

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Telecommunications Services)
Inside Wiring)
)
Customer Premises Equipment)
)
In the Matter of)
)
Implementation of the Cable)
Television Consumer Protection)
and Competition Act of 1992)
)
Cable Home Wiring)

CS Docket No. 95-184

MM Docket No. 92-260

REPLY COMMENTS OF GTE

GTE Service Corporation, on behalf of its
affiliated domestic telephone and video service
companies

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SUMMARY

GTE supports the Commission's creative solution to address incumbent operators' control over cable wiring in multiple dwelling unit ("MDU") buildings. As GTE and others point out, access to these facilities is crucial to allow alternative providers to serve MDU residents and pose a credible competitive threat to existing monopoly cable providers. To this end, most competitive multichannel video programming distributors ("MVPDs") agree with GTE that the Commission should adopt its overall framework, with minor modifications, regarding the disposition of cable "home run" and "home" wiring in MDU buildings upon termination of service.

In response to the Commission's proposal, cable companies predictably challenge the FCC's authority to adopt its framework and question the public benefits of such a proposal. GTE maintains that the Commission has ample authority under the Communications Act to adopt its proposed rules, and it and other commenters have demonstrated the substantial benefits associated with a timely and predictable wiring disposition scheme. Moreover, the Commission should decline to adopt the various suggestions of cable company commenters that seek to limit the scope of the FCC's proposals or impose a mandated-pricing scheme. These recommendations will undermine the effectiveness of the Commission's rules and further delay competition.

Therefore, the Commission should move promptly to adopt its proposed cable wiring disposition mechanism in light of the recommendations made by GTE in its initial comments and discussed below. The record underscores the importance of

implementing procedures that ensure timely and fair disposition of cable wiring. In particular, the Commission should:

- Promote competitive access by adopting a prompt disposition mechanism and ensuring a seamless transition between service providers;
- Allow private negotiations to establish market-based prices for cable home run wiring;
- Adopt competitively-neutral policies concerning the cable demarcation point and access to conduit and molding;
- Refrain from mandating ownership rights in new cable installations and permit these rights to be determined by building owners and video providers.

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REPLY COMMENTS OF GTE

GTE Service Corporation, on behalf of its affiliated domestic telephone and video service companies (collectively "GTE"),¹ hereby respectfully submits its reply comments in response to the *Further Notice of Proposed Rulemaking* issued in the above-captioned proceeding.² As set forth below, GTE urges the Commission to reject the

¹ GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc., GTE Communications Corporation, and GTE Media Ventures, Inc.

² Telecommunications Services Inside Wiring, Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, CS Docket No. 95-184, MM Docket No. 92-260 (rel. Aug. 28, 1997) ("*Further Notice*" or "*FNPRM*").

cable industry's predictable list of objections and proposals that seek only to disable the FCC's proposed procedural framework for the disposition of cable "home run" and "home" wiring. These roadblocks undermine the FCC's goal to establish competition to entrenched monopoly providers. In GTE's view, the Commission's proposed framework, with minor changes, will promptly and effectively bring competition to multiple dwelling unit residents by removing the legal uncertainties surrounding the disposition of cable wiring.

I. INTRODUCTION

The Commission should be commended for initiating this further rulemaking in recognition of the fact that meaningful competition between incumbent cable operators and alternative providers in multiple dwelling unit ("MDU") buildings does not exist. Incumbent operators continue to deny MDU residents access to other service providers by controlling bottleneck facilities necessary for competition and restricting competitors' use of existing facilities on MDU premises. Given that space limitations and economic factors limit the placement of new cable wiring, alternative multichannel video programming distributors ("MVPDs") are routinely precluded from offering competitive services. As a result, subscribers suffer because they are denied both the benefits of competition and *any* choice among video service providers.

