to cooperate to avoid service disruption to subscribers to the extent possible.[134] One of our overriding goals in this proceeding is to ensure as seamless a transition as possible. Our rules are premised on the good faith cooperation of all parties to protect against such disruption. We expect service providers to cooperate and to make all necessary efforts to minimize any service disruption when a transition is undertaken.

46. If the parties are unable to agree on a price and the incumbent elects to submit to binding arbitration, the parties will have seven days to agree on an independent expert or to each designate an expert who will pick a third expert within an additional seven days. The independent expert chosen will be required to assess a reasonable price for the home run wiring by the end of the 90-day notice period. We believe that it is not practical for the Commission to set a default price or formula that could apply to the widely varying circumstances throughout the country.[135] We think that this process should help ensure that the parties reach a fair price, while not creating a lengthy and complicated mechanism. If the incumbent elects to submit the matter to binding arbitration and the MDU owner (or, in some cases, the alternative provider) refuses to participate, the incumbent will have no further obligations under our home run wiring disposition procedures.

47. We decline to adopt the proposal of Adelphia, et al., and Time Warner to require the MDU owner, rather than the incumbent provider, to elect: (1) to buy the wiring; (2) to pay to remove it; or (3) to allow the incumbent to leave the wiring in place and restrict others from using it.[136] Similarly,

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[134]We believe that the current notification requirements, in conjunction with a general rule requiring a seamless transition, are sufficient to protect subscribers from lengthy service disruptions when switching providers. We decline to adopt commenters' suggestions that we require incumbents to continue service until the new provider is connected.

[135]*See* Further Comments of Adelphia, et al., at 28; Further Comments of GTE at 10-11; Further Comments of Heartland Wireless at 6; Further Comments of ICTA at 6-7; Further Comments of OpTel at 4; Further Comments of RCN at 13 (contending that a default price would skew negotiations); Further Comments of SBC at 4-6; Further Comments of Time Warner at 6, 41-45 (contending that a default price is likely not to appropriately account for the "business value" or fair market value of the wiring and any Commission set price would become a price ceiling for the wiring, tilting the negotiations in favor of the MDU owner). But see the following comments suggesting that the Commission set various default prices or formulas: Further Comments of Ameritech at 4-5 and Further Reply of Ameritech at 11-14 (pricing guidelines of $0.06 per foot); Further Comments of CATA at 11-13 ($150 - $300 per unit passed, based on actual cost to replace wiring, not original cost less amortization); Further Comments of Cablevision Systems at 12-16 (at least $150 per unit passed, as opposed to per subscriber, representing estimate of replacement cost rather than original cost less amortization); Further Comments of Jones Intercable, et al., at v, 18-19 (replacement value, including some amount for labor, on a per dwelling unit basis); Further Comments of NCTA at 24 (marketplace value); Further Comments of Summit at 1 (depreciated value or fair market value which is "equal to the cost to duplicate, reduced to equate the ages of the original and duplicated equipment"); Further Comments of TCI at 3, 17-19 (three MDU categories of $72, $115 or $184 per unit passed, based on labor and material cost for installations in new buildings); Further Reply of Media Access/CFA at 16-17 (supporting Ameritech's proposal); Further Reply of U.S. Wireless/Ohio Valley Wireless at 4-7 (default price of $1.00); Further Reply of NCTA at 11 (if default price set, it should reflect the replacement value of the wiring). NCTA states that any default price must be subject to de novo review by the courts in order to avoid an impermissible taking under the Fifth Amendment. Further Comments of NCTA at 24; *see also* Further Comments of Adelphia, et al., at 28-29; Further Comments of Time Warner at 41-44.

[136]Further Comments of Adelphia, et al., at 29; Further Comments of Time Warner at 37-39.

we decline to adopt the proposal of NCTA and others that, if the MDU owner refuses to buy the wiring at an established default price, or if the MDU owner cannot demonstrate that the incumbent has failed to negotiate in good faith, the procedures should terminate and the incumbent provider should not be obligated to abandon or remove the home run wiring.[137] We believe that the binding arbitration option described above addresses these commenters' underlying concern that incumbents should be assured of receiving a reasonable price for the wiring. As we have noted, we think competition has been deterred by prolonged assertions of ownership interest in the wiring by incumbents, not by MDU owners' reluctance to purchase the wiring. Our procedures are meant to bring the process of switching video service providers to an expeditious resolution.

48. We will not adopt the suggestion of several cable operators that the proposed building-by-building procedures not apply where the MDU owner receives any excess compensation for allowing the alternative provider into the premises,[138] or where the MDU owner bundles video service with rent.[139] We do not believe that there is sufficient record evidence to establish that such practices are per se anti-competitive and, if they are, that market forces will not address them.

(2) *Unit-by-Unit Procedures*

49. We adopt the following procedures for unit-by-unit disposition of home run wiring. Where the incumbent video service provider owns the home run wiring in an MDU and does not (or will not at the conclusion of the notice period) have a legally enforceable right to maintain its home run wiring on the premises, the MDU owner may permit multiple service providers to compete head-to-head in the building for the right to use the individual home run wires dedicated to each unit. Where an MDU owner wishes to permit such head-to-head competition, the MDU owner must provide at least 60 days' written notice to the incumbent provider of the owner's intention to invoke the following procedure.[140] The incumbent service provider will then have 30 days to provide the MDU owner with a written election as to whether, for all of the incumbent's home run wires dedicated to individual subscribers who may later choose the alternative provider's service, it will: (1) remove the wiring and restore the MDU consistent with state law; (2) abandon the wiring without disabling it;[141] or (3) sell the wiring to the MDU owner.[142] In other words, the incumbent service provider will be required to make a single election for how it will handle the disposition of individual home run wires whenever a subscriber wishes to switch video service

[137]Further Comments of NCTA at 5, 22-25; *see also* Further Comments of Jones Intercable, et al., at v, 19; Further Comments of TCI at 4, 15-16, 19-21; Further Reply of NCTA at 9.

[138]Further Comments of Adelphia, et al., at 22-26; Further Comments of Cablevision Systems at 17-18; Further Comments of Comcast, et al., at 30; Further Comments of CATA at 14-15; Further Comments of Jones Intercable, et al., at iv, 10-11; Further Comments of Time Warner at 4, 35-37.

[139]Further Comments of Adelphia, et al., at 22; Further Comments of Time Warner at 35.

[140]As in the building-by-building context, we believe that it is reasonable to require that MDU owners seeking to avail themselves of these procedures notify the incumbent in writing.

[141]Again, if the incumbent elects to abandon the wiring, its ownership will be determined by state law.

[142]As in the building-by-building situation, the MDU owner may permit the alternative provider to purchase the home run wiring if the MDU owner refuses to purchase it.

providers; that election will then be implemented each time an individual subscriber switches service providers.[143] If the MDU owner permits the alternative service provider to purchase the home run wiring, the alternative service provider will be required to make a similar election within this same 30-day period for any home run wiring that the alternative provider subsequently owns (i.e., after the alternative provider has purchased the wiring from the current incumbent provider) and that is solely dedicated to a subscriber who switches back from the alternative provider to the incumbent.

50. In the *Inside Wiring Further Notice*, we tentatively concluded that it would streamline and expedite the process of changing service providers if alternative service providers and MDU owners were permitted to act as subscribers' agents in providing notice of a subscriber's desire to change services.[144] We continue to believe that this is the case.[145] However, consistent with our intention not to "create or destroy any property rights" by these procedures,[146] we will not create any new right of MDU owners and alternative providers to act on behalf of subscribers in terminating service.[147] Nor will we restrict the rights of such MDU owners and alternative providers under state law.[148] We therefore decline at this time to adopt specific procedures to guard against unauthorized changes in service, i.e., "slamming."[149] Given that an unauthorized change of MVPDs would likely be apparent to consumers (e.g., differing channel line-ups), we do not believe that slamming poses the same dangers in the video context as in the telephony

[143]As in the context of building-by-building dispositions of home run wiring, incumbent providers will be prohibited from using any ownership interests they may have in property on or near the home run wiring, such as molding or conduit, to prevent, impede, or in any way interfere with the ability of an alternative MVPD to use the home run wiring.

[144]*Inside Wiring Further Notice* at para. 39.

[145]*See* Further Comments of GTE at 8-9; Further Comments of ICTA at 3 n.1; Further Comments of OpTel at 5; Further Reply of ICTA at 15; *see also Cable Home Wiring Further Notice*, 11 FCC Rcd at 4572 (where the Commission did not prohibit a subscriber from delegating to an agent the task of terminating service and authorizing the purchase of home wiring on his or her behalf). *But see* Further Comments of Comcast, et al., at 21; Further Comments of TCI at 4, 22-24; Further Comments of Time Warner at 6, 45-47.

[146]*Inside Wiring Further Notice* at para. 32.

[147]*See* Further Comments of Jones Intercable, et al., at iv, 11-12 (asking the Commission to clarify that it did not intend to create new agency law).

[148]*See* Further Comments of Jones Intercable, et al., at 11 (the Commission should "adopt a 'hands off' policy with respect to creating any implied agency"). *But see* Further Comments of Time Warner at 6, 45 (suggesting that neither the MDU owner nor the alternative MVPD should be allowed to act as the subscribers' agent without the incumbent's consent).

