we conclude that the same competitive concerns are present regardless of the type of service provider that initially installs the broadband inside wiring. In addition, we conclude that such an extension of our rules is necessary in the execution of our functions and is not inconsistent with the Communications Act, as described above. To promote parity among broadband competitors and to fulfill the directives of the 1992 Cable Act and the 1996 Act, we will apply our cable inside wiring rules to all MVPDs.[287]

d. Constitutional Arguments

(1) *Background*

102. Time Warner argues that the proposed procedures constitute an impermissible taking under the Fifth Amendment.[288] Comcast, et al., believe that takings concerns would be alleviated if a just compensation formula is implemented.[289] However, Building Owners, et al., argue that the Commission should allow the price for wiring to be set by the marketplace because the Commission might infringe on Fifth Amendment property rights if it sets a price that presents the parties with an unrealistic choice of how to deal with the property.[290] GTE asserts that the proposed disposition procedures would not amount to an unconstitutional taking because property will not be deemed abandoned unless the incumbent fails to act and because this proceeding has afforded incumbents adequate process.[291]

(2) *Discussion*

103. We conclude that the procedural mechanisms we have adopted do not constitute an impermissible "taking" under the Fifth Amendment.[292] First, there is no forced taking of the incumbent's physical property, since the incumbent has a reasonable opportunity to remove, abandon, or sell the wiring. The Fifth Amendment cannot be construed to allow a service provider with no contractual or other legal right to remain on a person's property to leave its wiring on the property indefinitely and prohibit the property owner from using it. There can be no taking of the incumbent's access rights because the procedures expressly apply only where the incumbent does not have a contractual, statutory or other legal right to maintain its wiring on the premises. If the incumbent fails to act within the

[287]In *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), the Supreme Court held that prior to passage of the 1984 and 1992 Cable Acts, the Commission had ancillary jurisdiction over cable in order to carry out its responsibility for regulating television broadcasting. Similarly, applying our rules to all entities engaged in the transmission of video programming is necessary to carry out our responsibilility for regulating cable under Title VI.

[288]Further Comments of Time Warner at 54-55, 62-67.

[289]Further Comments of Comcast, et al., at 15.

[290]Further Comments of Building Owners, et al., at 8-9.

[291]Further Comments of GTE at 14-15; Further Reply of GTE at 15-17; *see also* Further Reply of OpTel at 2.

[292]The Fifth Amendment provides that private property shall not be "taken for public use, without just compensation." U.S. Const. amend. V.

reasonable periods set forth and its wiring is deemed abandoned, it is the operator's failure to act, not the Commission's rule, that would extinguish the cable operator's rights.[293]

B. Sharing of Molding

104. In the *Inside Wiring Further Notice*, we noted that RCN argued that some MDU owners do not object to a second set of home run wires but to the installation of a second set of hallway molding or conduits, and that in some cases there is room in the molding or conduit for it to install its home run wiring without interfering with the incumbent's wiring.[294] We sought comment on a proposal to permit the alternative service provider to install its wiring within the incumbent provider's existing molding or conduit, even over the incumbent's objection, where there is room in the molding or conduit and the MDU owner does not object.[295] We tentatively concluded that such a rule would promote competition and consumer choice and would not constitute a taking of the incumbent provider's private property without just compensation under the Fifth Amendment.

105. A number of commenters support the Commission's proposal.[296] Community Associations Institute further suggests that the Commission allow MDU owners to permit the addition of wiring to existing moldings and conduits except where contracts bar such action.[297] Building Owners, et al., specifically argue that access to molding and conduits should only be permitted with the prior consent of the building owner.[298] Cox supports the proposal so long as the incumbent has not bargained for and

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[293]*See United States v. Locke*, 471 U.S. 84, 107 (1985) (rejecting Fifth Amendment taking claim where the plaintiff failed to comply with statutory requirement for filing mining claim that would have indicated its intent to retain property right); *see also Texaco v. Short*, 454 U.S. 516, 530 (1982) (noting that the Court has never required compensation to a private property owner who fails to take reasonable actions imposed by law for the consequences of his own neglect).

[294]*See* Ex Parte Letter from Jean L. Kiddoo, Swidler & Berlin, on behalf of RCN, to William F. Caton, Acting Secretary, Federal Communications Commission (July 18, 1997) ("RCN Ex Parte Letter").

[295]*Inside Wiring Further Notice* at para. 83.

[296]Further Comments of Ameritech at 6; Further Comments of OpTel at 7-8; Further Comments of SBC at 6-7; Further Comments of RCN at 8-9; Further Comments of GTE at 16; Further Comments of Media Access/CFA at 20-21; Further Comments of CEMA at iii, 13; Further Comments of Time Warner at 47-48 (asserts that with proper compensation, the proposal may be an appropriate way to further two-wire competition; claims it may waive its exclusive molding rights as a gesture of good faith); Further Reply of OpTel at 8. However, Jones Intercable, et al., and NCTA oppose the proposal. Further Comments of Jones Intercable, et al., at iv, 15-17; Further Comments of NCTA at 5, 25-26; *see also* Further Comments of TCI at 11-12 (Commission should not adopt rule that permits alternative providers to use moldings or conduits where such use is inconsistent with an existing contract between the MDU owners and the incumbent MVPD).

[297]Further Comments of Community Associations Institute at 17.

[298]Further Comments of Building Owners, et al., at 6; *see also* Further Comments of Nat'l Assn. of Realtors at 2.

received the exclusive right to use the molding or conduit.[299] DIRECTV, however, suggests that such actions be allowed regardless of whether the incumbent has a contract purportedly giving it the right to exclusive use of the molding or conduit.[300]

106. NCTA argues that forced sharing would be an impermissible taking, and that the Commission should leave the issue to contract and property law.[301] On reply, NCTA states that if the Commission adopts its proposal, it should apply only where the incumbent has no statutory, contractual or common law right to exclude or limit such access.[302]

107. Time Warner offers a proposal under which sharing of molding or conduit would be permitted if all affected MVPDs and the MDU owner agree that there is adequate space, subject to appropriate compensation.[303] Where the parties cannot agree that there is adequate space for additional wires, and the MDU owner is willing to allow installation of larger molding or conduit, the party owning the molding or conduit would install larger molding or conduit at the expense of the party seeking occupancy.[304]

108. Several parties also believe that the incumbent should be compensated for an alternative provider's access to its molding or conduits.[305] RCN proposes that if parties cannot reach a negotiated price for access, the cost for each wire would be determined by calculating the incumbent's documented installation costs for the molding or conduit minus depreciation.[306] According to RCN, the new provider's share of the costs would be the depreciated per wire cost times the number of wires it installs in the molding or conduit.[307] Similarly, Media Access/CFA argues that the price should be prorated to reflect the percentage of empty space actually used and should be based on depreciation value, rather than replacement value.[308]

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[299]Further Reply of Cox at 5.

[300]Further Comments of DIRECTV at 15-16.

[301]Further Comments of NCTA at 25-26; *see also* Further Comments of Comcast, et al., at 26-27; Further Reply of Time Warner at 24-27 (empty spaces are subject to the takings clause).

[302]Further Reply of NCTA at 14-15.

[303]Further Comments of Time Warner at 48.

[304]*Id.*

[305]Further Comments of SBC at 6-7 (parties should negotiate a price); Further Comments of RCN at 9; Further Comments of Media Access/CFA at 20-21 (alternative provider should reasonably compensate the incumbent); *see also* Further Reply of Bell Atlantic at 5 (alternative provider should be liable for any damage caused by using existing molding or conduits).

[306]Further Comments of RCN at 9.

[307]*Id.*

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

109. We will adopt a rule that permits an alternative MVPD to install its wiring within an incumbent's existing molding, even over the incumbent provider's objection, where the MDU owner agrees that there is adequate space in the molding and the MDU owner gives its affirmative consent.[309] We believe that such a rule will promote head-to-head competition among MVPDs by overcoming the resistance of MDU owners to the installation of redundant molding. At this time we will not require the sharing of space within conduits. The record does not contain sufficient evidence regarding the practicability of such a requirement.

110. We have authority to adopt these rules on the sharing of molding under Sections 4(i) and 303 of the Communications Act, for similar reasons described in the disposition of home run wiring section, above.

111. We agree with RCN that such a rule would not constitute a "taking" of private property because, absent a contractual right of exclusive occupation, the incumbent would not have a property interest in the air space between the molding and the hallway wall or ceiling. We do not believe -- and commenters have not adduced any case law to the contrary -- that merely attaching hallway molding to a third party's real property ordinarily gives the attaching party any property interest in the vacant air space covered by the molding. However, we will not apply this rule where the incumbent has an exclusive contractual right to occupy the molding. Since we do not believe that the incumbent ordinarily will have a property interest in the vacant air space inside the hallway molding, we will not require the alternative MVPD to compensate the incumbent for the placement of its wires. The alternative provider will, however, be required to pay any and all installation costs, including the costs of restoring the property to its prior condition and the costs of any damage to the incumbent's wiring or other property.