In response to the Commission's proposal that seeks to correct this imbalance, opponents have responded by obfuscating the benefits of any solution in a cloud of objections and proposed roadblocks to competition. In addition to challenging the FCC's jurisdictional basis to adopt its proposal, several cable companies and others doubt the usefulness of the proposed framework because they argue it would apply

only in limited circumstances given incumbents' existing legal rights to remain on MDU property. Indeed, the National Cable Television Association ("NCTA") raises the specter of protracted litigation over these rights, noting that when the "economic benefit . . . is sufficiently great, any plausible legal challenge to its enforceability [of the disposition rules] can be expected."³ Further, cable operators seek to create numerous roadblocks to competition, such as suggesting that the FCC's rules be limited only to unit-by-unit conversions and proposing pricing mechanisms that would overcompensate incumbent providers and undermine new entrants' ability to negotiate prices for existing wiring. The Commission should not be distracted by these misguided and self-serving claims; rather, it should intensify its effort to bring competition to MDU subscribers by adopting its proposed framework with minor modifications.

The Commission's proposed framework will foster competition for MDU residents by correcting the overwhelming advantage incumbent operators have over alternative providers in offering video services to end users in MDU buildings. As GTE explained in its comments, the most effective way to allow new entrants to compete is to promote inter-MDU competition. The prospect of serving residents throughout an entire building will encourage new entrants to make the substantial investment required to secure programming and bring services to MDU buildings. While unit-by-unit competition may have some limited benefits to residents, such competition is feasible only in a limited number of circumstances due to space limitations and the economic risk of bringing

³ Comments of the National Cable Television Association, Inc., Docket Nos. CS 95-184 & MM 92-260 at 17 (filed Sept. 25, 1997) ("NCTA Comments").

service to a building with the prospect of obtaining only one or several subscribers. Accordingly, the Commission should focus its efforts on improving inter-MDU competition, while permitting intra-MDU video competition to develop where feasible. Increased subscriber choice among competing video service providers will follow from improved inter-MDU competition because building owners have a strong market incentive to act in the interest of their residents and offer services that residents want.

II. COMPETITIVE MULTICHANNEL VIDEO PROVIDERS GENERALLY ENDORSE THE FRAMEWORK OF THE COMMISSION'S PROPOSED PROCEDURAL RULES

Noting the pro-competitive benefits of a timely and predictable wiring disposition scheme, most competitive MVPDs generally support adoption of Commission's proposed framework with minor modifications.⁴ For example, the Wireless Cable Association explains that the FCC's proposed rules will "create more opportunities for alternative MVPDs to compete on a fair and equitable basis with incumbent cable operators in the MDU environment."⁵ Similarly, OpTel states that the proposed procedures will "facilitate the ability of the new MVPD to quickly and efficiently provide service to the residents of the MDU" which in turn will "reduce entry barriers and

⁴ See, e.g., Comments of Ameritech New Media, Inc., Docket Nos. CS 95-184 & MM 92-260 at 2 (filed Sept. 25, 1997) ("Ameritech Comments"); Comments of Heartland Wireless Communications, Inc., Docket Nos. CS 95-184 & MM 92-260 at 2 (filed Sept. 25, 1997) ("Heartland Wireless Comments"); Comments of OpTel, Inc., CS Docket No. 95-184 at 2 (filed Sept. 25, 1997) ("OpTel Comments"); Comments of SBC Communications, Inc., Docket Nos. CS 95-184 & MM 92-260 at 3 (filed Sept. 25, 1997) ("SBC Comments"); Comments of Wireless Cable Association International, Inc., Docket Nos. CS 95-184 & MM 92-260 at 14-15 (filed Sept. 25, 1997) ("WCA Comments").

⁵ WCA Comments at 14-15.

increase the level of competition, on an MDU-by-MDU basis."⁶ GTE agrees that the Commission's framework will promote competition by removing incumbents' ability to limit the use of existing cable home run wiring, thereby improving new entrants' ability to access MDU residents.

As GTE explained in its comments, increased competition among video providers will benefit MDU residents. The Community Associations Institute correctly observes, that from a resident's perspective, the proposed rules will "provide many community associations and their residents with increased access to alternative telecommunications providers and enhanced choices for competitive video services."⁷ Heartland Wireless and other alternative providers echo the view that the FCC's proposed framework will promote consumer choice.⁸ In addition, competition will ensure reasonable rates for video services and promote development of new service

⁶ OpTel Comments at 3.