[149]"Slamming" is the unauthorized change of a consumer's chosen long distance service. *See In the Matter of Direct Impact Telecommunications, Inc. v. American Teletronics Long Distance, Inc.*, 12 FCC Rcd 4891, n.28 (1997). We use the term more generically here to mean an unauthorized change in any communications service.

context.[150] We will take additional steps to curb slamming if, once our new rules have become effective, slamming becomes a problem.[151]

51. As with the proposed building-by-building procedures, we will permit the parties to negotiate for the sale of the home run wiring. If one or both of the video service providers elects to negotiate for the sale of the home run wiring it may own, the parties will have 30 days from the date of such election to reach an agreement. During this 30-day negotiation period, the incumbent, the MDU owner and/or the new provider may also work out arrangements for an up-front lump sum payment in lieu of a unit-by-unit payment. An up-front lump sum payment would permit either service provider to use the home run wiring to provide service to a subscriber without the administrative burden of paying separately for each home run wire every time a subscriber changes providers.[152]

52. If the parties cannot agree on a price, the provider that has elected to sell the wiring will be required to elect: (1) to abandon without disabling the wiring; (2) to remove the wiring and restore the MDU consistent with state law; or (3) to submit the price determination to binding arbitration by an independent expert.[153] If the incumbent fails to comply with any of the deadlines established herein, the home run wiring will be considered abandoned and the incumbent may not prevent the alternative provider from using the home run wiring immediately to provide service.

53. If the incumbent elects to submit to binding arbitration, the parties will have seven days to agree on an independent expert or each designate an expert who will pick a third expert within an additional seven days. The independent expert chosen would be required to assess the price for the wiring within 14 days. We realize that the expert's price determination may not be issued for up to 28 days after the 60-day notice period has expired. If subscribers wish to switch service providers during this period, the procedures set forth below should be followed, subject to the price established by the arbitrator. As stated above with regard to the building-by-building procedures, we believe that it is not practical for the Commission to set a default price or formula that would apply to the widely varying circumstances

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[150]*See* Further Reply of RCN at 11 (subscribers know immediately if their video service has been changed and can rectify the situation at once; also, there is no reason to believe that MDU owners would initiate or participate in slamming activities). *But see* Further Reply of Time Warner at 27-28 (transparency of video slamming does not make it any better as a matter of policy, just easier to recognize).

[151]*See* Further Comments of Comcast, et al., at 21; Further Comments of Jones Intercable, et al., at 12; Further Comments of TCI at 4; Further Comments of Time Warner at 45-46 (all asking the Commission to adopt rules similar to those in the long distance telephone context to prohibit "slamming").

[152]Time Warner suggests that, in the unit-by-unit context, an up-front lump sum payment would be reasonable whereby the first new MVPD would be required to pay the incumbent 50% of the fair market value of the wiring (established through negotiation or binding arbitration), with subsequent MVPDs being required to pay their pro rata share, and each MVPD would have the equal right to use the home run wiring when a particular resident requests that MVPD's service. Further Comments of Time Warner at 40; *see also* Further Comments of Comcast, et al., at 21-22.

[153]*See* Further Comments of Adelphia, et al., at 28; Further Comments of Time Warner at 38-39 (if negotiations fail, the matter should be submitted to binding arbitration or alternative dispute resolution). Again, if the MDU owner (or, in some cases, the alternative provider) refuses to submit the issue to arbitration, the incumbent's obligations under our procedures will cease.

throughout the country.[154] If the MDU owner (or, in some cases, the alternative provider) refuses to participate, the incumbent's obligations under the Commission's home run wiring procedures will cease.

54. After completion of this initial process, a provider's election will be carried out if and when the provider is notified either orally or in writing that a subscriber wishes to terminate service and that an alternative service provider intends to use the existing home run wire to provide service to that particular subscriber. At that point, a provider that has elected to remove its home run wiring will have seven days to do so and to restore the building consistent with state law. If the subscriber has requested service termination more than seven days in the future, the seven-day removal period will begin on the date of actual service termination (and, in any event, shall end no later than seven days after the requested date of termination). We conclude that seven days is adequate for removal because we believe that, unlike in the building-by-building context, the provider will only be required to remove a single home run wire.

55. If the current service provider has elected to abandon or sell the wiring, the abandonment or sale will become effective upon actual service termination or upon the requested date of termination, whichever occurs first. If the incumbent provider intends to terminate service prior to the end of the seven-day period, the incumbent will be required to inform the subscriber or the subscriber's agent (whichever is notifying the incumbent that the subscriber wishes to terminate service) at the time of the request for service termination of the date on which service will be terminated. In addition, the incumbent provider must disconnect the home run wiring from its lockbox and leave it accessible for the new provider within 24 hours of actual service termination.

56. We base the above procedures on the assumption that the alternative service provider will have an incentive to ensure that the incumbent is notified that the alternative service provider intends to use the existing home run wire to provide service. If, however, the subscriber's service is simply terminated without any indication that a competing service provider wishes to use the home run wiring, the incumbent service provider will not be required to carry out its election to sell, remove or abandon the home run wiring. This might occur, for instance, where an MDU tenant is moving out of the building. In such cases, we do not believe that it would be appropriate to require the incumbent to sell, remove or abandon the home run wiring when it might have every reasonable expectation that the next tenant will request its service. However, the incumbent provider will be required to carry out its election with regard to the home run wiring if and when it receives notice from a subsequent tenant (either directly or through an alternative provider) that the tenant wishes to use the home run wiring to receive a competing service.

57. Where the incumbent receives a request for service termination but does not receive notice that an alternative provider wishes to use the home run wiring, the incumbent will still be required to follow the procedures set forth in our cable home wiring rules -- e.g., to offer to sell to the subscriber any cable home wiring that the incumbent provider otherwise intends to remove. The required notice in the unit-by-unit context may be effected in two stages (i.e., the subscriber may call to terminate service and the alternative provider may separately notify the incumbent that it wishes to use the home run wiring). In order for the home run wiring and the home wiring to be disposed of in a coordinated manner, we believe that our cable home wiring rules must apply upon any termination of service. In addition, we believe that subscribers should have the right to purchase their home wiring to protect themselves from

[154]See note 135, *supra*, regarding comments for and against the Commission setting a default price or formula..

unnecessary disruption associated with removal of home wiring, regardless of whether they intend to subscribe to an alternative service.

(3) *Ownership of Home Run Wiring*

58. In both the building-by-building and unit-by-unit approaches, the MDU owner will have the initial option to negotiate for ownership and control of the home run wiring because the property owner is responsible for the common areas of a building, including safety and security concerns, compliance with building and electrical codes, maintaining the aesthetics of the building and balancing the concerns of all of the residents.[155] Moreover, vesting ownership of the home run wiring in the MDU owner, as opposed to the alternative service provider, will reduce future transaction costs since the above procedures will not need to be repeated if service is subsequently switched again.[156] Nevertheless, we recognize that some MDU owners may not want to own the home run wiring in their buildings;[157] in such cases, the MDU owner may permit the alternative service provider to purchase the wiring.[158]

59. We do not believe that individual subscribers will be disadvantaged by having the MDU owner own the home run wiring. If a subscriber has the ability to choose between multiple service providers in the unit-by-unit context, the MDU owner has already concluded that it is willing to permit multiple service providers on the premises in order to compete for subscribers. Since the MDU owner will have voluntarily opened its building to multiple competitors, we do not believe that it will deny a resident the ability to use the home run wiring for the resident's provider of choice. Furthermore, we believe that, if the alternative service provider purchases the home run wiring, that provider will not be able to act as a bottleneck and the individual subscriber will continue to be protected because, as described herein, the alternative service provider will also be subject to these same procedures if and when the alternative provider's service is terminated.

60. As we have noted, several cable interests contend that the Commission's belief that MDU owners will act in the best interest of the residents in their buildings is misplaced.[159] According to these

[155]*See, e.g.*, Building Owners, et al., Comments at 18; Further Comments of OpTel at 5-6 (arguing that MDU owners have every incentive to maximize resident welfare and temporary residents have less interest in enhancing the service options of future tenants).

[156]*See* Further Comments of TCI at 9.

[157]*Cf.* Building Owners, et al., Comments at 25, 33.

[158]*See* Further Comments of GTE at 9 and Further Comments of OpTel at 6 (both supporting the Commission's proposal to allow the alternative provider to purchase the wiring if the MDU owner declines to do so).

