Commission's final rules permit shared moldings and conduits, and to the extent that they would preempt private contracts and state statutes that prohibit MDU access by alternative providers, home run wiring rules would advance, and not frustrate, the goal of facilities-based competition.[10]

IV. THE COMMISSION SHOULD ADOPT RULES TO PREVENT PARTIES FROM CIRCUMVENTING THE NEW RULES OR ENGAGING IN OTHER ANTICOMPETITIVE BEHAVIOR.

MAP/CFA support the comments of various parties that urge the Commission to clarify its proposed rules to prevent any loopholes which would allow incumbent MVPD's to circumvent the inside wiring rules, or otherwise to engage in anticompetitive conduct.

For example, cable industry commenters have argued that, under the "remove, sell, or abandon" provisions of the Commission's proposal, *FNOPR* at ¶¶35, 39, MDU owners and alternative MVPDs would have no incentive to purchase the existing home run wiring at a fair price. *E.g.*, Time Warner Comments at 13; Cox Comments at 12-13; Jones Intercable Comments at 18-19; CATA Comments at 11-13. They argue that MDU owners will "stonewall" negotiations

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[9]In any event, it may soon be possible for viewers to receive service from both the franchised cable operator and the alternative provider on a single wire. DirecTV Comments at 4-5.

[10]The Commission has already discussed at length, and properly rejected, the industry's assertion that Section 652(d)(2) of the 1996 Act prohibits home run wiring rules. *FNOPR* at ¶¶65-67.

or refuse to purchase the wiring with the hope that the departing provider will abandon the wiring. *Id.* As an alternative, these commenters urge the Commission to set a default price for the wiring, which would apply if the departing incumbent provider chooses to sell the wiring and it is unable to settle on a price with the MDU owner. *Id.*

The devil with this proposal is in the details. The default price guarantees the incumbent a certain return for the wiring if it elects to sell, and there is no reason for the incumbent to settle for a lower price. Therefore, should the Commission set such a default price, it should ensure that this price is not fixed so high that the departing incumbent is unjustly enriched. For example, if the incumbent has claimed depreciation of the home run wiring on its corporate taxes, but the default price allows it to recover the replacement value for new wiring, instead of the depreciated value, it would recover the value of the wiring twice. In arguing they should receive replacement value, cable commenters have claimed that the incoming alternative MVPD would otherwise receive a windfall. *E.g.,* Cox Comments at 14; Jones Intercable Comments at 18; CATA Comments at 13. But it makes little sense to charge the alternative MVPD for new wiring if it would be receiving older wiring that might be damaged, worn, or out of date.[11] Therefore, MAP/CFA support the Comments of Ameritech that the price should be set according to the current rules for inside wiring of single dwelling units. Ameritech Comments at 4-5. *See* MAP/CFA Comments at 16, n. 13.

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[11]The inequity of the incumbents' argument may also be seen by considering the observations of several cable commenters that they soon plan to provide higher bandwidth networks and new technologies, perhaps involving fiber optic cables. *E.g.*, Cox Comments at 5-8; Cablevision Comments at 8-11. Therefore, the real effect of making alternative MVPDs pay full replacement costs would be to force the alternative providers to buy outdated equipment while subsidizing the incumbents' switch to newer equipment.

MAP/CFA also support the comments of several alternative MVPDs urging the Commission to shorten the period between the time notice is given to an incumbent MVPD, and the time the incumbent makes an election to sell, remove or abandon its wiring. *E.g.*, Wireless Cable Association Comments at 12-13 ("WCA Comments"); Echostar Comments at 2-3. As WCA notes, this 90 day period (60 days notice that a subscriber intends to change MVPDs plus the 30 day election period) gives the incumbent "ample time to price or restructure its service offerings and/or lock the residents of the building into long term contracts before its competitor even arrives on the property." WCA Comments at 12. This would destroy competition, or at least give the incumbent an unfair advantage in unit-by-unit competition.

Finally, MAP/CFA support the comments of those parties suggesting that an incumbent post a performance bond as collateral for failing to restore an MDU's premises to prior condition if it chooses to remove home run wiring. *E.g.*, RCN Comments at 14; ICTA Comments at 5-6. As the Community Associations Institute suggests, this performance bond could function as a penalty which makes whole the MDU owner if an incumbent fails to remove its wiring after stating its intention to do so. Community Associations Institute Comments at 14-15.

CONCLUSION

The Commission should again reject cable industry's reheated arguments regarding the Commission's authority to promulgate inside wiring rules. And it must resist the industry's efforts to render the rules ineffective by preempting state laws and private contracts that prevent competition and viewer choice. The Commission's proposal can work - but only if it places control of wiring in the hands of viewers, and not landlords. This is the result that the First

Amendment, and Congress, demand.

Respectfully submitted,

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