112. We also will adopt a variant of Time Warner's proposal for those situations in which the molding may not have sufficient space for the alternative MVPD's wiring. Under the rule we will adopt, where the MDU owner does not agree that there is adequate space in the molding for the additional wiring, and the MDU owner is willing to permit the installation of larger molding that could contain both the incumbent's and the alternative MVPD's wiring, the the MDU owner (with or without the assistance of the incumbent and/or the alternative provider) shall be permitted to remove the existing molding (and return the molding to the incumbent, if appropriate) and replace it with the larger molding at the alternative MVPD's expense. Again, the alternative MVPD would be required to pay any and all installation costs, including the costs of restoring the property to its prior condition and the costs of any damage to the incumbent's wiring or other property. This rule will not apply if the incumbent has contracted for the right to maintain its molding on the MDU owner's property without alteration by the MDU owner. Absent such a contractual provision, we believe that the incumbent has no right to prevent the MDU owner from altering the molding in its hallways and other areas of its property.

C. Disposition of Cable Home Wiring

113. As we stated in the *Inside Wiring Further Notice*,[310] we believe that fostering competitive choice in MDUs requires the coordinated disposition of two segments of cable wiring: (1) the home run

[309] *See* Further Comments of Building Owners, et al., at 6 (access to molding should only be permitted with the prior consent of the building owner); Further Comments of Nat'l Assn. of Realtors at 2.

[310] *Inside Wiring Further Notice* at para. 73.

wiring from the point where the wiring becomes devoted to an individual unit to the cable demarcation point; and (2) the cable home wiring from the demarcation point to the subscriber's television set or other customer premises equipment. Without clear and predictable rules for the disposition of each of these segments, an alternative provider's ability to convince an MDU owner or individual subscriber to switch services could be significantly compromised. The procedural framework discussed above addresses the disposition of MDU home run wiring. Here, we set forth specific rules on how to address certain issues regarding the disposition of MDU cable home wiring that were not addressed in our prior home wiring order.[311] We believe that these rules will promote competition and consumer choice by providing a comprehensive and workable framework for the disposition of MDU cable wiring.

114. As in the context of home run wiring, our MDU home wiring rules will apply regardless of the identity of the incumbent video service provider involved.[312] While initially this incumbent will commonly be a cable operator, it could also be a SMATV provider, an MMDS provider, a DBS provider or others. We conclude that the same authority described above regarding the disposition of cable home run wiring allows us to apply our MDU home wiring rules to other video service providers.

1. Disposition of Home Wiring When Service Is Terminated for an Entire MDU

115. In the *Cable Home Wiring Further Notice*, we requested comment on, among other issues, whether, in order to promote the goals of Section 624(i) and our rules thereunder, the subscriber (on a non-loop-through wiring configuration) or the building owner (with a loop-through wiring configuration) should be given the opportunity to purchase the cable home wiring when the MDU owner terminates cable service for the entire building.[313] For the most part, alternative service providers support having the cable home wiring procedures apply where the building owner terminates service on behalf of the entire building.[314] Some commenters believe that when the building owner terminates service the individual subscriber should be given the opportunity to purchase the home wiring;[315] others believe only the building owner should have that right.[316] GTE asserts that cable "subscriber" should be defined as the one that

[311]*See Cable Home Wiring Further Notice*, 11 FCC Rcd 4561.

[312]*See Inside Wiring Further Notice* at para. 74 (proposing to apply home wiring rules to all MVPDs). In this *Order*, we will apply all of our cable home wiring rules for multiple-unit installations to all MVPDs. We also believe that it may be beneficial to apply our cable home wiring rules for single-unit installations to all MVPDs. We seek comment on this issue in the *Second Further Notice*.

[313]*Cable Home Wiring Further Notice*, 11 FCC Rcd at 4582.

[314]Ameritech Docket No. 92-260 Comments at 8; Bell Atlantic Docket No. 92-260 Comments at 3; NYNEX Docket No. 92-260 Comments at 4; Further Reply of ICTA at 16. *But see* Building Owners, et al., Docket No. 92-260 Comments at 1; CATA Docket No. 92-260 Comments at 5.

[315]New York City Docket No. 92-260 Comments at 7 (other than bulk arrangements, only subscribers should have the opportunity to purchase the home wiring); *see also* GTE Docket No. 92-260 Comments at 7 (Commission should deregulate wiring and give subscribers full control over home wiring).

[316]ICTA Docket No. 92-260 Comments at 4 (building owner should have the right to purchase regardless of who terminates; requiring option to purchase only when tenant terminates is inconsistent with congressional intent); OpTel Docket No. 92-260 Comments at 8; PacTel Docket No. 92-260 Comments at 3 (owner should be given the right to

contracts or arranges for service.[317] Bell Atlantic contends that the building owner may be acting as the subscriber's authorized agent if the subscriber agrees in its lease agreement that the landlord may terminate service.[318] Building Owners, et al., oppose applying the Commission's rules under Section 624(i) when service for the entire building is terminated, because much of the building wiring is not cable home wiring and because a landlord is allegedly not a "subscriber" under the Commission's rules.[319]

116. In the *Inside Wiring Further Notice*, we tentatively concluded that, if the MDU owner has the legal right, either by law or by contract, to terminate the subscriber's cable service, the owner terminating service for the entire building is effectively voluntarily terminating service on the subscriber's behalf,[320] and our home wiring rules would be triggered.[321] We affirm this conclusion. We conclude that providing the cable operator a single point of contact (i.e., the MDU owner) will further the statutory purposes of minimizing disruption and facilitating the transfer of service to a competing video service provider. Because we believe that it would be impractical and inefficient for the incumbent provider to deal with each individual subscriber regarding the disposition of his or her cable home wiring when the entire MDU is switching providers, we will deem the MDU owner to be acting as the terminating "subscriber" for purposes of the disposition of the cable home wiring within the individual dwelling unit where the cable home wiring is not already owned by a resident. We clarify, however, that, contrary to Time Warner's contention, we are not changing our definition of subscriber to include MDU owners. We believe that, when as a matter of law or contract, the MDU owner has the right to terminate service, the MDU owner is effectively terminating service on behalf of the subscriber.[322]

117. For those MDU owners proceeding under our home run wiring disposition procedures, we will adopt the following framework in order to ensure the orderly disposition of the home wiring. When an incumbent provider is notified under our home run wiring disposition procedures that the incumbent provider's access to the entire building will be terminated and that the MDU owner seeks to use the home run wiring for another service, the incumbent provider must, within 30 days: (1) offer to sell to the MDU owner any home wiring within the individual dwelling units which the incumbent

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purchase and occupant should be given the right to control, e.g., to choose video service providers); Further Reply of U.S. Wireless/Ohio Valley Wireless at 3 (building owners are "subscribers" and are entitled to control all wiring within their buildings). *But see* Building Owners, et al., Docket No. 92-260 Comments at 4-5 (Commission does not have authority over landlords because they are neither subscribers nor cable operators); Time Warner Docket No. 92-260 Reply Comments at 7-8.

[317]GTE Docket No. 92-260 Comments at 7. *But see* Building Owners, et al., Docket No. 92-260 Comments at 4-5 (landlord is not a subscriber as defined in 47 C.F.R. § 76.5(ee)).

[318]Bell Atlantic Docket No. 92-260 Comments at 3 n.3.

[319]Building Owners, et al., Docket No. 92-260 Comments at 4-5.

[320]*See* Bell Atlantic Docket No. 92-260 Comments at 3 n.3.

[321]*Inside Wiring Further Notice* at para. 76.

[322]Similarly, with regard to exclusive bulk service contracts, we conclude that it is logical for the landlord to be deemed the subscriber, and thus for the landlord to have the right to purchase the home wiring as provided in our general rules.

provider owns and intends to remove; and (2) provide the MDU owner with the total per-foot replacement cost of such home wiring.[323]

118. As with the home run wiring, if an MDU owner declines to purchase the cable home wiring not already owned by a resident, the MDU owner may permit the alternative service provider to purchase the wiring upon service termination under our rules.[324] We will require that the MDU owner decide whether it or the alternative provider will purchase the cable home wiring and so notify the incumbent provider no later than 30 days before the termination of access to the building will become effective. If the MDU owner and the alternative service provider decline to purchase the home wiring, the incumbent provider will not be permitted to remove the home wiring until the date of actual service termination, i.e., likely 90 days after the building owner notified the incumbent that its access to the entire building will be terminated. We will modify our current home wiring rules to allow the incumbent provider 30 days after service termination, rather than the current seven days, to remove all of the cable home wiring for the entire building if the MDU owner has terminated service for the entire building and has declined to purchase the home wiring. We believe this is appropriate given the amount of home wiring that may need to be removed from an entire building. Under these circumstances, if the incumbent provider fails to remove the home wiring within 30 days of actual service termination, it cannot make any subsequent attempt to remove the wiring or restrict its use.

2. Disposition of Home Wiring When Service Is Terminated by an Individual Subscriber

119. In the *Cable Home Wiring Further Notice*, we sought comment on whether, when a subscriber who voluntarily terminates cable service does not own the premises and elects not to purchase the wiring, the premises owner should have the right to purchase the cable home wiring.[325] Alternative service providers contend that the premises owner should have this right to purchase when the individual subscriber declines to purchase the wiring, if not at all times.[326] ICTA claims that this arrangement would promote competition and, consistent with Section 624(i), would avoid damage, cost and inconvenience to the owner's property.[327] Building Owners, et al., claim that only owner residents (as opposed to

[323]*See* 47 C.F.R. § 76.802.