[159]Further Comments of Adelphia, et al., at 20-26; Further Comments of Cablevision Systems at 7; Further Comments of Comcast, et al., at 4; Further Comments of Jones Intercable, et al., at iii, 7-10 (the Commission's presumption that MDU owners will act in the interest of their tenants contradicts real-world experience); Further Comments of Media Access/CFA at 1-2, 8-12 (objects to the amount of control the Commission would give to MDU owners to dictate tenants' choices since MDU owners typically resist the installation of multiple sets of wires; submits that MDU owners would not be effective representatives for their tenants because they benefit from exclusive contracts); Further Comments of Time Warner at 7-12.

commenters, MDU owners more often act based on their own immediate financial interest.[160] They contend that MDU owners are the true bottlenecks to competition in that they have a direct financial interest in granting exclusive access to alternative MVPDs, either because of a direct financial investment in a non-cable MVPD seeking to serve the building or because of large "kickbacks."[161] Time Warner claims that the Commission cannot point to any reliable evidence that the real estate market is responsive to the video service interests of MDU residents.[162] TCI, however, supports the Commission's proposal to give MDU owners, rather than the competing MVPDs, the initial option to negotiate for ownership and control of the home run wiring.[163] Not only is the MDU owner responsible for the safety and security concerns in the common areas, TCI asserts, but MDU owner control could reduce future transaction costs and administrative hassles, particularly in the unit-by-unit context where service may be switched back and forth between providers. The result will reduce disruption to the subscriber.[164]

61. We agree with those commenters that argue that MDU owners seek to maximize their profits, but disagree that this incentive always leads them to be willing and able to ignore their tenants' desires. Even some cable operators recognize that many MDU owners (e.g., condominium associations and cooperative boards) are representative of their residents' interests.[165] We continue to believe that, in rental MDUs, market forces will compel MDU owners in competitive real estate markets to take their tenants' desires into account. It is not, as some commenters suggest, that we assume that viewers will move from one MDU to another based on the video services provided.[166] Rather, it is that a significant percentage of MDU renters move each year,[167] and MDU owners must compete with rival owners to keep

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[160]*See, e.g.,* Further Comments of Adelphia, et al., at 20; Further Comments of Comcast, et al., at 4-8.

[161]*See* Further Comments of Adelphia, et al., at 21-22, 24-25 ("landlords get bigger kickbacks by auctioning exclusive rights than by allowing competition"); Further Comments of Cablevision Systems at 7 ("landlords refuse to allow a second wire . . . because they elevate revenues from auctioning off the whole building over giving their tenants an ongoing choice"); Further Comments of Comcast, et al., at 4 ("MDU owners routinely seek cash payments and/or a percentage of revenues in consideration for long term -- 15 to 20 year -- exclusive contracts"); Further Comments of Time Warner at 7-9 (the real inhibition to consumer choice for MDU residents results from MDU owners's ability to act as 'broadband service gatekeepers'") and at n.17 (particularly true in rent control situations like New York City where MDU owners have an incentive to drive out longstanding tenants). *But see* Further Reply of ICTA at 11-13 (cable operators' condemnation of "kickbacks" is hypocritical and misplaced); Further Reply of OpTel at 7-8 (Commission should not interfere with private contractual payments for access).

[162]Further Comments of Time Warner at 10.

[163]Further Comments of TCI at 8-9.

[164]*Id.* at 9.

[165]*See* Further Comments of Comcast, et al., at 24; *see also* Further Reply of Community Associations Institute at 2-3.

[166]*See, e.g.,* Further Comments of Comcast, et al., at 25.

[167]*See* Ex Parte Letter from Jim Arbury, Vice President, National Multi-Housing Council and National Apartment Association, to Rick Chessen, Federal Communications Commission (December 16, 1996) (estimating that nationwide 33% of all residents of rental apartments move in a given year).

current residents and attract additional residents. In this context, an MDU owner that agrees to an exclusive contract in exchange for a monetary payment but does not somehow flow that payment through to its residents (e.g., a new swimming pool, a security system, or discounting the rent below the competitive level) is vulnerable to competition from similarly situated MDUs offering a more attractive mix of price and amenities to prospective tenants. If the MDU owner tries to simply keep the payment, new tenants will not be as attracted to the building and existing tenants will have an additional reason to relocate to another MDU (e.g., an otherwise similar residence where, to attract tenants, the owner has utilized its exclusive access payment to reduce rent or improve amenities). We believe that consumer welfare will be maximized by letting the market determine the appropriate mix of price and amenities in the MDU marketplace.

62. In the *Inside Wiring Further Notice*, we also sought comment on whether we should adopt a rule requiring video service providers to transfer to the MDU owner upon installation ownership of the home wiring and home run wiring installed in MDUs under contracts entered into on or after the effective date of any rules we may adopt.[168] We stated that such a rule might increase competition and consumer choice in future installations by permitting MDU owners to control access to the home run wiring from the start.[169]

63. Cable commenters that addressed the issue of requiring video providers to transfer ownership of the wiring to the MDU owner upon installation generally contend that, not only does the Commission not have authority to establish such a restriction, but as a policy matter, MDU owners and video providers are capable of protecting their own interests in contracts and the Commission should not interfere.[170] Adelphia, et al., and Time Warner, however, suggest that, instead of adopting the proposed procedures, the Commission should require video providers and MDU owners to include in their service contracts a clear provision which specifically provides for the disposition of home run wiring.[171]

64. Several other commenters also argue that the Commission should not adopt a rule requiring video service providers to transfer ownership of all newly installed cable wiring upon installation.[172] GTE and Heartland Wireless claim that such a rule would be outside the Commission's statutory authority and would be inconsistent with the procompetitive, deregulatory nature of the 1996

[168] *Inside Wiring Further Notice* at para. 85.

[169] *Id.*

[170] *See* Further Comments of Jones Intercable, et al., at 17-18; Further Comments of NCTA at 5, 26-27; Further Comments of TCI at 12.

[171] Further Comments of Adelphia, et al., at 5-7; Further Comments of Time Warner at 20-22.

[172] Further Comments of GTE at 17-20; Further Comments of SBC at 6; Further Comments of Heartland Wireless at 7; Further Reply of ICTA at 5; Further Reply of OpTel at 8; Further Reply of GTE at 22-23; *see also* Further Reply of Community Associations Institute at 12.

Act.[173] Media Access/CFA maintains its position that tenants should be given the first opportunity to purchase the wire.[174]

65. Ameritech argues that ownership of inside wire in future installations should be transferred to the MDU owner.[175] Ameritech proposes that the MVPD should be able to dedicate ownership of the inside wiring to the MDU owner free of charge in exchange for the MDU owner's agreement not to grant exclusive rights to any other MVPD, unless the second MVPD pays the first MVPD 100% of the first MVPD's original cost to install its cable inside wire.[176] RCN believes the Commission should require video providers to transfer to the MDU owner, upon installation, ownership of inside wiring, but only to the extent that the MDU owner desires ownership.[177] RCN proposes the same transfer for molding and conduits.[178]

66. We will not require video service providers to transfer ownership of cable inside wiring to MDU owners upon installation. At this time, we believe this issue is best left to marketplace negotiations between the service provider and the MDU owner. Some MDU owners may choose to bargain for ownership of the inside wiring, while others may prefer to let the service provider maintain ownership. We are not convinced that MDU owners have insufficient bargaining power in this situation to protect their interests. Even under the home run disposition procedures adopted above, we recognize that some MDU owners may not wish to exercise ownership over the inside wiring. We believe that MDU owners should have the same option at the time of installation.

67. We do believe, however, that all parties involved would benefit from additional certainty regarding ownership of the home run wiring upon termination of a service contract. For any contracts between MVPDs and MDU owners entered into after the effective date of our rules, we will require the MVPD to include a provision describing the disposition of the home run wiring upon the contract's termination.[179] We believe that such a rule will provide certainty to the parties and permit them to address the disposition of home run wiring in light of their circumstances. Where the parties' contract clearly and expressly addresses the disposition of the home run wiring, our procedures will not apply. We also reiterate that the parties may rely upon any existing contractual rights upon termination, in addition to the procedures we are adopting.

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[173]Further Comments of GTE at 17-20; Further Comments of Heartland Wireless at 7.

[174]Further Comments of Media Access/CFA at 21.

[175]Further Comments of Ameritech at 8; *see also* Further Comments of CEMA at iii, 13; Further Reply of Ameritech at 15-16.

[176]Further Comments of Ameritech at 8-10; *see also* Further Reply of Info. Tech. Industry Council at 5-6.

[177]Further Comments of RCN at 15.

[178]*Id.*

[179]*See* Further Comments of Adelphia, et al., at 5-7; Further Comments of Time Warner at 21.

(4) *Impact on Incumbent Video Service Providers*

68. We conclude that cable operators' argument that the loss of their home run wiring eliminates their ability to provide other telecommunications services is misplaced.[180] Cable operators' ability to compete in the telephony market should be largely unaffected. The procedures adopted herein apply where the incumbent has no legally enforceable right to remain on the premises and the MDU owner and/or the individual subscriber has selected another provider's package -- notwithstanding the incumbent's other telecommunications services. We think that affording the incumbent the ability to remain in the building on the premise that it has a service to offer in addition to video undermines this proceeding's effort to enhance competition. Cable operators continue to have the opportunity to market video or any other service. The procedures we implement seek to afford the MDU owner or resident with an ability to make a choice. In addition, MDU owners will remain free to implement the type of multiple-wire model advocated by the cable industry by requiring all service providers to install their own home run wires.