⁷ Comments of the Community Associations Institute, Docket Nos. CS 95-184 & MM 92-260 at 4 (filed Sept. 25, 1997) ("CAI Comments").

⁸ See, e.g., Heartland Wireless Comments at 2-3, 8; Ameritech Comments at ii.

offerings as providers seek to attract and retain subscribers.⁹ Accordingly, the Commission should recognize the substantial benefits to MDU residents that will flow from its proposed rules and reject the self-serving arguments of those incumbent operators who seek to preserve their monopoly status.

III. THE PROPOSALS OFFERED BY CABLE OPERATORS ARE A CLEAR ATTEMPT TO FORESTALL COMPETITION

A. The Commission's Proposed Framework Can Foster Competition Consistent With Existing Legal Rights

Several parties assert that the Commission should not adopt its proposed framework because these rules will operate in only a limited set of circumstances.¹⁰ For example, the Media Access Project expresses dissatisfaction with the Commission's

⁹ In a recent petition filed with the FCC, the Consumers Union and the Consumer Federation of America urged the Commission to reverse the growing trend of increasing cable rates and the market power of cable incumbent providers. See Consumers Union and Consumer Federation of America Petition to Update Cable Television Regulations and Freeze Existing Cable Television Rates, MM Docket Nos. 92-264, 92-265, 92-266 (filed Sept. 23, 1997). In their filing, the Petitioners note that "[c]able rates increased more than three times as fast as inflation since Congress passed the Telecommunications Act of 1996[.]" and that recent developments in the cable industry have led to "sharply increased market power, anticompetitive actions, and unprecedented price increases." *Id.* at 4. Indeed, the Petitioners also urge the FCC to limit cable operators' ability to engage in anticompetitive conduct, including the "denial of access to facilities." *Id.* at 18.

¹⁰ See Further Joint Comments of Building Owners & Managers Association International, et al., Docket Nos. CS 95-184 & MM 92-260 at 3 (filed Sept. 25, 1997) ("Joint Comments of Building Owners et al."); Comments of Media Access Project & Consumer Federation of America, Docket Nos. CS 95-184 & MM 92-260 at 7-9 (filed Sept. 25, 1997) ("Media Access Project Comments"); Comments of Philips Electronics North America Corp. et al., Docket Nos. CS 95-184 & MM 92-260 at 7-8 (filed Sept. 25, 1997) ("Philips Electronics Comments").

proposal because it does not go far enough.¹¹ In particular, it and other parties claim that existing legal rights -- such as perpetual, exclusive contracts, state mandatory-access statutes and common law property rights -- will prevent MDU owners from terminating service and requiring the disposition of cable wiring in accordance with the FCC's proposal.¹² Similarly, several cable operators and NCTA suggest that the Commission's rules will apply in only narrow circumstances, yet they seek to place additional requirements that would prevent effective operation of these rules.¹³ GTE maintains that these parties incorrectly understate the effectiveness of the FCC's proposed rules.

First, those commenters who argue that the proposed framework will be ineffective fail to consider that other steps may be taken to facilitate competition in conjunction with the Commission's disposition framework. As an example, GTE has suggested that the Commission adopt a "fresh look" policy whereby MDU owners would be given a limited opportunity to reexamine perpetual, exclusive contracts entered into with a cable operator not subject to effective competition. Indeed, the Joint Comments of the Building Owners and Managers Association International correctly note that a "fresh look" policy for perpetual contracts is necessary to "tak[e] advantage of the

¹¹ Media Access Project Comments at 8.

¹² See, e.g., Media Access Project Comments at 7-11; Philips Electronics Comments at 7.

