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November 17, 1997

BY HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Stop Code - 1170
Washington, D.C. 20554

Re: **Petition for Reconsideration of the NCCTA**
CS Docket No. 95-184/MM Docket No. 92-260

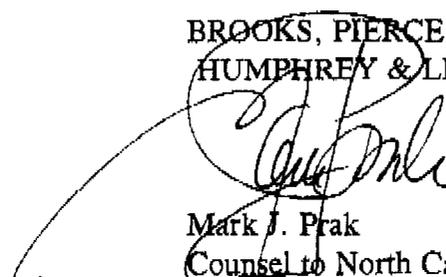
Dear Ms. Salas:

Transmitted herewith, on behalf of the North Carolina Cable Telecommunications Association, are a facsimile of an original and eleven copies of its Petition for Reconsideration to be filed in the above-referenced matter.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with this office.

Very truly yours,

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.


Mark J. Prak
Counsel to North Carolina Cable
Telecommunications Association

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

PETITION FOR RECONSIDERATION
OF THE NORTH CAROLINA CABLE
TELECOMMUNICATIONS ASSOCIATION

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November 17, 1997

**Before the
FEDERAL COMMUNICATIONS COMMISSION
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**PETITION FOR RECONSIDERATION
OF THE NORTH CAROLINA CABLE
TELECOMMUNICATIONS ASSOCIATION**

Pursuant to Section 1.429 of the Commission's Rules (47 C.F.R. § 1.429), the North Carolina Cable Telecommunications Association ("NCCTA") petitions for reconsideration of the Commission's Report and Order and Second Further Notice of Proposed Rulemaking, FCC 97-376 (Released: October 17, 1997) (the "Report and Order"), regarding cable home wiring. The Report and Order, which was adopted on October 9, 1997, did not consider the public policy arguments contained in the reply comments filed by NCCTA on October 6, 1997. In their haste to eliminate this issue from the Commission's regulatory agenda, the departing Commissioners have done consumers a disservice.

I. Introduction

The Commission has undertaken an ill-considered regulatory change with regard to its cable inside wiring rules. Out of a desire to promote what it sees as "competition," the Commission has adopted rules affecting inside wiring in multiple dwelling unit ("MDU") buildings that would deny consumers residing in MDUs the opportunity to choose cable programming as their video product of choice. Under these new rules, the Commissioner would enrich MDU building owners while denying their residents the ability to receive public, educational, and government access channels, local television signals, and emergency information. Unlike other multi-channel video providers, cable operators are required by law to carry all of the above types of video programming because of their presumed public interest importance.

The net result of the implementation of the Commission's new rules will be that MDU owners -- concerned not about their tenants as the Commission naively believes -- will remove cable operators from their buildings and enter into exclusive contracts with alternative video providers. Because North Carolina has no access-to-premises legislation, MDU owners in our state can, and do, attempt to dictate their tenants' video choices. *This clearly is not competition that will benefit consumers.* Instead, the Commission, by putting its regulatory "thumb on the scale," will simply shift subscribers from one video provider to another *without any opportunity for consumer choice.* Only facilities-based competition can provide true consumer choice for individual tenants.

Tragically, what will be lost under the Commission's new rules will be the ability of citizens, who happen to live in an MDU, to watch meetings of their local city council or county commission on public access channels provided, at significant cost, by their franchised local cable operator. In addition, persons residing in MDUs will be cut out of the Commission's new Emergency Alert

System ("EAS") because *the newly adopted EAS rules do not apply to SMATV operators*.¹ Given the Commission's observation that MDUs account for some 28% of the housing market in the United States, these public interest considerations are not insubstantial. One searches the Report and Order in vain for any indication that the Commission even considered these important public policy considerations. Haste lays waste they say.