(5) *Application of Procedural Framework*

69. As noted above, the procedural mechanisms we are adopting will apply only where the incumbent provider no longer has an enforceable legal right to maintain its home run wiring on the premises against the will of the MDU owner.[181] These procedures will not apply where the incumbent provider has a contractual, statutory or common law right to maintain its home run wiring on the property. We also reiterate that we are not preempting any rights the incumbent provider may have under state law. In the building-by-building context, the procedures will not apply where the incumbent provider has a legally enforceable right to maintain its home run wiring on the premises, even against the MDU owner's wishes, and to prevent any third party from using the wiring. In the unit-by-unit context, the procedures will not apply where the incumbent provider has a legally enforceable right to keep a particular home run wire dedicated to a particular unit (not including the wiring on the subscriber's side of the demarcation point) on the premises, even against the property owner's wishes.

70. In the *Inside Wiring Further Notice*, we sought comment on whether we should create any presumptions or other mechanisms regarding the rights of the parties if the incumbent's right to maintain its home run wiring on the premises is disputed.[182] Many of the cable interests focus their comments on when an incumbent provider does not have a "legally enforceable right to remain on the premises."[183] Operators ask the Commission to clarify that the procedures will not apply when the incumbent provider

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[180] *See* Further Comments of Cablevision Systems at 9-11 (claiming that the Commission's proposal fails to take into account that many operators use or plan to use wiring to provide other services, such as Internet service, and that "the forced surrender of its broadband wire to a competitor" would preclude Cablevision from competing for pay per view services and local telephone service in MDUs and deny these competitive benefits to MDU tenants).

[181] *See also* Further Comments of GTE at 7 (agreeing that proposed framework should only apply when incumbent does not have a legally enforceable right to remain on the property).

[182] *Inside Wiring Further Notice* at paras. 34, 35, 39.

[183] *See, e.g.,* Further Comments of NCTA at 15 (determining whether the incumbent has the right to stay on property is the "crux of the matter").

and the MDU owner have entered into a contract which specifically deals with the disposition of the home run wiring following termination of service.[184] They assert that this is important if the Commission is to be true to its assertion that the proposed rules are not intended to create or destroy any property rights.[185] Adelphia, et al., and TCI ask the Commission to make clear that the proposed rules do not give MDU owners a new right to terminate service outside the contract or state law.[186]

71. Several commenters also ask the Commission to state specifically that the procedures would not apply in any jurisdiction with a mandatory access law.[187] The cable commenters are troubled by the Commission's notation in footnote 100 of the *Inside Wiring Further Notice* that where a mandatory access statute is triggered by a tenant requesting service, the incumbent provider may not have the right to maintain its facilities on the premises if no tenant is currently requesting service.[188] The commenters contend that most mandatory access statutes do not hinge on a tenant's request for service, and that in those few that do, franchised cable operators have the right to maintain their cable wiring throughout the MDU indefinitely.[189]

72. Cable interests generally claim that the proposed procedures should not apply until the incumbent provider's rights are "fully exhausted."[190] NCTA suggests that, if the incumbent provider notifies the MDU owner of its intent to initiate a state court proceeding to enforce its rights within 30 days of the MDU owner's notice that it intends to use the Commission's procedures, the procedures should be stayed until the judicial proceeding is terminated.[191] Cable operators also state that the Commission must

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[184]Further Comments of Adelphia, et al., at 4-5, 8-10; Further Comments of Time Warner at 24-25.

[185]Further Comments of Adelphia, et al., at 8.

[186]Further Comments of Adelphia, et al., at 10; Further Comments of TCI at 11 (certain statements in the *Further Notice* could be interpreted as inconsistent with the principle of contract sanctity).

[187]Further Comments of Adelphia, et al., at 4-5, 10-14; Further Comments of TCI at 10-11; Further Comments of Time Warner at 28-33; *see also* Further Comments of New York DPS at 2-3 (scope and effect of state access statutes are matters for state regulators and state courts to resolve, and the Commission should not create any presumptions or mechanisms with respect to rights conferred under state statutes).

[188]Further Comments of Adelphia, et al., at 11-14; Further Comments of Time Warner at 28-33.

[189]Further Comments of Adelphia, et al., at 11-14; Further Comments of Time Warner at 28-33.

[190]Further Comments of Adelphia, et al., at 8, 16; Further Comments of Comcast, et al., at 12-13; Further Comments of Jones Intercable, et al., at 13, 15; Further Comments of Time Warner at 27-28; *see also* Further Comments of NCTA at 14-15. *But see* Further Comments of WCA at 8-11; Further Comments of Heartland Wireless at 5.

[191]Further Comments of NCTA at 20-21; *see also* Further Comments of Comcast, et al., at 11-12. *But see* Further Reply of Ameritech at 2-8 (alternative provider should have possession of inside wire during pendency of any state court proceedings); Further Reply of GTE at 9-10 (procedures should not be tolled during judicial proceedings to determine incumbent's rights).

determine how the incumbent's rights will be established.[192] Cable commenters believe, however, that the Commission should not establish any presumptions as to whether the incumbent has the right to remain on the premises.[193] For the most part, these parties contend that establishing any presumption in this area would be contrary to the Commission's decision not to create or destroy any property rights nor to preempt state law.[194] NCTA claims that the Commission would be "wholly outside its area of expertise" if it were to attempt to determine an appropriate presumption, which would have to be based on complex contractual, statutory and common law issues.[195] Cablevision Systems asserts that the benefits of its substantial investments in upgrading its network to offer new services will be denied subscribers if a presumption adopted by the Commission prevents Cablevision Systems from exercising its right to remain in an MDU under state law or contractual agreement.[196]

73. Ameritech objects to the Commission's proposal to exempt incumbents with a legally enforceable right to remain on the premises and argues that, at a minimum, such an exemption should not apply to future agreements.[197] Ameritech reasons that incumbents could otherwise easily evade the Commission's new rules by entering into long-term contracts.[198] DIRECTV argues that the Commission has the authority to provide that MDU owners may notify incumbent operators at any time that their exclusive use of the inside wiring will be terminated in 90 days in spite of the existence of contracts that may support such exclusive use.[199] Community Associations Institute urges the Commission to establish the presumption that the incumbent operator does not have the right to maintain wiring on the property without securing a ruling from a court of law; and argues that any action to establish such a right should not stay the proposed disposition procedures.[200] Similarly, Media Access/CFA argues that by refusing to preempt mandatory access statutes and contractual rights of access, the Commission would be creating an

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[192]Further Comments of Adelphia, et al., at 14-16; Further Comments of Comcast, el al., at 12; Further Comments of Jones Intercable, et al., at 12-15; Further Comments of NCTA at 4, 14-21.

[193]Further Comments of Adelphia, et al., at 16; Further Comments of Cablevision Systems at 4-8; Further Comments of Comcast, et al., at 11 (if incumbent has a contract that allegedly provides for continued access, there should be a presumption that the incumbent has a legally enforceable right); Further Comments of CATA at 9-11; Further Comments of Jones Intercable, et al., at iv, 12-15; Further Comments of NCTA at 4, 15-17, 21-22; Further Comments of TCI at 12-14; Further Comments of Time Warner at 25-28.

[194]*See, e.g.,* Further Comments of NCTA at 22.

[195]Further Comments of NCTA at 21; *see also* Further Comments of Jones Intercable, et al., at 14.

[196]Further Comments of Cablevision Systems at 10.

[197]Further Comments of Ameritech at 6-7; *see also* Further Reply of Ameritech at 8; Further Reply of Telebeam at 2-4.

[198]Further Comments of Ameritech at 7.

[199]Further Comments of DIRECTV at 5-7. *But see* Further Reply of TCI at 5 (arguing that DIRECTV's proposal should be rejected).

[200]Further Comments of Community Associations Institute at 9-10; Further Reply of Community Associations Institute at 7-8.

exception that would swallow the rule.[201] WCA contends that ultimately the Commission should preempt all state mandatory access statutes, but in the interim, it should clarify that, in the case of a dispute regarding the incumbent's right to remain on the premises, the disposition procedures will take effect until a court rules otherwise.[202] OpTel argues that incumbents should be required, when service termination is requested, to make "an affirmative good faith showing" of its legally enforceable right to remain on the property.[203] RCN argues that an incumbent claiming the legal right to control wiring, molding, or conduits or to exclude an alternative service provider should obtain a court order affirming its rights within 30 days of receiving notice from the MDU owner, and forfeitures should be imposed for non-compliance.[204] ICTA asks the Commission to create a presumption that the incumbent provider does not have a legally enforceable right to remain on the premises so that the Commission's rules would have full force and effect until the incumbent proved its claim through whatever judicial proceeding was appropriate.[205]

74. RCN and WCA also urge the Commission to make it clear that state mandatory access statutes do not authorize MVPDs to block moldings or conduits with unused wire.[206] They state that incumbents have no right to maintain unused home run wiring that is blocking competitive access merely because a state does not make mandatory access contingent upon a subscriber's request for service.[207]

75. Both CEMA and Philips, et al., note that the Commission's proposal will not apply in many situations because of state mandatory access statutes.[208] Building Owners, et al., believe that the proposed rules may serve to confuse matters by raising the issue of possible preemption of state law and contract rights.[209] CEMA suggests that the Commission preempt these statutes if it decides to adopt the

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[201]Further Comments of Media Access/CFA at 8; Further Reply of Media Access/CFA at 10-14; *see also* Further Reply of U.S. Wireless/Ohio Valley Wireless at 3-4.