[324]*See* Further Reply of ICTA at 16.

[325]*Cable Home Wiring Further Notice*, 11 FCC Rcd at 4583.

[326]Ameritech Docket 92-260 Comments at 9; Bell Atlantic Docket 92-260 Comments at 2-3; ICTA Docket 92-260 Comments at 5 (premises owner should always have the right to purchase, not only if subscriber declines); OpTel Docket 92-260 Comments at 2, 7-8 (because owner has long term investment in building and services available to it, owner should always be allowed to purchase wiring when subscriber is merely renting); PacTel Docket 92-260 Comments at 4 (building owner should have the right to purchase while tenant should have the right to use); *see also* New York City Docket 92-260 Comments at 8.

[327]ICTA Docket 92-260 Comments at 5; *see also* Ameritech Docket 92-260 Reply Comments at 8-9.

tenants) should have the right to purchase cable home wiring in the first place.[328] In addition, Building Owners, et al., contend that it is essential for the building owner to have full control over its property, including the wiring, subject only to state property law, a lease or other contract.[329] Time Warner claims that Congress did not confer benefits or opportunities on landlords.[330] NCTA asserts that the wiring should be available to subsequent residents unless the operator removes the wiring.[331]

120. In the *Inside Wiring Further Notice*, we proposed two modifications to our cable home wiring rules. First, we proposed to permit the MDU owner or the alternative service provider to purchase the cable home wiring within each unit if the subscriber declines, provided that the MDU owner provides adequate notice to the incumbent provider that it or the alternative provider wants to purchase the home wiring under those circumstances. Second, we proposed to change the time in which an incumbent provider must remove the home wiring or make no further effort to use it or restrict its use from seven business days to seven calendar days after the individual subscriber terminates service.[332]

121. In response to the *Inside Wiring Further Notice*, Comcast, et al., and ICTA agree that an MDU owner should have the opportunity to purchase the home wiring should one or more of its tenants decline to do so,[333] but Time Warner and Building Owners, et al., argue that MDU owners should not be allowed to purchase home wiring.[334] Comcast, et al., state that while it does not challenge the Commission's proposal to allow the MDU owner to purchase the home wiring when a tenant declines to do so, it does believe that just compensation for the wiring must be "more than simply the replacement value of that wiring."[335] They also state that the home wiring rules should not apply when the home run wiring rules do not apply (e.g., when a subscriber terminates service without informing the incumbent that

[328]Building Owners, et al., Docket 92-260 Comments at 6, 8, 18-19 (Commission's home wiring rules should not apply to apartment or cooperative residents; current rules adequately address condominium situation because condominium owners should be treated like single dwelling unit owners).

[329]Building Owners, et al., Docket 92-260 Comments at 6-7, 9; *see also id.* at 10-11 (only building owner or service provider should own the wiring).

[330]Time Warner Docket 92-260 Comments at 6-7.

[331]NCTA Docket 92-260 Comments at 5.

[332]*See Inside Wiring Further Notice* at para. 79.

[333]Further Comments of Comcast, et al., at iv; Further Comments of ICTA at 3 n.1.

[334]Further Comments of Time Warner at 60-62 (claiming that building owners do not meet the definition of a subscriber); Further Comments of Building Owners, et al., at 10 (arguing that Section 623(b) might give the authority to regulate the rates at which operators may sell cable home wiring, but that it does not give the Commission the authority to grant building owners the right to acquire wiring or the authority to require cable operators to sell it).

[335]Further Comments of Comcast, et al., at iv.

it wishes to use the home run wiring for another video provider).[336] Media Access/CFA, however, argue that preventing individual subscribers from exercising the option to purchase their home wiring would unlawfully subordinate individual choice and place the MDU in a gatekeeper position.[337]

122. We will continue to apply our rules permitting individual terminating subscribers (or their agents) to purchase the cable home wiring up to a point at or about 12 inches outside their individual units.[338] We continue to believe that this is consistent with the purposes of Section 624(i) to promote consumer choice and competition by permitting subscribers to avoid the disruption of having their home wiring removed upon voluntary termination and to subsequently utilize that wiring for an alternative service.[339] If the subscriber declines to purchase its home wiring, we believe that the premises owner should be permitted to purchase the cable home wiring within the individual's premises based on the per-foot replacement cost.[340] This approach will preserve the current subscriber's rights, and still allow the premises owner to act on behalf of future tenants, thus promoting competition and consumer choice. As with the home run wiring in an MDU, if the premises owner declines to purchase the cable home wiring, the owner may permit the alternative service provider to purchase it.

123. Where an individual MDU resident terminates service, the MDU owner must provide reasonable advance notice to the incumbent provider if it wishes to purchase the home wiring (or that the alternative provider will purchase it) if and when an individual subscriber declines. The MDU owner will be required to inform the incumbent provider one time for the entire building. If the MDU owner fails to provide the incumbent with such notice, the incumbent will be under no obligation to sell the home wiring to the MDU owner or the alternative provider when an individual subscriber terminates and declines to purchase the wiring. Where an MDU owner does not or cannot invoke our unit-by-unit home run wiring disposition procedures (e.g., if it elects to have two-wire competition to each unit), we will require the MDU owner to provide the incumbent provider reasonable advance notice if the MDU owner or the alternative provider intends to purchase the home wiring if and when a subscriber declines.

124. In addition, where an individual subscriber is terminating service, we will change the time in which an incumbent provider must remove the home wiring or make no further effort to use it or restrict its use in single unit installations from seven business days to seven calendar days after the individual subscriber terminates service. We believe that this minor change is sufficient time for removal

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[336]Further Comments of Comcast, et al., at 22; *see also* Further Comments of SBC at 3 (arguing that the disposition of home wiring would be complicated when an occupant moved out, if non-owner occupants were permitted to purchase the wiring).

[337]Further Comments of Media Access/CFA at 16-18.

[338]Our current rules require a cable operator, if the operator owns the wiring and intends to remove it, to give a terminating subscriber an opportunity to purchase the wiring on the subscriber's side of the demarcation point (at or about 12 inches outside the customer's premises). If the subscriber declines to acquire the wiring, the operator must remove it within seven business days or make no subsequent attempt to remove it or restrict its use. *See* 47 C.F.R. § 76.802(a).

[339]*See* 1992 House Report at 118; 1992 Senate Report at 23; *see also Cable Home Wiring Further Notice*, 11 FCC Rcd at 4570 (citing *Cable Wiring Order*, 8 FCC Rcd at 1435).

[340]*See* 47 C.F.R. § 76.802.

of a single subscriber's cable home wiring, and will avoid customer confusion by having the time permitted for the provider to remove the home wiring within the individual unit run concurrently with the time permitted for the provider to remove, sell or abandon the home run wiring under our procedural framework.

3. Effect of Subscriber Vacating the Premises on the Application of Cable Home Wiring Rules

125. We also sought comment in the *Cable Home Wiring Further Notice* on the disposition of cable home wiring in the event that a subscriber terminates cable service, elects not to purchase the wiring and vacates the premises within the time period the operator has to remove the home wiring.[341] We stated that we believed that, as long as the cable operator is allowed access to the premises to remove its wiring if it so wishes, whether the subscriber vacates the premises has no bearing on the application of our rules. The cable operator would be required to remove the wiring within seven days of the subscriber's termination of service, or make no subsequent attempt to remove it or to restrict its use, regardless of who subsequently resides in the premises.[342]

126. Several commenters believe that whether a subscriber vacates the premises should have no bearing on the application of the home wiring rules.[343] NYNEX asserts that the cable operator must ascertain when the wire can be removed during the time period allowed and that, if the cable operator fails to act promptly and the new tenant refuses to grant access, the operator loses its right to remove the wiring or restrict its use.[344] WCA states that the operator's failure to act should extinguish any claim of ownership or control over the home wiring.[345] PacTel contends that once the unit is vacant, all service providers should have equal access to the next tenants.[346]

127. We conclude that our cable home wiring rules should apply even when the subscriber is vacating the premises within the seven day period. A cable operator that owns the wiring and intends to remove it must offer to sell the cable home wiring to the subscriber upon voluntary termination, and if the subscriber declines, the operator must remove the wiring within seven days or make no further effort

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[341]Section 76.802(a) provides that, if the terminating subscriber declines to purchase the cable home wiring, the cable operator must then remove it within seven business days, under normal operating conditions, or make no subsequent attempt to remove it or to restrict its use. 47 C.F.R. § 76.802(a).

[342]*Cable Home Wiring Further Notice*, 11 FCC Rcd at 4583.

[343]Ameritech Docket 92-260 Comments at 8-9; Bell Atlantic Docket 92-260 Comments at 3; ICTA Docket 92-260 Comments at 6; New York City Docket 92-260 Comments at 7-8; NYNEX Docket 92-260 Comments at 4-5; OpTel Docket 92-260 Comments at 2, 6-7; PacTel Docket 92-260 Comments at 4; WCA Docket 92-260 Comments at 25; Ameritech Docket 92-260 Reply Comments at 9.

[344]NYNEX Docket 92-260 Comments at 4-5; *see also* OpTel Docket 92-260 Comments at n.4 (requesting clarification that the operator must remove the wiring, not merely disable it); Ameritech Docket 92-260 Reply Comments at n.23 (supporting OpTel's clarification request).