¹³ See, e.g., Comments of CableVision Communications, Inc., et al., Docket Nos. CS 95-184 & MM 92-260 at 14-15 (filed Sept. 25, 1997) ("CableVision/Comcast Comments"); NCTA Comments at 16-20.

natural forces of competition in the real estate market."¹⁴ Such a policy would be warranted in this circumstance in order to ensure reasonable cable rates to subscribers and to promote the availability of new services to consumers. Accordingly, a fresh look policy would improve the effectiveness of the Commission's proposed framework, and thus, the Commission should promptly consider and adopt such a policy in the further stages of this proceeding.¹⁵

A number of cable operators likewise overstate the scope and intent of state-mandatory access laws.¹⁶ For example, Time Warner asserts that the Commission's rules should not apply in mandatory access states because "all such [mandatory access] laws preserve the provider's rights to remain on the premises."¹⁷ GTE submits that this argument overestimates the reach of state mandatory-access laws. Contrary to the assertions of Time Warner and others, mandatory-access laws were enacted as pro-consumer measures designed to ensure that MDU subscribers could access video

¹⁴ See Joint Comments of Building Owners et al. at iii; *accord* WCA Comments at 3.

¹⁵ While the FCC has indicated that it will consider exclusive contracts and other issues in a subsequent action, GTE urges the Commission to adopt such a policy as part of its proposed framework or in response to another Further Notice of Proposed Rulemaking. See *FNPRM* at ¶ 3.

¹⁶ See, e.g., Comments of Adelphia Cable Communications et al., Docket Nos. CS 95-184 & MM 92-260 at 10 (filed Sept. 25, 1997) ("Adelphia Cable Comments"); Comments of Time Warner Cable, Docket Nos. CS 95-184 & MM 92-260 at 28-29 (filed Sept. 25, 1997) ("Time Warner Comments").

¹⁷ Time Warner Comments at 29.

services even over an MDU owner's objections.¹⁸ They categorically do not exist, as Adelphia Cable claims, to give operators a "perpetual right to serve and install facilities."¹⁹ To the extent this is the case, then preemption of these laws may be appropriate in order to ensure that they do not frustrate competition and reasonable rates in video markets.²⁰

In conjunction with the FCC's procedural framework for cable wiring, GTE urges the Commission to reject cable company suggestions to "toll" the proposed deadlines when a cable company seeks to assert its legal rights to remain in a particular building.²¹ This proposal is a blatant anticompetitive attempt to place yet another hurdle in front of MDU owners who seek to switch video providers. GTE disagrees that legal rights must be established by a judicial proceeding prior to completing the procedures in the Commission's proposed rules. Establishing an automatic "stay" of the rules upon the mere assertion of an incumbent cable operator's rights is inconsistent with

¹⁸ See Fla. Stat. § 718.1232 (1996) (applying mandatory access right to a "resident of any *condominium dwelling unit*, whether tenant or owner") (emphasis added); Fla. Stat. § 718.103 (1996) (defining "condominium" as any property right defined by statute that is comprised of units "that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements").

¹⁹ Adelphia Cable Comments at 10.

²⁰ See Consumer Electronics Manufacturers Association Comments at 11. However, GTE opposes RCN's suggested abrogation of bulk service contract rights to the extent that the Commission's rules would limit a competitive MVPD's bulk service contract with a private building owner. See Comments of RCN Telecom Services, Inc., Docket Nos. CS 95-184 & MM 92-260 at 16 (filed Sept. 25, 1997) ("RCN Comments").

²¹ See, e.g., Adelphia Cable Comments at 14; CableVision/Comcast Comments at 29.

established legal precedent for staying rules and will only further entrench incumbent providers' market dominance. It is reasonable to expect that new entrants and MDU operators will first determine the merit of an incumbent's right to remain on the property, if any, and trigger the Commission's disposition rules only where such a right does not exist. Therefore, GTE urges the FCC not to grant the ill-conceived "automatic stay" of its rules when an incumbent cable operator files a court action and instead allow courts to decide these issues in particular circumstances consistent with established precedent.

B. Effective Inter-MDU Competition Should Be Encouraged

The Commission should reject the arguments that facilities-based, "two wire" competition is the best means to increase overall competition among providers²² and that the FCC's proposed framework should only apply in a unit-by-unit context.²³ As GTE explained in its comments, focusing exclusively on individual subscriber choice actually hinders competition.²⁴ The Commission correctly initiated this proceeding

²² See Comments of Cox Communications, Inc., Docket Nos. CS 95-184 & MM 92-260 at 5-7 (filed Sept. 25, 1997) ("Cox Comments") (proposing that the Commission require MDU owners to permit the installation of multiple sets of home run wiring); Time Warner Comments at 18-20.