[202]Further Comments of WCA at 8-10; Further Reply of WCA at 4-5, 7-11. *But see* Further Reply of Comcast, et al., at 9 (WCA proposal would greatly increase litigation as incumbents seek to preserve their legal rights).

[203]Further Comments of OpTel at 2; Further Reply of OpTel at 5-6.

[204]Further Comments of RCN at 12-13.

[205]Further Comments of ICTA at 2-3; Further Reply of ICTA at 2-3; *see also* Further Comments of Skyzone at 2.

[206]Further Comments of RCN at 9-12; Further Comments of WCA at 10-11; Further Reply of RCN at 8-10. *But see* Further Reply of Time Warner at 9-12 ("blocked conduit" argument is contrary to Commission intent that procedures will not apply where incumbent still has existing rights to wiring under state law).

[207]Further Comments of RCN at 9-12; Further Comments of WCA at 10-11; *see also* Further Reply of OpTel at 6-7.

[208]Further Comments of CEMA at iii, 6-7; Further Comments of Philips, et al., at 3-4, 7.

[209]Further Comments of Building Owners, et al., at 6-7; *see also* Further Comments of Nat'l Assn. of Realtors at 2 (opposing the rules to the extent that they alter such rights).

proposal because Sections 1 and 601 of the Communications Act should take precedence over state law.[210] Philips, et al., also argue that exclusive contracts will limit the usefulness of the proposed rules.[211]

76. In reply comments, cable operators object to RCN's proposal that the incumbent obtain a final court ruling or an injunction within 30 days in order to toll the wiring disposition procedures.[212] First, absent a statutory right, they argue that a cable operator cannot force a court to issue a final ruling within 30 days.[213] Second, they argue that the failure to obtain a temporary restraining order or an injunction is no basis on which to conclude that the incumbent will not ultimately prevail on the merits.[214] Third, they argue that if the proposed procedures proceed before it is clear that the incumbent does not have a right to maintain its wires on the premises, the Commission's intent to provide "order and certainty" and not to disturb existing property rights would be undermined.[215] Fourth, they argue that an incumbent's damages for being wrongly forced to remove or abandon its wiring will be virtually impossible to calculate and difficult to prove.[216]

77. After consideration of the comments, we adopt a presumption that the building-by-building and unit-by-unit procedural mechanisms will apply unless and until the incumbent obtains a court ruling or an injunction enjoining its displacement during the 45-day period following the initial notice. The incumbent will still be required to make its election to sell, remove or abandon the wiring by the end of the initial 30-day period in the absence of such a ruling or injunction. In light of this rule, we decline to adopt the suggestions of various commenters that we shorten the initial election period.[217] We also

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[210]Further Comments of CEMA at iii, 8-13.

[211]Further Comments of Philips, et al., at 7-8.

[212]*See* Further Reply of NCTA at 6-7; Further Reply of Time Warner at 7-8 (proposing alternative approach whereby parties would be permitted to negotiate; if the MDU owner believed the incumbent's claims were frivolous, the incumbent would be required to file a lawsuit within 30 days and, if the incumbent won, the MDU owner would be required to pay damages and court costs); Further Reply of Jones Intercable, et al., at 1-3.

[213]*See* Further Reply of NCTA at 6-7; *see also* Further Reply of Time Warner at 7-8 (Commission cannot tell state or federal court when it must issue ruling or force incumbents to commence litigation on an expedited time schedule).

[214]*See* Further Reply of NCTA at 6-7; Further Reply of Jones Intercable, et al., at 1-2 (temporary restraining order requirement would amount to a nationwide mandatory injunction that would automatically evict an incumbent when its rights are in doubt and either a temporary restraining order is unavailable or the local court puts the matter over to a preliminary injunction hearing).

[215]*See* Further Reply of NCTA at 8-9; Further Reply of TCI at 7 n.17 (Commission's takings analysis predicated on assumption that incumbent has no legally enforceable right to remain on the premises); Further Reply of Time Warner at 7-8.

[216]Further Reply of NCTA at 8-9; Further Reply of Cox at 7 (no way to make the operator whole if forced to elect to sell, remove or abandon wiring when not required to do so under state law).

[217]We also decline to adopt Community Associations Institute's request that the time periods be lengthened for association boards. *See* Further Comments of Community Associations Institute at 13. We believe that changing video service providers is not a commonplace event and that association boards will be able to make allowances to

decline to adopt the cable operators' proposal to stay our procedures until all judicial procedures are terminated, including all appeals. We have not received evidence sufficient to persuade us that state courts will not respond expeditiously. Significantly, the record indicates state courts' ability to protect incumbents' rights.[218] The record continues to support our judgment that an incumbent's failure to obtain a state court injunction justifies a presumption that the incumbent no longer has an enforceable legal right to remain on the premises. Contrary to some commenters' assertions, we do not believe that this presumption interferes with the incumbent's state law rights. A court applying state law will continue to be the ultimate arbiter of whether the incumbent has a legally enforceable right to remain on the premises, and possesses the ability to take any necessary and appropriate steps to make the parties whole under state law. Our presumption simply means that if the incumbent cannot obtain an injunction to maintain its home run wiring on the premises, it is appropriate to permit the MDU owner to invoke our procedures pending any further litigation.

78. We will adopt one exception to our presumption that our procedures will apply in the absence of a state court ruling or injunction obtained within 45 days of the initial notice. We will not require an incumbent provider to obtain such a ruling or injunction where a state's highest court has found that, under its state mandatory access statute, the incumbent always has an enforceable right to maintain its home run wiring on the premises. We believe that to require the incumbent to initiate court proceedings in this situation is wasteful and unnecessary. In such cases, we believe that the burden should shift to the new provider to obtain a judicial determination to the contrary.

79. We decline, however, to adopt some commenters' request that we provide that our procedures do not apply in states that have enacted mandatory access statutes. Several commenters take issue with our statement that where the incumbent provider's mandatory right of access is dependent upon a subscriber's request for service, the provider may no longer have a legally enforceable right to maintain that subscriber's home run wiring on the premises against the MDU owner's wishes once the subscriber no longer requests service.[219] We clarify that we did not intend to and do not now express any opinion on the merits of this issue.[220] The enforceability of a state mandatory access statute is an issue for the state courts to decide under their particular statutes.[221] We are unwilling to conclude that state mandatory access statutes always grant incumbents the right to maintain their home run wiring in an MDU over the MDU owner's objection. Contrary to the arguments of some cable operators, this is not an issue of the right to install wiring. Rather, the issue is whether the incumbent has a legally enforceable right to

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comply with our procedures.

[218]*See, e.g.,* Further Comments of NCTA at 16-18 (discussing several state and federal court cases in which incumbents sought injunctive relief against MDU owners attempting to evict them); Further Reply of Telebeam at 4 n.6 (stating that in pending litigation between TCI of Pennsylvania and an MDU owner, TCI has been successful in obtaining court hearings within days of submitting requests for temporary injunctions).

[219]*See Inside Wiring Further Notice* at n.100.

[220]Similarly, we express no opinion on whether state mandatory access statutes permit an incumbent MVPD to block moldings or conduits with unused wiring.

[221]*But see* Further Reply of ICTA at 4 (the Commission should state that its proposed unit-by-unit rules will apply, even in mandatory access states, unless the owner, by contract, explicitly gives the incumbent the right to maintain home run wiring when it is not being used by the incumbent to serve tenants).

maintain its home run wiring on the premises over the objection of the MDU owner. Accordingly, our procedures will apply in mandatory access states to the extent state law does not permit the incumbent to maintain its home run wiring (in the case of a building-by-building disposition) or a particular home run wire to a particular subscriber (in the case of a unit-by-unit disposition) against the will of the MDU owner.

80. The above procedural mechanisms will apply regardless of the identity of the incumbent video service provider involved.[222] While initially this incumbent would commonly be a cable operator, it could also be a SMATV provider, an MMDS provider, a DBS provider or others. We believe that this will ensure competitive parity among MVPDs and ensure that MDU owners are able to benefit from these procedures regardless of the MVPD that initially wired their buildings.

c. Statutory Authority

(1) *Background*

81. Several commenters agree with the Commission's position that it has statutory authority under Section 623 to adopt its proposed framework.[223] GTE reasons that the proposed disposition procedures fall within the Commission's obligation under Section 623 to ensure reasonable rates for programming, installation, and equipment, which the Commission has defined to include inside wiring.[224]

82. Building Owners, et al., argue that while Section 623(b) might grant the Commission authority to regulate the rates at which operators may sell cable home wiring, it does not authorize the Commission to give building owners the right to acquire wiring or to require cable operators to sell it.[225] Cable interests generally contend that the Commission does not have the statutory authority to adopt the proposed procedures because the procedures: (1) are inconsistent with Section 624(i) and its legislative history which clearly state that the statute only applies to wiring within the unit; (2) are not necessary to the Commission's functions under Sections 624(i), 623 or 601; and (3) would not serve the stated purposes

[222]*See, e.g.,* Further Comments of NCTA at n.17; Further Comments of RCN at 15; Further Comments of Time Warner at n.33 (apply to all MVPDs except open video system operators that are required to construct end-to-end overbuilds).