[345]WCA Docket 92-260 Comments at 25.

[346]PacTel Docket 92-260 Comments at 4.

to remove it or restrict its use.[347] We expressly state that the cable operator must be given reasonable access to the individual premises during the removal period. We believe that the foregoing policy will promote the objectives of Section 624(i) by minimizing disruption and facilitating subsequent subscribers' ability to use their home wiring to connect to the video service provider of their choice.

128. The disposition of the cable home wiring under these circumstances will not affect our rules for the unit-by-unit disposition of the MDU home run wiring. As described above,[348] our rules regarding the disposition of the home run wiring are not triggered where a subscriber terminates service and vacates the premises unless and until a new or subsequent subscriber (or his or her agent) notifies the incumbent service provider that the subscriber wishes to receive service from an alternative service provider lawfully serving the premises.

D. MDU Demarcation Point

1. Background

129. In the *Inside Wiring Notice*, we sought comment on "whether and how our wiring rules can be structured to promote competition both in the markets for multichannel video programming delivery and in the market for telephony and advanced telecommunications services."[349] In particular, we requested comment on whether and where the Commision should establish a common demarcation point for wireline communications networks, regardless of the type of wiring they employ (e.g., coaxial cable or "twisted-pair" copper wiring) or the type(s) of services provided (e.g., video or telephony).[350] We stated that sound reasons for creating a common demarcation point may exist, such as when cable and telephony services are provided over a single broadband wire. In that situation, we posited that a common demarcation point could facilitate competition by decreasing confusion over where a particular service's demarcation point is located and reducing the possibility that conflicting property rights could impede a transfer of service.[351]

130. We sought comment on whether, alternatively, we should continue to establish demarcation points based on the services provided over facilities (i.e., telephony or cable), or whether we should create demarcation points based upon the nature of the facilities ultimately used to deliver the service (i.e., narrowband termination facilities or broadband termination facilities).[352] We noted that we "recognize that numerous other factors may affect the proper location of the cable network's demarcation

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[347] *See* 47 CFR § 76.802.

[348] *See* Section III.A.2.b. above.

[349] *Inside Wiring Notice*, 11 FCC Rcd at 2755-56.

[350] *Id.* at 2754.

[351] *Id.* at 2754-55.

[352] *Id.*

point, as well as one's control over cable inside wiring and cable service generally."[353] We also sought comment on the "legal and practical impediments faced by telecommunications service providers in gaining access to subscribers."[354]

131. Several commenters support the establishment of a common demarcation point in single family homes for both cable and telephone wiring.[355] These commenters state that a common demarcation point would foster competition by easing a subscriber's transition among services providers. A common point would permit a subscriber to switch service providers by simply disconnecting the inside wiring from one provider's network and reconnecting it to another network, all at one location. Time Warner and others support a common point set at or about 12 inches outside of the point where the wiring enters the customer's home, because this will allow service transfers without requiring the presence of the consumer to allow access to the interior of the home.[356] They assert that this approach will accommodate future competition between cable and telephone companies,[357] while also facilitating testing and complying with existing electric codes.[358] Other commenters would modify this approach to allow a common point set at or about 12 inches outside the premises or 12 inches inside the premises,[359] or the closest practicable point to that location,[360] "provided that the point is reasonably accessible to competing providers."[361] Bell Atlantic would allow multiple demarcation points anywhere between the property line (i.e., a terminating device) and 12 inches inside the premises, but adds that the demarcation rules for existing single-family homes should be grandfathered.[362]

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[353] *Id.* at 2757.

[354] *Id.* at 2775.

[355] AT&T Comments at 6; Cincinnati Bell Comments at 2; GTE Comments at 8-9; PacTel Comments at 6; USTA Comments at 3-4; U S West Comments at 4-6; DIRECTV Comments at 8; Time Warner Reply Comments at 5-6; Bell Atlantic Reply Comments at 11; Further Reply of Bell Atlantic at 1-3.

[356] *See, e.g.*, Time Warner Reply Comments at 5-6; AT&T Comments at 5-6 (noting that this point would coincide with the current cable demarcation point, and that the telephone rules would have to be amended only slightly to move that demarcation point from just inside the premises to the network interface unit, which is typically located outside the premises); Charter/Comcast Comments at 14; Media Access/CFA Comments at 10; Tandy Comments at 6; *see also* NYNEX Comments at 5-6 (urging the Commission to restrict this approach only to new construction); U S West Comments at 4 (stating that there "is apparently no reason why [the Commission] could not" set a common point); DIRECTV Comments at 8 (phrasing it as "the first point where physical wiring is dedicated to an individual subscriber").

[357] *See, e.g.*, Adelphia Comments at 3; Circuit City Comments at 15; Charter/Comcast Comments at 14.

[358] Time Warner Reply Comments at 6; *see also* AT&T Comments at 5.

[359] Adelphia Comments at 3. Time Warner apparently supported this point in its initial comments but supports a point outside the premises in its reply comments. *See* Time Warner Comments at 5 and Reply Comments at 5-6.

[360] PacTel Comments at 7 (supporting this point as long as it is beyond any electronics equipment).

[361] Ameritech Reply Comments at 4.

[362] Bell Atlantic Reply Comments at 12.

132. The New Jersey BPU, in contrast, believes that the current demarcation points offer sufficient access to competitors, and that changing these rules would not benefit consumers at this time.[363] Building Industry Consulting adds that, in practice, the telephone demarcation point has moved gradually closer to the cable point.[364] For this reason, Building Industy Consulting believes that establishing a common demarcation point would not be burdensome, while TIA relies on the same reasoning to argue that setting a common demarcation point is unnecessary.[365]

133. Many commenters argue that the current cable demarcation point in MDUs (at or about 12 inches outside of where the cable wire enters the subscriber's individual dwelling unit) is anticompetitive. These commenters assert that, as a physical matter, the cable wiring at the demarcation point is often embedded in brick, plaster, or cinder blocks, or encased in conduits or moldings, particularly in older MDUs.[366] These commenters state that, as a practical matter, a large majority of property owners refuse to allow installation of a second set of cable wires in their buildings due to the risk of property damage, space limitations[367] and aesthetic concerns.[368] Alternative MVPDs contend that property owners routinely insist that a competitor to the incumbent cable operator may only provide service to the consumers residing in the MDU if the competitor uses the existing wiring within the building.[369] These commenters assert that, given the growing number of MDU residents, this is a significant nationwide problem.[370]

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[363]New Jersey BPU Comments at 2.

[364]Building Industry Consulting Comments at 2.

[365]TIA Comments at 2.

[366]*See, e.g.*, OpTel Reply Comments at 6; Media Access/CFA Comments at 5-7; Liberty Comments at 2; WCA Comments at 11.

[367]*See* WCA Comments at 13 (space limitations often place a de facto cap on the number of competing service providers that may serve an MDU property, such that a property owner often cannot give an alternative service provider the space necessary to compete in the building); *see also* Multimedia Development Comments at 15; Riser Mgt. Comments at 4 (stating that "there are many buildings in which conduits, riser shafts, entrances links, or crawl space are already crowded to the point that limits access" or that makes the "installation of separate systems by each [provider] physically impossible").

[368]*See, e.g.*, ICTA Comments at 21 ("Virtually all property owners refuse to allow installation of a second set of separate cable wires . . . [because] . . . [p]ost-wiring a building generally negatively impacts the appearance of the property because [the wiring] cannot be hidden without tampering with the structure of the building."); DIRECTV Comments at 2 ("The MDU owners and tenants are typically unreceptive to assuming the cost and inconvenience of overbuild installations, which causes an intractable barrier to entry for new service providers."); *see also* Further Reply of USSB at 4-5.

[369]ICTA Comments at 21.

[370]Liberty cites the U.S. Bureau of the Census in describing data that MDUs accounted for 28% of the entire U.S. housing market in 1990, and that the number of dwelling units in MDUs in the U.S. increased by 51% between 1980 and 1990, while the number of households and single family residences grew by only 14% and 15%, respectively. Liberty Comments at Tables 1 and 2, Figures 1-2; *see also* DIRECTV Comments at 2 (stating that MDUs constitute "roughly one-fourth of the United States' TV households").

134. Alternative providers make several different proposals. Most commenters urge the Commission to establish a new cable demarcation point at the point at which the wiring becomes solely dedicated to an individual subscriber -- e.g., at the lockbox, where the riser cable connects to each unit's dedicated home run wiring.[371] Other proposals include: (1) placing the cable demarcation point at the minimum point of entry, as it typically is located in the telephone context;[372] (2) moving the cable demarcation point to a location near the entry to the building, such as a basement, telephone vault or frameroom;[373] and (3) placing the cable demarcation point within the MDU's common areas where existing wiring is first readily accessible to competitors.[374]

135. Alternative service providers argue that moving the cable demarcation point to the point where the wiring becomes dedicated to an individual unit will promote competition in the video marketplace. They assert that adopting their proposal would allow an alternative service provider, upon termination of the incumbent provider's service by a subscriber, to attach its network quickly and easily to the wiring solely dedicated to the individual subscriber's use.[375] They also argue that this new demarcation point would permit a second entrant to provide service without disrupting hallway walls or

[371]*See, e.g.*, GTE Comments at 4; USTA Comments at 3; ICTA Comments at 20-24; Multimedia Development Comments at 13-14; MultiTechnologies Services Comments at 2; RCN Comments at 2; OpTel Comments at 10-11; Media Access/CFA Comments at 10-11; U S West Comments at 5; New Jersey BPU Comments at 6-7; Compaq Comments at 36; WCA Comments at 10-12; AT&T Comments at 7-8; NYNEX Comments at 7; DIRECTV Comments at 7-8; PacTel Comments at 3-5; Ameritech Comments at 8; Liberty Comments at 2-3; Further Reply of USSB at 3-4; Further Reply of DIRECTV at 6; Further Reply of Nat'l Rural Telecom. Coop. at 5-6.