²³ See, e.g., Adelphia Cable Comments at 17-20; Time Warner Comments at 41.

²⁴ Comments of GTE Service Corp., Docket Nos. CS 95-184 & MM 92-260 at 4-5 (filed Sept. 25, 1997) ("GTE Comments").

because alternative competitive providers lack effective access to MDU subscribers.²⁵ By insisting that alternative providers compete *only* by placing new facilities, the cable operators' proposed "solution" of two-wire competition will only preserve the status quo and allow incumbents to exploit their monopoly position. If alternative providers could readily access subscribers by building new facilities, there would be no need for this proceeding.

Along similar lines, the Commission's rules should apply to building-by-building dispositions of cable wiring. As noted above, inter-MDU competition is necessary to create incentives for meaningful competition with entrenched incumbent providers and will assist the development of unit-by-unit competition where feasible. Contrary to cable operators' claims, consumers will benefit from inter-MDU competition through lower prices and wider variety of service options, and increased choice will follow through existing relationships between residents and building owners. Incumbent providers who suggest that requiring disposition of cable wiring throughout an MDU building will not promote competition seek only to retain their incumbent status and deny consumers the opportunity for any choice among providers.

²⁵ See *FNPRM* at ¶¶ 25-31; see also Statement of Reed E. Hundt, Chairman, Federal Communications Commission, before the Committee on the Judiciary, U.S. House of Representatives at 10 (Sept. 24, 1997) ("Currently, alternative service providers often have difficulty competing to serve these buildings [MDUs] because the owners do not want additional wires running through the hallways and want the new provider to use the existing wiring. This resistance to multiple sets of wires can deny MDU residents the ability to choose among competing service providers.").

C. The Commission Correctly Empowers MDU Owners To Implement the Disposition of Cable Wiring

In addition, GTE disagrees with Jones Intercable and others who assert that the Commission's framework merely benefits MDU owners and not subscribers.²⁶

According to Jones Intercable, MDU building owners will place their "economic motives ahead of tenant welfare" and thus the Commission should not apply its rules if the "MDU owner ever obtains compensation of any type from the MVPD," including items such as advertising support.²⁷ Further, Adelphia Cable and others suggest that MDU owners should not act as agents for subscribers in terminating service throughout a building or obtaining rights to purchase a resident's home wiring.²⁸ Such suggestions are unnecessary and only serve to delay competition.

²⁶ See, e.g., CableVision/Comcast Comments at 4-7; Comments of Jones Intercable et al., Docket Nos. CS 95-184 & MM 92-260 at 10 (filed Sept. 25, 1997) ("Jones Intercable Comments"); Time Warner Comments at 8-10, 35-36.

²⁷ Jones Intercable Comments at 10; see also Comments of Cable Telecommunications Association, Docket Nos. CS 95-184 & MM 92-260 at 15 (filed Sept. 25, 1997) ("CTA Comments"); Comments of Cablevision Systems, Inc., Docket Nos. CS 95-184 & MM 92-260 at 18 (filed Sept. 25, 1997) ("Cablevision Systems Comments"). In addition, GTE disagrees with the suggestion of CableVision/Comcast that the proposed framework should not apply if the MDU owner grants the alternative MVPD an exclusive contract greater than five years. See CableVision/Comcast Comments at 30. As GTE has noted, non-perpetual, exclusive contracts between alternative MVPDs and MDU owners are in the public interest because they give new entrants a reasonable opportunity to recover the substantial up-front costs of either re-wiring or purchasing existing facilities. Without such an opportunity, competition with existing providers likely will be thwarted in light of the risks associated with incurring such costs.

²⁸ Adelphia Cable Comments at 31; Comments of Tele-Communications, Inc., Docket Nos. CS 95-184 & MM 92-260 at 23 (filed Sept. 25, 1997) ("TCI Comments").