[223]*See* Further Comments of GTE at 13-14; Further Reply of GTE at 15; Further Reply of Ameritech at 1-2 (concurring with GTE's further comments); Further Reply of ICTA at 6 (proposed procedures are within the Commission's authority because they merely establish a set of timetables and do not affect substantive rights); Further Reply of RCN at 4-5 (Section 628(b) prohibiting unfair methods of competition provides the necessary statutory authority). *But see* Further Reply of TCI at 2-3 (GTE reliance on Section 623 does not pass "straight face" test).

[224]Further Comments of GTE at 13-14.

[225]Further Comments of Building Owners, et al., at 10. Building Owners, et al., also argue that the Commission would be in error to the extent it attempted to assert jurisdiction over building owners pursuant to Section 624(i) by claiming that they are subscribers. Further Comments of Building Owners, et al., at 9-10; *see also* Further Comments of Nat'l Assn. of Realtors at 2 (questioning the Commission's authority to adopt rules that appear to assert authority over building owners and managers).

of promoting consumer choice and competition.[226] NCTA asserts that Section 4(i) does not provide the Commission with any independent authority, and the Commission cannot do whatever it wants to promote competition in the video service marketplace.[227]

(2) *Discussion*

83. We conclude that the Commission has authority under Sections 4(i) and 303(r) of the Communications Act, in conjunction with the pervasive regulatory authority committed to the Commission under Title VI, and particularly Section 623, to establish procedures for the disposition of MDU home run wiring upon termination of service. 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."[228] The Commission may properly take action under Section 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission's functions.[229] We invoke Section 4(i)[230] here because, contrary to the arguments posed by some commenters, the Communications Act does not prohibit the Commission from adopting procedures regarding the disposition of home run wiring and because adopting such procedures is necessary to implement several provisions of the Communications Act by effectuating and broadening the range of competitive opportunities in the multichannel video distribution marketplace.

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[226]Further Comments of NCTA at 2, 3, 6-13; Further Comments of Adelphia, et al., at 2; Further Comments of CATA at 2, 3-8; Further Comments of Comcast, et al., at 14; Further Comments of Jones Intercable, et al., at 2-7; Further Comments of TCI at 2, 4-8; Further Comments of Time Warner at 5, 49-54, 55-62; Further Reply of Cox at 2; Further Reply of NCTA at 6-7. *But see* Further Reply of Media Access/CFA at 3-9 (proposed rules are necessary to effectuate Commission's obligations under Section 624(i) and Section 207).

[227]Further Comments of NCTA at 7-13; *see also* Further Comments of Building Owners, et al., at 10 (the Commission overstates its authority under Section 4(i)). *But see also* Further Reply of Philips, et al., at 5-7; Further Reply of DIRECTV at 2-4.

[228]Communications Act, § 4(i), 47 U.S.C. § 154(i).

[229]NCTA argues that the cases cited by the Commission in the *Inside Wiring Further Notice* "provide no support for the dubious proposition that a regulation is 'not inconsistent' with the Communications Act, for purposes of Section 4(i), so long as it is not expressly prohibited by the Act." Further Comments of NCTA at 8. To the contrary, in *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975), the court held that, even though the Act makes no mention of any authority to prescribe a rate of return, a Commission order prescribing a rate of return for AT&T allowed the public to receive the benefit of the protection inherent in the Commission's authorization to prescribe just and reasonable charges, and therefore "was in the public interest, necessary for the Commission to carry out its functions in an expeditious manner, and within its section 4(i) authority." *Id.* at 204. In concluding that this result is not inconsistent with Section 205 or any other provision of the Act, the court reasoned that "there is no explicit statutory prohibition against prescribing a rate of return. Additionally, since the rate of return is one component of a charge, and the charges prescribed must properly reflect the allowable rate of return, the prescription of a rate of return is fully consistent with the prescription of charges." *Id.*

[230]*See also* Communications Act, § 303(r), 47 U.S.C. § 303(r) (Commission has authority 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 . . . .").

84. Courts have upheld various Commission regulations that were not within explicit grants of authority under the "wide-ranging source of authority"[231] of Section 4(i). In these cases, the courts found that the Commission's regulations were not inconsistent with the Communications Act because they did not contravene any provision of the Act[232] and were "appropriate and reasonable"[233] exercises of authority.[234]

85. Recently, in *Mobile Communications Corp. v. FCC* ("*Mtel*"),[235] the United States Court of Appeals for the District of Columbia Circuit acknowledged the Commission's authority under Section 4(i) to regulate even where the Communications Act does not explicitly authorize such action. In that case, the D.C. Circuit held that the Commission had authority under Section 4(i) to require Mtel, which held a pioneer's preference, to pay for a narrowband personal communications service ("PCS") license, despite the fact that the Communications Act did not specifically authorize the Commission to charge a price for a license granted to a pioneer's preference holder.[236] The court denied Mtel's argument that the Commission's action was inconsistent with the Communications Act and therefore not within the Commission's Section 4(i) power. Mtel argued that Congress' explicit grant of authority to the Commission to collect certain fees and to conduct auctions for specified types of licenses denied the Commission authority to impose other fees.[237] The court found Mtel's reliance on the *expressio unius maxim* -- that the expression of one is the exclusion of other -- misplaced. According to the court, "[t]he maxim 'has little force in the administrative setting,' where we defer to an agency's interpretation of a

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[231]*New England Tel. & Tel. Co. v. FCC,* 826 F.2d 1101, 1107 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989); *see North American Tel. Ass'n v. FCC*, 772 F.2d 1282, 1293 (7th Cir. 1985) (reference to Commission's "broad powers under section 4(i)").

[232]*North American Tel. Ass'n*, 772 F.2d at 1292 (Section 4(i) "could not properly be used . . . to contravene another provision of the Act.").

[233]*Id.* at 1108.

[234]Contrary to the suggestion by some commenters, *see* Further Comments of Time Warner at 57; Further Comments of TCI at 7, the recent *Iowa Utilities Board* case does not offer a more limited view of our authority under Section 4(i). *See Iowa Utilities Board v. FCC*, No. 96-3321, 1997 WL 403401 at * 4 (8th Cir. July 18, 1997) ("Both of these subsections [Sections 4(i) and 303(r)] merely supply the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute. Neither subsection confers additional substantive authority on the FCC.").

[235]77 F.3d 1399 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 81 (1996).

[236]The Commission granted Mtel a pioneer's preference in 1993. Later that year Congress amended the Communications Act to allow the Commission to use auctions for allocation of some kinds of licenses (including PCS licenses) when "mutually exclusive applications are accepted for filing." *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Section 6002 (codified at 47 U.S.C. § 309(j)). The Commission subsequently reversed its decision that Mtel would not have to pay for its license, in part, because of the Commission's "clearer understanding of the interdependence of the nationwide narrowband PCS licenses and the potential anticompetitive effects that the free award of one of these licenses may have on the PCS market as well as the auction process." *In Re Application of Nationwide Wireless Network Corp.*, 9 FCC Rcd 3635, 3640 (1994).

[237]*Mtel*, 77 F.3d at 1404.

statute unless Congress has "'directly spoken to the precise question at issue.'"[238] The court also denied Mtel's argument that, in the absence of an affirmative statutory mandate to support the payment requirement, the Commission's action was not "necessary in the execution of [the Commission's] functions," as required by Section 4(i).[239]

86. Similarly, in *New England Telephone & Telegraph Co. v. FCC*,[240] the court affirmed a Commission order requiring telephone companies to refund charges they had collected in excess of the authorized rate of return, even though the Communications Act's only provision explicitly mentioning refunds "does not apply to the circumstances of this case," because refunds were necessary to remedy the violation of the Commission's rate of return order.[241] In *North American Telecommunications Association v. FCC*,[242] the court affirmed a Commission order pursuant to Section 4(i) requiring the Bell holding companies to file capitalization plans for subsidiary companies organized to sell telephone equipment, even though the Communications Act conferred no authority on the Commission over holding companies and the legislative history of the Communications Act suggested that Congress had considered granting such authority but ultimately denied it, because such a requirement "was necessary and proper to the effectuation of" the Commission's functions.[243] The court stated that "Section 4(i) empowers the Commission to deal with the unforeseen -- even if that means straying a little way beyond the apparent boundaries of the Act -- to the extent necessary to regulate effectively those matters already within the boundaries."[244]

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[238]*Mtel*, 77 F.3d at 1404-05 (citing *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (quoting *Chevron v. NRDC*, 467 U.S. 837 (1984))).

[239]The Commission had argued that in imposing the payment requirement it relied on its duty to determine "whether the public interest, convenience, and necessity will be served" by the granting of a license application as required by Section 309(a). The court found that "in light of that requirement, the payment condition would be 'necessary in the execution of [the Commission's] functions' under Section 4(i) so long as the Commission properly found it necessary to 'ensure the achievement of the Commission's statutory responsibility' to grant a license only where the grant would serve the public interest, convenience, and necessity." *Mtel*, 77 F.3d at 1406 (citations omitted). The court found that the concerns alluded to by the Commission in its Licensing Decision, specifically "the unjust enrichment of Mtel from a free license while, under the new auction regime, others would be required to pay," or "the prospect of predation by Mtel," "would support a finding that the payment requirement is 'necessary in the execution of [the Commission's] functions.'" *Id.*

[240]826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989).