[372]*See, e.g.*, CEMA Comments at 4-5; Ameritech Comments at 5-6 ("[I]n a converging marketplace where telephone companies and cable operators are providing a variety of broadband services . . . different regulations for premises wire based on the identity of the provider no longer are reasonable or necessary, especially where different services are provided over the same wire."); Bell Atlantic Reply Comments at 12-14 (recommending that the minimum point of entry be established as the common demarcation point for buildings that are built or substantially rewired after January 1, 1998, which would prevent premises owners from having to give up valuable corridor space for multiple feeder cables, and would maximize the amount of wiring that can be provided by companies other than the service providers); AT&T Comments at 3; Tandy Comments at 6; GTE Comments at 7; Circuit City Comments at 14-15; Cincinnati Bell Comments at 2; Media Access/CFA Comments at 4; GTE Comments at 3; Riser Mgmt. Comments at 3; California PUC Comments at 1-2.

[373]Building Owners, et al., Comments at 38. Many commenting property managers and owners state that "[d]epending on the type of property, the demarcation point should be outside the building or outside of the premises of each resident." *See, e.g.*, 1st Lake Comments at 1; Community Associations Institute Comments at 1; Real Estate Board of New York, Inc. Comments at 2.

[374]DIRECTV Comments at 7-8; Liberty Petition for Reconsideration of the *Cable Wiring Order* at 1; WJB-TV Limited Partnership Response to Petitions for Reconsideration of the *Cable Wiring Order* at 3; WCA Reply Comments to Petitions for Reconsideration of *Cable Wiring Order* at 7; USTA Supporting Statement on Petitions for Reconsideration of *Cable Wiring Order* at 2.

[375]Liberty Petition for Reconsideration of the *Cable Wiring Order* at 2.

ceilings, or installing additional hallway molding in order to conceal a second set of home run wiring.[376] These commenters contend that this would greatly increase property owners' willingness to allow them to enter the building and compete, thereby fostering competition and enhancing consumer choice.[377]

136. Some commenters that advocate moving the cable demarcation point to the "solely dedicated" point, as described above, urge the Commission to deem the MDU property owner the "subscriber" for purposes of Section 624(i) and to allow the property owner to purchase the home run wiring upon termination of the cable service.[378] These commenters argue that to permit a tenant to purchase the wiring would constitute an impermissible taking of the property owner's property,[379] would be beyond the Commission's authority under Section 624(i),[380] and would not be sound policy since only the MDU owner has a long term interest in the property and the services available to the MDU.[381]

137. DIRECTV suggests that the Commission should establish a "virtual" demarcation point from which an alternative provider could share the wiring simultaneously with the cable operator.[382] Other alternative providers endorse this view, if it is technically possible.[383] CEMA states that some of its members "are currently developing equipment that will allow multiple uses of a single broadband wire,

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[376]*See* OpTel Reply Comments at 6; Media Access Project/CFA Comments at 6; Ameritech Comments at 3-4; New Jersey BPU Comments at 6-7; GTE Comments at 4; WCA Comments at 11-12; NYNEX Comments at 7-8; PacTel Comments at 3; USTA Comments at 3; RCN Comments at 5 & n.5; Riser Mgmt. Comments at 5; AT&T Reply Comments at 6; Liberty Comments at 2-3; DIRECTV Comments at 8; OpTel Comments at 10-11; Multimedia Development Comments at 13-14; AT&T Comments at 7.

[377]*See* Ameritech Reply Comments at 2; AT&T Comments at 4-8; TIA Comments at 7; Media Access/CFA Comments at 6-10; Circuit City Comments at 15; GTE Comments at 2; DIRECTV Comments at 1-2; Info. Tech. Industry Council Comments at 3; NYNEX Comments at 7-8; RTE Group Comments at 2; MFS Comments at 2; Multimedia Development Comments at 2.

[378]OpTel Comments at 12-13; ICTA Comments at 11 n.4. ICTA states that this approach is consistent with the legislative history of Section 624(i), which indicates that the provision was enacted to protect the interests of property owners in avoiding damage to their property from a cable operator's removal of wiring. ICTA Comments at 10.

[379]ICTA Comments at 11-19.

[380]*See id.* at 8-10 (arguing that the Commission only has authority under Section 624(i) over cable "within the subscriber's premises," and that the Commission therefore does not have the authority to extend the demarcation point further from the rental unit if the tenants are given the option of purchasing the wiring).

[381]*See id.* at 25-26; OpTel Comments at 12-14; WCA Comments at 15-16; Multimedia Development Comments at 14-15 (stating that "[t]he interests of an MDU property owner, whether it is a condominium association or landlord, closely parallels those of its building residents regarding building services," and that in order to attract and retain residents, a premises owner "seeks to provide the best possible building environment at the most reasonable cost."); Building Owners, et al., Reply Comments at i-ii (stating that "the real estate business is extremely competitive, and landlords have very strong incentives to meet their tenants' needs. Over the long run, the building operators that do so will succeed, and those that do not will fail, because the real estate industry is not a monopoly.").

[382]DIRECTV Comments at 8-10.

[383]*See* NYNEX Comments at 8-9; Batholdi Reply Comments at 16.

including the potential for simultaneous use, and the high-speed, real-time transport of digitally encoded information to the customer premises."[384] Cable operators generally oppose DIRECTV's suggestion that two video service providers may share a single wire, stating that the alternative provider would have to use different frequency bands to avoid interference, and, while theroetically possible, most systems do not have sufficient bandwidth capacity to carry multiple MVPDs.[385]

138. Cable operators generally argue that the Commission should not modify the current cable demarcation point in MDUs.[386] Some cable operators argue that the alternative service providers have failed to support their assertions that the current cable demarcation point is often inaccessible and that the cost of installing additional home run wiring is prohibitive.[387] Cable operators contend that they often are the second entrant into an MDU, and that in such circumstances they install their own inside wiring, including home runs.[388] In addition, some cable operators assert that alternative service providers typically assuage concerns of landlords through compensation for access to the MDU, which they claim cable operators may be precluded by law from doing.[389] Alternatively, Charter/Comcast urges the Commission to move the demarcation point for broadband services inside the customer's premises, such as to the wall plate.[390]

139. Cable operators argue that moving the cable demarcation point would restrict their ability to compete to provide telephony and other telecommunications services, such as Internet access, if a

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[384]CEMA Reply Comments at 13.

[385]Cox Comments at 19; Marcus Cable, et al., Comments at 6; Adelphia Comments at 5; CATA Comments at 4; TKR Comments at 5.

[386]Adelphia Comments at 1-2 ; CATA Comments at 6-7; Time Warner Comments at 6-8; Continental/Cablevision Comments at 6-10; Charter/Comcast Comments at 17; Guam Cable TV Comments at 3-4; Marcus Cable, et al., Comments at 8-9; NCTA Comments at 4-5; TCI Comments at 45; TKR Comments at 10.

[387]*See, e.g.,* Cox Reply Comments at 10-11; Marcus Cable, et al., Reply Comments at 7; *see also* Time Warner Comments at 17-18 (asserting that, contrary to claims by Liberty and NYNEX, only approximately two percent of MDUs in New York City have home runs that are inaccessible to competitors because the wiring is concealed behind old plaster walls or ceilings, and that even in those cases, "true" inside wiring is available at the wall plates of the individual dwelling units).

[388]Cox Reply Comments at 10-11 (citing Charter/Comcast Comments at 18-19 (arguing that post-wiring a condominium building costs less than $10,000)). Guam Cable TV states that MDU subscribers in Guam are able to receive multiple services from multiple providers because: (1) most contractors use large interior conduit together with miniature coaxial cable; (2) premises owners insist that service providers leave in a pull cord for use by the next provider; and (3) wiring is often concealed in unobtrusive exterior moldings on older buildings. Guam Cable TV Comments at 4-5. Cable operators argue that Guam's experience proves that the costs of installing additional wire is not an impediment to new providers, and add that, "if building owners wish it, as the Congress does, subscribers can have a real choice of MVPDs." Marcus Cable, et al., Reply Comments at 9; CATA Reply Comments at 6.

[389]*See, e.g.,* Charter/Comcast Comments at 17 and n.28.