Contrary to these claims, it has been GTE's experience that MDU owners have strong incentives to act in the best interest of their residents.²⁹ In newly-constructed facilities, for example, MDU owners compete for residents based upon the types of services and amenities offered in their buildings. GTE has found that MDU owners primarily rely upon service quality and reliability when selecting between competing video providers. This is particularly true, as the Community Associations Institute explains, in the context of resident-controlled facilities where community associations as MDU owners "have a strong incentive to promote and serve the interests of the residents since board members must regularly seek the votes of their neighbors to remain in office."³⁰ In light of these incentives and MDU owners' other legal obligations to residents under state law, the MDU owner is a logical choice to negotiate with the incumbent over the disposition of the cable throughout a building and to purchase cable "home run" and "home" wiring upon termination.

Indeed, allowing MDU owners to negotiate directly with incumbent operators and new providers benefits subscribers by reducing transactions costs. There is little question that MDU owners should negotiate for the sale of home run wiring given their interest in maintaining access to the common areas of the building. Further, allowing MDU owners to purchase cable home wiring that is not already owned by residents upon termination of service throughout an entire building is more efficient and practical

²⁹ GTE urges the Commission to refrain from adopting rules of general applicability to counter the unique issues that may apply to MDU owner incentives in rent-controlled markets.

³⁰ CAI Comments at 6.

than requiring the MDU owner to contact each individual subscriber directly. This proposal also discourages the inefficient removal of wiring where a subscriber-tenant may not wish to own the wiring within its premises, but the building owner intends to purchase such wiring for the benefit of future residents. Moreover, allowing the MDU owner to negotiate directly with the new provider allows the MDU owner to obtain volume discounts and other favorable service options on behalf of its residents given economies of scale, which otherwise might not be available on a unit-by-unit basis.

Further, there is no logical reason to conclude that the Commission's proposals must eliminate the potential for MDU building owner misconduct.³¹ While GTE acknowledges that there may be isolated instances where unscrupulous owners could seek to improperly benefit from a new video service provider, the Commission should not entirely abandon its proposal based on this concern nor should it deny well-intentioned MDU owners the opportunity to permit competition in their buildings. Moreover, any restrictions on MDU owners are unnecessary given, as the cable companies point out, the wide variety of state laws designed to protect against anticompetitive conduct -- such as conspiracy and tortious interference with contracts -- between MDU building owners and service providers.³² Cable operators have demonstrated little reluctance to use these laws where there is the slightest concern about such conduct and thus the Commission need not take any action in this regard.

³¹ See Cablevision Systems Comments at 4-7.

³² See, e.g., Time Warner Comments at 8-12.

D. The Cable Companies' Jurisdictional and Constitutional Arguments Are Seriously Flawed and Should Be Rejected

Not surprisingly, cable companies assert that the Commission does not have authority to adopt its proposed procedural framework.³³ GTE disagrees. As it noted in its initial comments, GTE submits that the Commission has ample authority to adopt its proposed procedural framework under Section 623 of the Communications Act.³⁴ Section 623 mandates reasonable rates for regulated cable services and prescribes a framework for determining the price of equipment used by subscribers to access such services.³⁵ The Commission's proposed framework for the disposition of cable wiring will promote competition among video providers, thereby allowing consumers to benefit from increased service offerings and lower prices. Moreover, Congress expressed a clear preference for competition over regulation as a means to ensure reasonable cable rates under the Act and clearly intended that the Commission protect the interests of consumers where effective competition does not exist.³⁶ Accordingly, the Commission need not look beyond Section 623 to find sufficient authority to adopt its proposed procedural framework.

Similarly, GTE submits that the proposed framework will not result in an unconstitutional taking of property. The procedural mechanisms in the *FNPRM*

³³ See, e.g., CTA Comments at 7-9; CableVision/Comcast Comments at 14; NCTA Comments at 2-13.

³⁴ GTE Comments at 13-14.

³⁵ See 47 U.S.C. § 543(b).