[241]826 F.2d at 1107-09.

[242]772 F.2d 1282, 1292-93 (7th Cir. 1985).

[243]*Id.* at 1293.

[244]*Id.* at 1292. NCTA argues that in this case, in contrast, the Commission's proposal does not deal with the "unforeseen," because the "Act's legislative history foresaw the issue of the regulation of MDU wiring outside subscriber premises, and it said, 'Do not go there.'" Further Comments of NCTA at 10. As discussed below, however, Congress did not indicate in Section 624(i) that the Commission is powerless to adopt procedures governing disposition of home run wiring. Moreover, it arguably was "unforeseen" at the time that Congress adopted Section 624(i) that adopting rules relating only to disposition of wiring within subscribers' premises would be insufficient to foster competition in delivery of video programming services, which Section 624(i) was intended to do.

87. Applying these principles here, we conclude that the Commission is authorized under Section 4(i) and 303(r), in conjunction with Section 623, to establish procedures regarding the disposition of MDU home run wiring upon termination of service. Establishing rules regarding the disposition of the home run wiring upon termination is "necessary" to the execution of the Commission's functions. Courts have made clear that they will defer to the Commission's judgment as to what actions are "necessary in the execution of its functions" under Section 4(i). In *New England Telephone & Telegraph Company*, the court emphasized that "the Commission enjoys significant discretion to choose among a range of reasonable remedies . . . ."[245] Furthermore, the Commission "does not have to show that it selected the only conceivably appropriate remedy in order to invoke its 4(i) powers."[246] Rather, "'[t]he question eventually reduces to one of judgment, informed by the policy of the statute that Congress has seen fit to enact.'"[247] The court held that although the Commission might have adopted other corrective measures, "the measure it adopted in this case was *appropriate and reasonable*," and therefore authorized by Section 4(i).[248]

88. We believe that establishing procedures regarding the disposition of MDU home run wiring will assist the Commission in discharging its statutory obligations under Section 623 and its overall responsibility to pursue Congress' preference for competition stated in the 1992 Cable Act.[249] Section 623(b) of the Communications Act requires the Commission to prescribe rules to ensure that rates for basic cable service are "reasonable"[250] and provides that such regulations "shall include standards to establish, on the basis of actual cost, the price or rate for . . . installation and lease of equipment used by subscribers . . . ."[251] Some commenters point out, concerning equipment, that Section 623(b) deals with rates for the "installation and lease" of equipment and argue that our authority under Section 623 to regulate equipment rates does not relate to the disposition of wiring upon termination of service.[252] We agree that our authority more properly rests on the requirement in Section 623(b)(1) that the Commission ensure, by regulation, that the rates for the basic service tier are reasonable. Section 623 seeks to foster services to the subscriber at reasonable prices. We believe that establishing the above procedures regarding the disposition of MDU home run wiring is a necessary, "appropriate and reasonable" method to fulfill Section 623's mandate of reasonable cable rates. We believe that these procedures will provide certainty for property owners, alternative video service providers and subscribers regarding the disposition

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[245]826 F.2d at 1108.

[246]*Id.* Thus, NCTA's suggestion that this action is beyond the Commission's Section 4(i) authority, because "there is not a hint in [Section 623] that Congress meant Section 623 to authorize, *much less require*, the Commission to take on the responsibility of reducing rates by promoting competition," takes an overly literal reading of the word "necessary" that is inconsistent with the Section 4(i) case law. Further Comments of NCTA at 13 (emphasis added).

[247]*New England Tel. & Tel. Co. v. FCC,* 826 F.2d at 1108 (citation omitted).

[248]*Id.* (emphasis added).

[249]Communications Act, § 623(a), 47 U.S.C. § 543(a).

[250]Communications Act, § 623(b), 47 U.S.C. § 543(b).

[251]Communications Act, § 623(b)(3), 47 U.S.C. § 543(b)(3).

[252]*See, e.g.,* Further Comments of NCTA at 12; Further Comments of CATA at 7.

of the home run wiring when the existing service is terminated, thereby alleviating current circumstances that deter the property owner from considering alternative service providers and fostering competition among service providers. We believe that such competitive choice will exert a restraining influence on rates as service providers compete for the opportunity to serve the entire building or individual subscribers.

89. In the 1992 Cable Act, Congress specifically embraced a "[p]reference for competition" over regulation in setting rates for cable services.[253] Fostering competition among service providers through the adoption of rules regarding the disposition of MDU home run wiring is a fundamental means to ensure that cable service rates remain "reasonable." The legislative history of Section 623(b) states that Congress agreed that "[r]ather than requiring the Commission to adopt a formula to set a maximum rate for basic cable service, the conferees agree to allow the Commission to adopt formulas *or other mechanisms and procedures* to carry out this purpose. The purpose of these changes [in the legislation] is to give the Commission the authority to choose the best method of ensuring reasonable rates for the basic service tier and to encourage the Commission to simplify the regulatory process."[254] We therefore find that it is within our scope of authority under the 1992 Cable Act and Section 4(i) to establish procedural mechanisms that encourage reasonable rates through a competitive environment rather than a regulatory one.

90. Further, our decision to establish procedures regarding the disposition of home run wiring in MDUs is consistent with the Communications Act's fundamental purpose of "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communications service . . . ."[255] Similarly, Section 601 of the Communications Act states that one of the purposes of Title VI of the Act -- relating to cable communications -- is to promote competition in cable communications.[256] Due to the lack of competitive alternatives in multichannel video programming services,[257] Congress has authorized the Commission to ensure that basic cable services are available at reasonable rates,[258] to ensure that cable programming service rates are not unreasonable,[259] and to establish standards whereby cable operators fulfill customer service requirements.[260] That is what we do here.

91. We also believe that our rules will help fulfill Congress' mandate in the 1996 Act to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to

[253]Communications Act, § 623(a), 47 U.S.C. § 543(a).

[254]H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. 62 (1992) (emphasis added).

[255]Communications Act, § 1, 47 U.S.C. § 151.

[256]Communications Act, § 601(6), 47 U.S.C. § 521(6).

[257]*See, e.g.*, S.12, 102d Cong., 2d Sess. at 8-20 (1992).

[258]Communications Act, § 623(b), 47 U.S.C. § 543(b).

[259]Communications Act, § 623(c), 47 U.S.C. § 543(c).

[260]Communications Act, § 632(b), 47 U.S.C. § 552(b).

all Americans."[261] We believe that our procedural mechanisms will enhance competition, fostering the deployment of innovative technologies and expanded services.[262] Based on the record before us,[263] we find that failing to establish such procedures would continue existing barriers to competitive choice for individuals residing in MDUs. Individuals residing in MDUs often are currently limited to receiving service from only one provider. Although we recognize that subscriber choice would be enhanced by the use of multiple wires, we do not believe that requiring MDU owners to permit multiple wires is a viable option at this point in time. We believe that the inability of the MDU owner to use the existing home run wiring deters consideration of alternative providers, and that providing certainty with regard to the disposition of the MDU home run wiring provides a reasonable means of increasing choice and promoting competition. In sum, we believe that adoption of the above procedures for disposition of home run wiring is necessary to the effectuation of the Commission's obligations under Section 623(b).

92. Turning to the other component of Section 4(i), we also conclude that the procedural mechanisms we are adopting are "not inconsistent" with any provision of the Communications Act. The crux of the commenters' argument that adoption of these procedures is beyond the Commission's authority is that they conflict with Section 624(i) of the Act.[264] To the contrary, Section 624(i) does not prohibit the Commission from adopting rules concerning wiring outside the subscriber's premises.[265] By its plain language, Section 624(i) *mandates* that the Commission take certain action, but does not preclude any other exercise of our authority. It states: "Within 120 days after the date of enactment of this subsection, 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."[266] This provision only mandates that the Commission adopt rules regarding the disposition of wiring installed within subscribers' premises, it does not limit the Commission's existing authority with respect to wiring outside those premises.[267] Indeed, in *Mtel*, the court rejected the argument that Congress's specific grant

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[261] 1996 Conference Report at 1.

[262] *See, e.g.*, Ameritech Reply Comments at 6.

[263] *See* Section III.A.2.a. above.

[264] *See, e.g.,* Further Comments of NCTA at 7-10 (e.g., arguing that *Mtel* is distinguishable from this case because "it is one thing for Congress to authorize certain actions and remain silent as to others, and quite another for Congress to authorize certain actions and specifically indicate that other actions are not intended."); Further Comments of Adelphia, et al., at 2-3 n.3; Further Comments of CATA at 5-6; Further Comments of Jones Intercable, et al., at 2-4; Further Comments of TCI at 5-6; Further Comments of Time Warner at 50-54.