[390]*Id.* at 15; *see also* CEMA Comments at 5 (stating that consumers are likely to want multiple services from multiple providers, and that the most suitable location for the sophisticated electronics and other equipment that will be necessary in these situations is inside the customer's premises).

subscriber chose a competitor's video services.[391] They assert that consumers would benefit from additional broadband wires to their premises, since they could then have the flexibility of receiving different services from different providers, rather than simply choosing among service providers.[392] Cable operators argue that they should be permitted to maintain control over their wire in order to compete to provide such services, rather than have to relinquish their wire to a competitor and be forced to re-wire in the future.[393]

140. Cable operators also argue that allowing competitors to take over the cable operators' existing plant would undercut their incentives to upgrade and deploy end-to-end broadband networks.[394] Cox states that it is not surprising that telephone companies and other alternative service providers favor a rule that allows them to take over the cable operator's plant, since this allows them to reduce costs while also protecting them from competition from cable operators in the provision of telephony, video and data services.[395] Some cable commenters contend that moving the cable demarcation point would slow network

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[391]*See, e.g.*, Ex Parte Letter from Arthur H. Harding, Fleischman & Walsh, counsel for Time Warner Entertainment Company, L.P., to William F. Caton, Acting Secretary, Federal Communications Commission (February 21, 1995) at 2; Cox Comments at 22. Time Warner also argues that the home run wiring is never truly "dedicated" because: (1) even after a subscriber terminates cable service, the operator must retain its entire end-to-end distribution system so that other services can be offered to that unit; (2) a home run often serves more than one unit through splitters; and (3) a home run may be redirected for use by another unit. Time Warner thus asserts that the only wiring that is "dedicated" to an individual subscriber's use is the wiring within the premises of each unit. Time Warner Comments at 11.

[392]*See* Time Warner Comments at 11 (a consumer, for instance, may want basic cable service from the incumbent cable operator, expanded basic service from a DBS provider, and telephone service from a local exchange carrier); Adelphia Comments at 2; NCTA Comments at 7-9; Marcus Cable, et al., Comments at 13-14; Continental/Cablevision Comments at 14-21 (moving the demarcation point would "thwart both competition and consumer choice in MDU units"). Time Warner states that, contrary to the assertions of the Media Access/CFA, multiple sets of broadband wires extending to a particular dwelling unit are never "redundant" because the cable operator always will need the wire connection to the subscriber in order to offer non-cable services. Time Warner Reply Comments at 34 (citing Media Access/CFA Comments at 5).

[393]*See, e.g.,* NCTA Comments at 7; Continental/Cablevision Comments at 14-21.

[394]Cox Comments at 20; Marcus Cable, et al., Comments at 5-6; Continental/Cablevision Reply Comments at 10 (allowing alternative service providers to take over the existing network would undermine "the present marketplace incentives that are spurring cable operators to make new investments to upgrade and expand their broadband capacity"); Time Warner Reply Comments at 17-18 (arguing that moving the demarcation point would contradict the intent of Congress expressed in the Telecommunications Act of 1996 to promote private sector investment in advanced telecommunications facilities and infrastructure development) (citing H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996) ("1996 House Report")); NCTA Comments at 22-23 (stating that cable operators have invested huge resources in upgrading their networks with fiber optic technology, and that requiring cable operators to forfeit ownership or control over and rebuild this portion of their facilities will eliminate their continued ability to use these facilities to offer cable service and reap the benefits of their efforts).

[395]Cox Comments at 21-22; *see also* Time Warner Comments at 8 (the end result will be that fewer wires will be installed to subscribers); Continental/Cablevision Comments at 10 (stating that such an approach would reward those entities that have been unwilling to invest in their own distribution networks while harming providers that have undertaken the risk and expense of such construction).

upgrades in areas with a high concentration of MDUs and disadvantage those subscribers residing in MDUs vis-a-vis subscribers residing in single family homes.[396]

141. The end result of moving the cable demarcation point in MDUs, according to cable operators, would be a "one-wire world" in which the MDU owner or manager would become the "gatekeeper" with the power to determine which services and service providers have access to subscribers.[397] Some cable commenters believe that the premises owner will generally promote its own interests at the expense of subscribers residing in the building.[398] These parties believe that, rather than enhancing property owners' power to control access to MDUs, the property owners' power should be minimized, in order to promote competition and enhance consumer choice.[399]

142. In reply, GTE disputes the claim that moving the demarcation point necessarily "would lead to a one-wire world and would discourage the offering of new services."[400] GTE states that, if a building owner wants to allow service providers to duplicate the wiring that exists in its structure, there is nothing in the current rules preventing this. Similarly, ICTA argues that moving the demarcation point would not discourage investment because a cable operator may protect itself by obtaining a property owner's agreement guaranteeing the operator access to the property for a period of time sufficient for the operator to recoup its investment in the wiring and make a reasonable profit.[401]

143. Alternative service providers also dispute the cable industry's argument that moving the cable demarcation point would impair cable operators' ability to offer additional services because the operator will no longer control the existing home run wiring. WCA asserts that this is a consumer decision and that MDU subscribers will do what all consumers do when choosing among providers -- i.e., evaluate the options and determine which one will provide the highest quality service at the lowest price. WCA believes it would be anti-competitive for the cable operator to hold a subscriber hostage to the

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[396]*See generally* Time Warner Reply Comments at 21. Others argue that, given the impending competition to cable operators from telephone companies, DBS providers and others, a potential change in the cable demarcation point could not come at a worse time. *See, e.g.*, Continental/Cablevision Comments at 10-11.

[397]Cox Comments at 20. Cox further states that, even in those states where cable operators have a mandatory right to access an MDU, an operator will have no incentive to re-enter the building since there is nothing to stop the premises owner from expropriating its wiring again for use by yet another competitor. *Id.* at 20-21.

[398]Marcus Cable, et al., Comments at 7-8 (citing cases in which premises owners have evicted franchised cable operators in order to provide exclusive access to an affiliated SMATV or one that promises a "kickback" to the developer); Continental/Cablevision Comments at 21-22. Marcus Cable, et al., contend that forcing cable operators to turn over their wiring to competitors would "create *de facto* exclusive arrangements for MDUs, even where the provider has not contracted for exclusivity, by transforming the cable operator into little more than a contractor for wiring installation." Marcus Cable, et al., Reply Comments at 9.

[399]Marcus Cable, et al., Reply Comments at 10; Continental/Cablevision Comments at 21-22; Charter/Comcast Comments at 17; CATA Reply Comments at 3; Cox Reply Comments at 11.

[400]GTE Reply Comments at 6.

[401]ICTA Reply Comments at 7 (citing Cox Comments at 20-21).

operator's video programming service only because the cable operator may offer telephony or other services in the future.[402] In addition, ICTA argues that the cable industry should not be able to use its competitive advantage with respect to video programming, which results from its control over inside wiring, to inhibit competition in other markets as well.[403]

144. Finally, some commenters contest cable operators' arguments that property owners will function as anti-competitive gatekeepers if the cable demarcation point is changed. First, these parties state that the cable industry's arguments ignore property owners' incentives to act in tenants' best interests if the owners want to avoid vacancies in their buildings.[404] These parties add that the cable industry ignores the "thousands of times" landlords seek to act in the best interests of their tenants but are "hamstrung" by cable operators' assertions of ownership over wiring, even after the cable operator's service has been terminated.[405] Second, some commenters argue that the issue is not whether there will be or should be a gatekeeper to an MDU, but whether the property owner or the cable operator would make a better gatekeeper. Ameritech, for instance, believes that given cable operators' incentives to preclude competition as compared with property owners' incentives to maintain and attract tenants, the property owners are the better candidates to act in the tenants' interests.[406]

145. In the *Inside Wiring Further Notice*, we sought additional comment on our tentative conclusion that where the cable demarcation point is truly physically inaccessible to the alternative provider, the demarcation point should be moved back to the point at which it first becomes physically accessible.[407] Several commenters support the Commission's proposal to require relocation of the demarcation point when it is "physically inaccessible" to a point where it first becomes accessible.[408]

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[402]WCA Reply Comments at 18-19.

[403]ICTA Reply Comments at 5-6 (the cable industry ignores the fact that many alternative video service providers are capable of, and currently offer, voice, video and data to subscribers); GTE Reply Comments at 6 (the cable operators' arguments are "self-serving" and clearly demonstrate that the cable industry opposes any change to the cable wiring rules in order to preserve its monopoly status); *see also* USTA Reply Comments at 3 (the cable operators' arguments ignore real-world obstacles to access to MDUs).

[404]ICTA Reply Comments at 7; WCA Reply Comments at 15-17; *see also generally* Building Owners, et al., Comments at 18-23 (stating that a property owner's interest in reducing turnover and attracting new residents provide incentives to provide residents with whatever amenities the property can afford).

[405]ICTA Reply Comments at 7; *see also* WCA Reply Comments at 16-18.

[406]Ameritech Reply Comments at 7-8; *see also* CEMA Reply Comments at 12 (stating that property owners can also provide cost savings to tenants by negotiating better service rates than a subscriber could individually).