³⁶ 47 U.S.C. § 543(a)(2); H.R. Rep. No. 102-862, at 63-64 (1992).

adequately protect the property interests of incumbent cable operators. Congress may condition exercise of property rights on performance of certain reasonable affirmative duties designed to further legitimate legislative objectives.³⁷ Under the Commission's proposed rules, incumbent providers will face one of three eventualities: (1) sale of their property, (2) removal of their property, or through inaction (3) abandonment. None of these eventualities implicates either of the two categories of regulatory action that were described as compensable in *Lucas v. South Carolina Coastal Council*: (1) a physical invasion of property or (2) the denial of the owner's economically beneficial use of the property.³⁸ First, if the provider freely chooses to sell the property obviously no takings has transpired. Second, if the property is voluntarily removed, no takings could have occurred. Finally, no property will be deemed abandoned, or as some have argued be "taken," unless and until the incumbent carrier fails to act to remove or sell its property. If the incumbent provider chooses to abandon its property, the Supreme Court has

³⁷ *United States v. Locke*, 471 U.S. 84, 104 (1985); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Turner v. New York*, 168 U.S. 90 (1897).

³⁸ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1013 (1992). Under the FCC's proposed rule, the incumbent cable operator would be free to re-use the wire in another building or attempt to convince the MDU owner to permit it to continue to provide services in that building.

never required Congress to "compensate the owner for the consequences of his own neglect."³⁹

Further, Time Warner desires to gain protection for its property "right" to remain in the MDU to offer cable or some other service.⁴⁰ While incumbent providers may have a property interest in their wiring itself, they generally have no property interest in access to the MDU (unless state law provides otherwise). Therefore while the Commission has an affirmative duty to protect the incumbent's property interests in the wiring itself, it is not obligated to protect the incumbent's largely nonexistent "right" to retain access to the building to provide other services.

IV. THE RECORD UNDERSCORES THE IMPORTANCE OF IMPLEMENTING PROCEDURES THAT ENSURE TIMELY AND FAIR DISPOSITION OF CABLE WIRING

A. Promoting Competitive Access Requires a Prompt Disposition Mechanism To Ensure a Seamless Transition Between Service Providers

The Independent Cable & Telecommunications Association ("ICTA") and other commenters emphasize the need to ensure the timely transfer between service providers, particularly where an MDU owner allows multiple providers to compete in a

³⁹ *Texaco Inc. v. Short*, 454 U.S. 516 (1982). In addition, Time Warner expresses concerns regarding the lack of an adjudicatory proceeding to assess "just" compensation. Time Warner Comments at 65-67. Yet these concerns are misplaced because under no proposal is a government-assessed just compensation to be paid. Similarly unpersuasive is Time Warner's argument regarding the impact of the Commission's rules on state law. *Id.* at 63. By its own terms, the Commission's proposal for abandonment, sale or removal is inapplicable when state law or any other authority creates "a legally enforceable right to remain on the premises." *FNPRM* ¶ 35.

⁴⁰ See Time Warner Comments at 65.

single building.⁴¹ In such a scenario, ICTA explains that "it is critical that the new service provider be able to deliver promised services to tenants promptly" given the incumbent's incentive to impede competition by altering "services and rates and institut[ing] short-term promotional offers" that are often tied to long-term service agreements.⁴² Accordingly, ICTA recommends that the Commission shorten the election and removal time periods in the context of the unit-by-unit disposition of cable wiring.⁴³ Although GTE supported the FCC's proposed timeframes, it believes that ICTA's shorter timeframes are a reasonable means to ensure competition where an alternative provider will be competing directly against an entrenched incumbent provider, while balancing the rights of incumbent operators. Therefore, GTE endorses these shortened timeframes.

GTE likewise endorses the suggestion of several commenters that the Commission should ensure a seamless transition between service providers.⁴⁴ For example, the Wireless Cable Association recommends that the Commission adopt a general rule requiring the parties to cooperate in the seamless transition of service, which, at a minimum, should prevent an operator from either removing cable until the

⁴¹ See Comments of the Independent Cable & Telecommunications Association, Docket Nos. CS 95-184 & MM 92-260 at 7 (filed Sept. 25, 1997) ("ICTA Comments"); Heartland Wireless Comments at 4; RCN Comments at 13.

⁴² ICTA Comments at 7.

⁴³ *Id.* at 8.