[265] This approach is consistent with assertions by certain parties that Section 624(i) should be read as the minimum, not maximum, level of authority the Commission may exercise over cable inside wiring. Media Access/CFA Comments at 12; Bartholdi Reply Comments at 4-5; ICTA Reply Comments at 8.

[266] Communications Act, § 624(i), 47 U.S.C. § 544(i) (emphasis added).

[267] The same is true of the legislative history language NCTA cites: "[Section 624(i)] deals with internal wiring within a subscriber's home or individual dwelling unit. In the case of 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." 1992 House Report, *cited in* Further Comments of NCTA at 7. That is, the *mandate* of Section 624(i) that the Commission adopt rules relates only to the wiring within the individual subscribers' dwelling units.

of *authority* to charge for certain licenses suggested that without that explicit grant of authority the Commission did not otherwise have the authority.[268] Even more so here, given that Section 624(i) *requires* the Commission to adopt rules in certain circumstances rather than *authorizes* it to do so, it cannot be read as a limit on the Commission's authority found elsewhere in the Communications Act. Furthermore, as the *Mtel* court found, the *expressio unius maxim* -- that the expression of one is the exclusion of other -- "'has little force in the administrative setting,' where [a court] defer[s] to an agency's interpretation of a statute unless Congress has "'directly spoken to the precise question at issue.'"[269] Indeed, the *Mtel* court stated: "[W]e think the nature of Congress's auction authorization more supports than undermines the Commission's decision here."[270]

93. Thus, this is not a circumstance where the general canon of statutory construction, the "specific governs the general,"[271] applies. The courts have found this canon applicable only where there "is an 'inescapable conflict' between the specific provision and the general provision."[272] Section 624(i) does not prohibit the Commission from adopting rules affecting home run wiring. We conclude that there is no "inescapable conflict" between Section 624(i) and the procedures discussed above.[273]

94. To the contrary, we believe that the rules we are adopting will further promote Section 624(i)'s underlying purpose of promoting consumer choice and competition by permitting subscribers to use their existing home wiring to receive an alternative video programming service.[274] Section 624(i) directs the Commission to prescribe rules regarding the disposition of wiring within a subscriber's premises in order to promote consumer choice and competition by permitting subscribers to avoid the disruption of having their home wiring removed upon voluntary termination and subsequently to utilize that wiring for an alternative service. We believe that, under our current rules, we cannot fully meet those objectives in the MDU context because, as described above, MDU owners often will not permit multiple

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[268]77 F.3d at 1406.

[269]*Mtel*, 77 F.3d at 1404-05 (citing *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (quoting *Chevron v. NRDC*, 467 U.S. 837 (1984))).

[270]*Mtel*, 77 F.3d at 1405 (quoting *Texas Rural Legal Aid*, 940 F.2d at 694 ("[A] congressional prohibition of particular conduct may actually *support* the view that the administrative entity can exercise its authority to eliminate a similar danger.")) (emphasis in original).

[271]*See, e.g., Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992).

[272]*Aeron Marine Shipping Co. v. United States*, 695 F.2d 567, 576 (D.C. Cir. 1982).

[273]*See, e.g., New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101, 1107 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989) (the "wide-ranging source of authority" found in Section 4(i) adequately supports the Commission's orders requiring refunds as a result of rate reductions, despite the fact that the only provision of the Act that mentions refunds does not apply to the circumstance of the case); *Lincoln Telephone Co. v. FCC*, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981) (Section 4(i) granted the Commission the authority to require a tariff filing by a telephone company that arguably qualified as a "connecting carrier," where the only provision in the Act expressly requiring carriers to file tariffs specifically exempted connecting carriers).

[274]In *Mtel*, the court noted that requiring Mtel to pay for its license fit within the situation "where the principles supporting an auction are powerful." 77 F.3d at 1405.

home run wires to be installed in their buildings. In order to promote consumer choice and competition, therefore, we are prescribing additional rules regarding the disposition of the existing home run wiring upon termination of service.

95. Furthermore, the statement in the legislative history regarding limiting the "right to acquire home wiring to the cable installed within the interior premises of a subscriber's dwelling unit," which some parties read out of context to suggest a limitation on our authority,[275] was made in conjunction with Congress' expression of concern about the potential for theft of service[276] and signal leakage.[277] The procedures we are adopting, however, do not grant alternative providers, subscribers, or MDU owners access to the incumbent provider's riser cable or lockbox and therefore do not pose the safety concerns about which Congress was concerned. We do not believe that the procedural mechanisms we are adopting will increase the frequency of service theft; a provider's control over its network security is unaffected by our rules. In addition, our rules do not affect the service provider's signal leakage responsibilities. It will remain the duty of the provider to protect against signal leakage while it is providing service, regardless of who owns the home run wiring in the building.[278]

96. In addition, cable operator reliance on the "Joint Use" provision of the 1996 Act (codified at Section 652(d)(2) of the Communications Act) as evidence of Congress' intent that cable operators retain ownership and control of the home run wiring is misplaced.[279] Section 652(d)(2) provides generally that a local exchange carrier ("LEC") may obtain permission from the cable operator to use that part of the transmission facilities extending from the last multi-user terminal to the premises of the end user, and that such use must be reasonably limited in scope and duration.[280] Cable operators assert that this provision invests them with ownership and control of all cable wiring outside the subscriber demarcation point, including the home run wiring, even after a subscriber terminates service, as Congress otherwise would not have established rules allowing cable operators to set the terms and conditions for a LEC's use of the facilities.[281]

97. We disagree. Notably, Section 652(d)(2) is entitled "Joint Use," indicating Congress' intent for the provision to govern only the joint use of the facilities by a cable operator and a LEC. It is an exception to the general prohibition in Section 652(c) on joint ventures or partnerships between cable operators and LECs that serve the same market area. We believe that Section 652(d)(2) does not constrain our authority to establish procedures governing the disposition of the home run wiring because the

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[275] *See, e.g.*, Further Comments of CATA at 6.

[276] The 1992 House Report states: "The Committee is concerned about the potential for theft of service within apartment buildings. Therefore, this section limits the right to acquire home wiring to the cable installed within the interior premises of a subscriber's dwelling unit." 1992 House Report at 118.

[277] *Id.*

[278] 47 C.F.R. § 76.601, *et seq.*

[279] *See* Further Comments of Time Warner at 16-17.

[280] 47 U.S.C. § 572(d)(2).

[281] *See, e.g.*, NCTA Comments at 10-11; Time Warner Comments at 16; CATA Comments at 4.

provision only addresses use of the wiring while the cable operator continues to own or use the facilities. Here, the procedural mechanisms would not apply until the cable operator has no legally enforceable right to remain on the premises and the MDU owner and/or subscriber terminates the operator's service.

98. Additionally, we believe that had Congress intended the "Joint Use" provision to govern cable wiring, it would have placed the provision in Section 624, which sets forth the existing wiring provisions, rather than in Section 652, which concerns telephone company-cable television cross-ownership restrictions. We also agree with alternative video service providers that Congress would have enumerated additional types of potential users of cable operators' wiring, other than telephone companies, if it had intended this provision to cover uses of the wiring other than the limited situation of wiring being shared between a LEC and a cable operator.[282]

99. In sum, we conclude that the procedures we are adopting are "not inconsistent" with the Act. As the court found in *Mtel*, "we see no conflict between the language and structure of the Communications Act" and our adoption of procedural rules regarding disposition of home run wiring.[283]

100. In addition, we believe that we have authority under Sections 4(i) and 303(r) to apply our cable inside wiring rules to all MVPDs, and not just to cable operators. Section 303(r) of the Communications Act authorizes the Commission, as required by public convenience, interest, or necessity, to promulgate rules and restrictions, not inconsistent with law, as may be necessary to carry out the provisions of the Act.[284] We believe that applying these rules to all Commission licensees that are MVPDs would be in the public interest. The same competitive concerns described above exist regardless of whether a cable operator or some other video service provider initially installed a subscriber's or an MDU's inside wiring. In addition, we believe that applying our cable home wiring rules to MVPDs that are Commission licensees would not be inconsistent with Section 624(i) and would further its purposes, since subscribers could use their existing inside wiring to receive an alternative service. Further, for similar reasons to those discussed above in adopting procedures for disposition of the home run wiring in MDUs for cable operators, such procedures are not inconsistent with Section 624(i) if applied to MVPDs that are radio licensees.

101. In addition, we conclude that we have the authority under Sections 4(i), 201 to 205, and 303(r) to extend our cable inside wiring rules to common carriers engaged in the transmission of video programming.[285] Section 201(b) in particular requires that "practices . . . for and in connection with [common carrier services] be reasonable."[286] For the same reasons that we are applying these rules to cable operators, we believe they are appropriately applied to common carrier practices consistent with Section 201(b). We conclude that Section 4(i) also invests the Commission with authority to expand our rules in this manner with regard to MVPDs that are neither radio licensees nor common carriers. Again,

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[282] *See, e.g.*, Bartholdi Reply Comments at 10-11.

[283] *Mtel*, 77 F.3d at 1406.

[284] *See* Communications Act, § 303(r), 47 U.S.C. § 303(r).

[285] *See* 47 U.S.C. §§ 201-205.

[286] 47 U.S.C. § 201(b).