[407]*Inside Wiring Further Notice* at para. 84. Among other things, we also sought comment on how to define "physically inaccessible." *Id.*

[408]Further Comments of GTE Comments at 16-17; Further Comments of Heartland Wireless at 6-7; Further Comments of RCN at 2-3; Further Comments of OpTel at 7-8; Further Comments of SkyZone at 2; Further Reply of GTE at 20-21. Several parties urge the Commission to clarify that relocation must be toward the junction box and away from the MDU unit. Further Comments of Heartland Wireless at 6-7; Further Comments of RCN at 2-3; Further Comments of WCA at 14; Further Reply of Telebeam at 4; Further Reply of GTE at 21; *see also* Further

Media Access/CFA propose a two-part definition that would ask whether accessing the demarcation point would: (1) require modification or damage to preexisting structural elements and (2) add significantly to the difficulty and/or cost of accessing the subscriber's home wiring.[409] A number of other definitions were also suggested.[410]

146. In reply, Time Warner suggests adoption of the Commisison's "bright-line" test that the cable demarcation point would be physically "inaccessible" where it is embedded in brick, metal conduit or cinderblocks, not simply within hallway molding.[411] Cable commenters propose that in such circumstances the demarcation point would be moved as close as practicable thereto (either closer to the unit or farther away) to permit access.[412]

2. Discussion

147. We believe that it is not necessary to establish a common cable and telephone demarcation point at this time. At least as far as inside wiring is concerned, telephony generally appears to continue to be delivered over twisted pair wiring and multichannel video programming generally appears to be delivered over coaxial cable.[413] The record before us indicates that this distinction is likely to continue

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Comments of Media Access/CFA at 19 (a physically inaccessible demarcation point should not be moved inside the subscriber's unit).

[409]Further Comments of Media Access/CFA at 20.

[410]RCN and WCA assert that a demarcation point should be defined as physically inaccessible if an alternative provider cannot connect its wiring without cutting or otherwise altering any parts of the building, including the molding or conduit. Further Comments of RCN at 3-5; Further Comments of WCA at 14. *See also* Further Reply of ICTA at 5 (supporting WCA's definition); Further Reply of OpTel at 8 (same). RCN further argues that a demarcation point is also inaccessible if it can be reached by only one molding or conduit and the molding or conduit is full or otherwise not available to competing MVPDs. Further Comments of RCN at 4-5. DIRECTV believes that the term "physically inaccessible" should encompass any instance where the demarcation point is not in an open, common space, but is behind a wall, floor, ceiling, or other structural component. Further Comments of DIRECTV at 16. Community Associations Institute believes that the MDU owner is in the best position to determine the point at which wiring is physically accessible. Further Comments of Community Associations Institute at 17. Comcast, et al., contend that the cable demarcation point should only be deemed physically inaccessible where it is embedded in brick, metal conduit or cinder block. Further Comments of Comcast, et al., at 27.

[411]Further Reply of Time Warner at 22-23; *see also* Further Reply of TCI at 14-15.

[412]Further Reply of Time Warner at 23; Further Reply of TCI at 15.

[413]Based on the record in this proceeding, it appears that cable operators and other entities planning to offer telephone service generally will do so by connecting to the existing telephone inside wiring network. *See, e.g.*, Time Warner Reply Comments at 2-3 ("Even as cable operators begin to deliver telephony services over their broadband networks, the actual telephone service delivered within the home or MDU residence will be over traditional "twisted pair" narrowband wiring"); NCTA Comments at 22; Cox Comments at 10-11; WinStar Comments at 5-8. Pursuant to Section 1.415(d) of the Commission's rules, we deny WinStar's Motion to Accept Late-Filed Comments. Reply comments in response to the *Inside Wiring Notice* closed April 17, 1996; Winstar's comments were filed on August 5, 1997. We will, however, consider WinStar's comments as informal comments under Section 1.419(b).

for at least the near future.[414] If and when circumstances change, we will revisit this issue with the goal of creating a single set of inside wiring rules.[415]

148. We are not prepared at this time to adopt DIRECTV's proposal that we could promote competition and consumer choice by having competing service providers share a single home run wire. The record reflects varied and contradictory perspectives that we cannot yet resolve. Several commenters have argued that transmitting competing services over a single wire is technically and/or practically infeasible.[416] DIRECTV acknowledges that its proposal has limitations, since only service providers that use different parts of the spectrum technically can share a single wire.[417] We do believe, however, that the technical, practical and economic feasibility of multiple services sharing a single wire deserves further exploration. We will therefore seek comment on DIRECTV's proposal in the *Second Further Notice*.

149. Nor at this time will we adopt any of the other proposals for modifying the cable demarcation point in MDUs (e.g., moving the demarcation point to the point at which it becomes dedicated to an individual subscriber). We reach no conclusions here on the merits of such proposed modifications. We believe that the procedures for disposition of MDU home run wiring adopted above address many competitive concerns that commenters proposed to address by moving the cable demarcation point.

150. We will, however, adopt our tentative conclusion that where the cable demarcation point is "physically inaccessible" to an alternative MVPD, the demarcation point should be moved to the point

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[414]*See, e.g.*, NCTA Comments at 22; Time Warner Reply Comments at 2-3 ("[E]ven as competitors begin providing additonal services over broadband networks, the inside wiring used to carry such services within the customer's dwelling unit will remain separate for the foreseeable future") (emphasis in original); SBC Reply Comments at 2; PacTel Comments at 2; New Jersey BPU Comments at 5-6; Cox Comments at 11 ("Even though cable operators and telephone companies are each finding it economical and desirable to upgrade their trunk plants with fiber optics, they are continuing to use coaxial cable to provide video and broadband services into and *inside* homes and MDUs and to use twisted pair copper inside wiring to provide telephone service. The costs associated with integrated broadband inside wiring to provide video programming and switched telephone service remain prohibitively high compared to the use of dual facilities. Furthermore, the existing dual wiring scheme is used in many millions of homes in the United States and it fully serves the needs of customers. There is no economic or technical incentive to change this scheme.") (emphasis in original).

[415]We note that, as a practical matter, the telephone demarcation point in new single family home installations may be located at a point outside of where the wiring enters the home, near the cable demarcation point. *See* Building Industry Consulting Comments at 2. Similarly, the points at which the telephone and cable inside wiring become devoted to individual multiple dwelling units may be at similar locations (e.g., in garden-style apartment buildings, such points may both be located in the basement of the individual buildings). While such examples may create a de facto convergence in many cases, so long as the cable and telephone inside wiring networks remain distinct, we do not believe that the Commission need require such a result.

[416]*See* Cox Comments at 19; Marcus Cable, et al., Comments at 6; Adelphia Comments at 5; CATA Comments at 4; TKR Comments at 5.

[417]*See* Further Comments of DIRECTV at 4-5, and attached Declaration of Robert J. Rothaus (DIRECTV signals and cable television signals can be carried simultaneously by a single wire because these signals occupy different frequency spectrums).

at which it first becomes physically accessible.[418] We clarify that this movement should be the closest point at which the wiring becomes physically accessible that does not require access to the subscriber's unit. Moving the demarcation point into the unit in such situations would add significantly to the disruption and inconvenience of switching service providers, contrary to the intent of Section 624(i).[419]

151. In addition, we will adopt a definition of "physically inaccessible" which asks whether accessing the demarcation point (1) would require significant modification or damage of preexisting structural elements, and (2) would add significantly to the physical difficulty and/or cost of accessing the subscriber's home wiring. For example, wiring embedded in brick, metal conduit or cinder blocks would likely be "physically inaccessible" under this definition; wiring simply enclosed within hallway molding would not.

E. Loop-Through Cable Wiring Configurations

1. Background

152. As described in the *Cable Home Wiring Further Notice*,[420] in a loop-through cable wiring system, a single cable is used to provide service to either a portion of or an entire MDU. Every subscriber on the loop is therefore limited to receiving video services from the same provider. If the cable is broken or removed, signals to all succeeding units are interrupted. In the *Cable Wiring Order*, we excluded MDU loop-through wiring from the cable home wiring rules, reasoning that applying our rules to loop-through wiring would give the initial subscriber control over cable service for all subscribers in the loop.[421] Because loop-through configurations are excluded from the home wiring rules, cable operators are not currently required to offer to sell the wire to subscribers upon termination of service, and no subscriber on the loop has the right to purchase that portion of the loop-through cable wiring located inside his or her dwelling unit. The ownership of loop-through wiring therefore currently depends on the circumstances (e.g., who installed the wire, whether the wire has been sold and state fixture law) and is not affected by our rules.[422]

153. On reconsideration in the *Cable Home Wiring Further Notice*, we maintained our decision to generally exclude loop-through wiring from our cable home wiring rules.[423] We found that inclusion

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[418]The presumptive demarcation point of at (or about) twelve inches outside of where the cable wire enters the subscriber's unit was adopted in the *Cable Wiring Order*, 8 FCC Rcd 1435 (1993).

[419]*See, e.g.*, Time Warner Reply Comments at 6 (noting that an exterior point of demarcation allows service connections and disconnections, as well as testing, without necessitating the presence of the resident to allow access to the interior of the home).

[420]11 FCC Rcd at 4579.

[421]*Cable Wiring Order*, 8 FCC Rcd at 1437.

[422]*Cable Home Wiring Further Notice*, 11 FCC Rcd at 4579.

[423]*Id.* at 4580.

of loop-through systems within these rules would be impractical, in part because establishing a separate demarcation point for each subscriber on a loop-through system and deciding how much wiring each subscriber should have the option to purchase are not feasible. Furthermore, loop-through configurations, by their nature, limit individual subscriber control, an essential element of the Commission's cable home wiring rules.