⁴⁴ See, e.g., WCA Comments at 11-12; Comments of EchoStar Communications Corp., Docket Nos. CS 95-184 & MM 92-260 at 2 (filed Sept. 25, 1997) ("EchoStar Comments").

new provider has connected its wire to the unit or disabling abandoned wire.⁴⁵ A new entrant's ability to compete will be undermined if an incumbent can create the real or imagined threat that subscribers' video services will be temporarily interrupted during the transition between service providers. The Commission can avoid such a result by adopting a general rule that promotes cooperation, thereby preventing anticompetitive conduct and ensuring uninterrupted service.

B. Negotiations Will Result in Market-Based Prices

A number of commenters agree with GTE that private negotiations will ensure market-based prices where an incumbent elects to sell the home run wiring.⁴⁶ The incentive exists for effective price negotiations given that a new entrant is faced with the substantial costs to re-wire an MDU while the incumbent cable operator has the ability to threaten removal of the cable wiring or actually remove the wiring. The record indicates that the credible threat of removal limits a new entrant's alleged bargaining advantage. For example, Time Warner explains that, under the Commission's proposal, "[r]emoval of MDU home run wiring will likely occur" when price negotiations fail because "the incumbent provider cannot rationally allow a competitor to take over its wiring for free" and that "such removals are bound to become standard practice for

⁴⁵ WCA Comments at 11-12 & n.23.

⁴⁶ See, e.g., Heartland Wireless Comments at 6; OpTel Comments at 4; SBC Comments at 5.

departing providers."⁴⁷ It follows, therefore, that private negotiations will operate efficiently and guarantee market-based prices for cable home run wiring.

In light of these incentives, the Commission should decline to adopt the various proposals offered by cable operators to set default or other pricing schemes for cable home run wiring.⁴⁸ Establishing any form of default pricing will remove the ability to achieve negotiated pricing because neither party will have an incentive to offer or accept a price that differs from the default price. In addition, default prices will not work because of the unique circumstances surrounding each wiring configuration that cannot be quantified in a formula. Lastly, establishing a default price risks skewing market incentives to purchase or remove cable wiring to the extent a pricing formula yields a price that is either too high or low relative to the true market price. As evidenced by the exorbitant default prices suggested by the cable operators in their comments, the cable companies propose to calculate default prices in a manner that attempts to double recover the amortized material and labor costs that have long since been recovered from cable subscribers and make it prohibitively expensive for new entrants to purchase existing cable wiring.

C. Alternative MVPDs Demonstrate the Need For Competitively-Neutral Policies Concerning the Cable Demarcation Point and Access To Conduit and Molding

A number of commenters urged the Commission to ensure that the location of the cable demarcation point does not prevent an alternative provider from accessing a

⁴⁷ Time Warner Comments at 13-15.

⁴⁸ See, e.g., NCTA Comments at 22-25; TCI Comments at 17.

subscriber's cable home wiring.⁴⁹ An alternative provider must access the demarcation point in order to connect its wiring to the customer's facilities, and a demarcation point that is embedded in a wall or otherwise physically inaccessible precludes a new provider from offering service in many instances. The Commission thus should adopt its proposal to relocate the demarcation point to the point where it first becomes "physically accessible." Further, in such cases, the FCC should move the demarcation point away from the subscriber's dwelling unit toward the point where the alternative provider has "reasonable access" to the cable wiring. This approach will ensure that the demarcation point is not moved to a location that disrupts customers' premises or MDU common areas and minimizes inconvenience to subscribers and MDU owners.

Similarly, Ameritech and RCN agree with GTE that the Commission should grant alternative providers access to existing molding or conduit where there is room in the conduit and the building owner does not object.⁵⁰ As Ameritech explained, such a rule "would promote competition and consumer choice and would not constitute a taking of the incumbent provider's private property without just compensation."⁵¹ To that end, GTE acknowledges that the compensation for such access would be appropriate so

⁴⁹ See, e.g., Comments of the Consumer Electronics Manufacturers Association, Docket Nos. CS 95-184 & MM 92-260 at 13 (filed Sept. 25, 1997) ("CEMA Comments"); Heartland Wireless Comments at 7; WCA Comments at 14.

⁵⁰ Ameritech Comments at 6; CEMA Comments at 13; RCN Comments at 9.

⁵¹ Ameritech Comments at 6.