154. In the *Cable Home Wiring Further Notice*, we asked whether the Commission should require cable operators to allow MDU owners to purchase loop-through wiring in the limited situation where all subscribers in a building want to switch to a new service provider. We also asked for comment on whether we should apply the same rules regarding compensation and technical standards to loop-through wiring that we now apply to non-loop-through wiring, and on the appropriate demarcation point for this limited circumstance. We solicited comment on how to apportion control of a loop-through wiring system, including how to assure that subscribers have a choice of multichannel video programming service providers. We further requested comment on whether we should prohibit future installations of loop-through wiring configurations.[424]

155. Alternative video service providers generally support the Commission's proposal to allow MDU owners to purchase loop-through wiring in the limited situation where all subscribers in a building want to switch to a new service provider.[425] These commenters assert that allowing the MDU owner to purchase the loop-through wiring under these circumstances will further the purposes of Section 624(i) by fostering competition and promoting consumer choice to the greatest extent possible, given the limitations of loop-through wiring configurations.[426] Ameritech and USTA also contend that individuals

[424] *Id.* at 4582.

[425] *See* Ameritech Docket 92-260 Comments at 5 (except that it should not be restricted to situations where all subscribers agree); Bell Atlantic Docket 92-260 Comments at 2; Liberty Docket 92-260 Comments at 1-5; NYNEX Docket 92-260 Comments at 2-3; OpTel Docket 92-260 Comments at 4-6; PacTel Docket 92-260 Comments at 2; RCN Docket 92-260 Comments at 3; USTA Docket 92-260 Comments at 2 (only if individual tenant is permitted to install additional wiring and exercises independent choice); Bartholdi Docket 92-260 Reply Comments at 1; SNET Docket 92-260 Reply Comments at 12. *But see* GTE Docket 92-260 Comments at 4 (requiring all subscribers to agree is not workable; should "deregulate" and allow building owner to control).

[426] Ameritech Docket 92-260 Comments at 6 and Docket 92-260 Reply at 3, 6-7 (building owner has greater incentive to represent interests of subscribers and allowing operators to continue to control loop-through wiring further entrenches incumbent's monopoly status); Liberty Docket 92-260 Comments at 3, 5 (subscribers should have choice of service providers, but this is not possible with loop-through wiring, regardless of who owns the wire; issue is who should be the gatekeeper -- the cable operator or the building owner); NYNEX Docket 92-260 Comments at 3 (competition would be better served with building owner rather than cable operator in control); OpTel Docket 92-260 Comments at 5 (would foster competition and provide maximum degree of flexibility to subscribers); PacTel Docket 92-260 Comments at 2 (would enhance consumers' access and foster competition); RCN Docket 92-260 Comments at 3 (consistent with basic premise of 1992 Cable Act, i.e., to promote competition; would allow alternative providers the opportunity to compete); Bartholdi Reply Docket 92-260 Comments at 4.

should always have the right to obtain service from another service provider that is willing to dedicate a wire to the subscriber's unit.[427]

156. Cable operators, on the other hand, generally oppose the proposal, asserting that it is impractical,[428] that competition would not be served,[429] that consumer choice would be restricted[430] and that the Commission does not have the authority to establish such a rule.[431] NCTA further contends that

[427]Ameritech Docket 92-260 Comments at 7; USTA Docket 92-260 Comments at 2; *see also* NCTA Docket 92-260 Comments at 4-5 (if building owner is allowed to control the wiring, its rights should, at a minimum, be conditioned on its surrender of its right to exclude other service providers). *But see* Building Owners, et al., Docket 92-260 Comments at 12, 18 and n.8 (only way for subscriber to receive service from more than one provider is if alternative provider has access and runs its own wires; oppose any plan that would require building owners to admit any or all service providers).

[428]Cox Docket 92-260 Comments at 29-31 (impractical and would disrupt landlord/video service provider relationships); Time Warner Docket 92-260 Comments at 4 (rapid tenant turnover would create a constant state of confusion; ownership would be in constant flux); Time Warner Docket 92-260 Reply Comments at 5; *see also* Building Owners, et al., Comments at 14-16 (MDU building owners are fully capable of protecting their interests and do not need the Commission to do it for them; building owners should therefore not be required to purchase the cable home wiring). *But see* Bartholdi Docket 92-260 Reply Comments at 2 nn.5 & 6, 5.

[429]CATA Docket 92-260 Comments at 2 (competition would suffer; proposal is a government sponsored charade because wiring will really be controlled by cable competitor and cable operator will be precluded from offering other new services); Charter/Comcast Docket 92-260 Comments at 12-13; Cox Docket 92-260 Comments at 29-31 (would retard facilities-based competition); NCTA Docket 92-260 Comments at 2-4 (landlords and developers fiercely resist competitive access by franchised cable operators and cable operators will lose ability to market other services); Time Warner Docket 92-260 Comments at 6 (competition would not be fostered because building owner would have control); Time Warner Docket 92-260 Reply Comments at 3-4 and n.8 (if only one service can be offered over loop-through wiring, it should be the franchised cable service that installed the wiring in the first place).

[430]CATA Docket 92-260 Comments at 1-2 (building owner and cable competitor can bring too much pressure on subscribers); Guam Cable TV Docket 92-260 Comments at 5 (landlord should not be permitted to act as guardian or parent of tenant); NCTA Docket 92-260 Comments at 2-4 (landlords will act for their own enrichment and subscribers' wishes will be subordinated to the owner's; undermines rationale for allowing consumers to acquire wiring); Time Warner Docket 92-260 Comments at 5-6 (coercive and deceptive practices by alternative service providers and building owners are likely to increase); Time Warner Docket 92-260 Reply Comments at 4; *see also* New York City Docket 92-260 Comments at 4-5 (replaces one monopoly for another); New York DPS Docket 92-260 Reply Comments at 7-8. *But see* Ameritech Docket 92-260 Reply Comments at 9 (allowing building owner to purchase home wiring will not result in the owner choosing the provider that pays the highest premium, but will result in a variety of considerations, including price, features and quality).

[431]CATA Docket 92-260 Comments at 2-3 (illegal because wiring is outside "premises"); Time Warner Docket 92-260 Comments at 3-4 (legislative history says statute is not intended to cover common wiring); Time Warner Docket 92-260 Reply Comments at 3 (because loop-through wiring includes wiring within premises and in common areas, including such wiring within the Commission's rules is in direct contravention of Congress' intent); Time Warner Docket 92-260 Reply Comments at 6-7 (raises takings concerns because cable operator's entire distribution system would essentially be confiscated); *see also* Building Owners, et al., Docket 92-260 Comments at 1-3 (Commission authority under Section 624(i) is severely limited); TCI Docket 92-260 Comments at 4 (sole source of Commission authority is 1992 Cable Act and existing regulations adequately address this statutory requirement). *But see* OpTel Docket 92-260 Comments at 5 ("premises" is sufficiently broad to allow proposed rule); Bartholdi

such a rule will ensure that cable operators hesitate before wiring a building.[432] Cox asserts that contracts and state law should govern,[433] while Time Warner states that it is better to require each service provider to install its own wiring.[434] Charter/Comcast and Building Owners, et al., contend that, rather than focusing on the loop-through non-loop-through distinction, the Commission should be focusing on whether to apply the cable home wiring rules to MDUs at all.[435] Both parties assert that non-owner residents of MDUs should not have the right to purchase cable home wiring. Charter/Comcast believes that allowing the cable operator to retain control is the best way to ensure choice and that our wiring rules should not apply to rental buildings.[436] Charter/Comcast also asks that condominiums with bulk service arrangements be exempt from the Commission's home wiring rules.[437]

157. Alternative service providers also urge the Commission to apply the same compensation scheme (i.e., per-foot replacement cost) and technical standards for loop-through wiring as we do for non-loop-through wiring.[438] With respect to the demarcation point for loop-through wiring, commenters variously assert that it should be (1) the same as for non-loop-through configurations,[439] (2) at the

Docket 92-260 Reply Comments at 4 (Commission has ample authority under Title I to regulate all cable wiring, inside and outside; not limited by 1984 or 1992 Cable Acts).

[432]NCTA Docket 92-260 Comments at 3-4.

[433]Cox Docket 92-260 Comments at 29-31; *see also* Charter/Comcast Docket 92-260 Comments at 12 (state fixture law should always govern wiring in rental MDU buildings; owners of single family dwelling units, not tenants, should have right to purchase).

[434]Time Warner Docket 92-260 Comments at 6.

[435]Charter/Comcast Docket 92-260 Comments at 1; Building Owners, et al., Docket 92-260 Comments at 5.

[436]Charter/Comcast Docket 92-260 Comments at 11-12.

[437]*Id.* at 4-7.

[438]Ameritech Docket 92-260 Comments at 5; GTE Docket 92-260 Comments at 5-6; Liberty Docket 92-260 Comments at 1-2; NYNEX Docket 92-260 Comments at 3; PacTel Docket 92-260 Reply Comments at 2 (New York City is wrong when it states that loop-through wiring is more expensive). *But see* CATA Docket 92-260 Comments at 3 (replacement cost would not be just compensation); New York City Docket 92-260 Comments at 5-6 (per-foot replacement cost is impractical because it does not account for substantial additional cost of constructing loop-through systems).

[439]Ameritech Docket 92-260 Comments at 5; Ameritech Docket 92-260 Reply Comments at 5-6 (demarcation point should be the same, with general exceptions -- should be 12 inches from the point of entry to the building, provided that the point is reasonably accessible to competing service providers).