Finally, the Commission should reconsider the Report and Order because the new rules are plainly inconsistent with Chairman William E. Kennard's recently articulated three-part test for evaluating policy choices.² As the Chairman stated in his confirmation hearing before the Commerce, Science, and Transportation Committee in the Senate, "competition must not be the goal in itself. It is the FCC's job to work with Congress to make sure that competition serves consumers." (emphasis added). This Petition demonstrates that the "competition" generated by the new rules will not serve consumers, but will serve only the financial interests of MDU owners. Next, the Chairman stated in his testimony that "communications should serve communities." The new rules, however, will actually hurt communities by restricting the access of MDU residents to public access channels, EAS warnings and, in some cases, the signals of local television stations. Finally, the Chairman emphasized the importance of "common sense": "The Commission's rules . . . should be practical and reflect an understanding of the markets and businesses they affect . . . [and] be in touch with people's real needs and daily demand." As this Petition demonstrates, the

¹ Emergency Alert System, Second Report and Order, FCC 97-338 (Released: September 29, 1997), p. 23, ¶ 42.

² Statement of William E. Kennard, Confirmation Hearing Before the Commerce, Science, and Transportation Committee of the U.S. Senate, October 1, 1997, p. 2.

new rules ignore market realities and will do nothing to promote competition that benefits consumers by giving them a choice.

In light of the above, the Commission should reconsider the rules set forth in the Report and Order and eliminate revised paragraphs (a) and (g) and paragraph (l) from Section 76.802; and paragraphs (a)(1)-(4), (b)(1)-(4), (c), and (e) from Section 76.804.

II. The Commission's Proposal Does Not Reflect the Reality That MDU Owners Have a Significant Anti-Competitive Incentive to Keep the Operators' Home Run Wiring and Maintain an Exclusive Relationship With Only One Video Provider

In the Report and Order, the Commission appears willing to accept at face value the claims of MDU building owners that competition in the rental housing market will prevent them from manipulating the provision of video services to their tenants' detriment. This naive belief misapprehends the elasticity of demand for video services as a component of a tenant's decision as to where to live. A tenant who is a party to a lease does not always have the ability to move his or her residence just because a landlord decides to bring in a new video provider. The fact is that MDU owners are going to meetings and conventions where they are learning about the money they can make by charging video programming and telecommunications providers substantial sums of money for access to their MDUs. Because these "doorbuster" fees have nothing to do with promoting consumer welfare, the Commission should recognize that the MDU industry is spinning a canard when it suggests that aesthetics are somehow a barrier to facilities-based competition.

In the Further Notice of Proposed Rulemaking released on August 29, 1997, the Commission asserted that a cable operator doing business in North Carolina had failed to cite any example of two-wire competition in our state.³ The fact is that, as the result of state court litigation this past year, an MDU owner in Durham, North Carolina, has post-wired its buildings to allow two-wire competition with the local cable company. This result came about only after the MDU owner understood that the incumbent, franchised cable operator was not going to leave without a judicial determination of its rights under its contract. As a result, consumers in this MDU are now plainly

³ Further Notice of Proposed Rulemaking, p. 16, ¶ 29.

better off because they not only have access to the incumbent cable operator, but also have a choice of video service providers. Not surprisingly, the landlord's business plan was to simply bundle cable in as a part of the rent and force the tenants to accept the landlord's video product.

The fact is that landlords will allow for a second wire if they think they can make money from it. Facilities-based competition, therefore, is absolutely critical to attaining competitive choice. Because the new rules will encourage MDU owners to stifle competition, these rules fail the Commissioner's "competition serving consumers" test.

III. The Commission's Proposal Will Enable MDU Owners to Enter Into Exclusive Contracts with Alternative Video Providers That Do Not Carry Public Access Channels, Transmit Emergency Alert Signals, or Carry the Signals of Local Television Stations

The law requires cable operators to carry certain programming such as PEG access channels, local television stations, and EAS transmissions to serve the public interest. Under Section 611 of the Communications Act, a franchising authority may establish requirements for a cable franchise with respect to "the designation or use of channel capacity for public, educational, or governmental use." 47 U.S.C. § 531(a) (1996). In addition, the franchising authority may designate channel capacity for public, educational, or governmental use. 47 U.S.C. § 531(b) (1996). Cable operators are also required to carry the signals of certain commercial and non-commercial television stations. 47 U.S.C. §§ 534(a), 535(a) (1996) (requiring *inter alia* that each cable operator carry the signals of certain local commercial and qualified noncommercial educational television stations); 47 U.S.C. § 535(l) (1996) (defining "qualified noncommercial educational television stations" as "owned and operated by a public agency, nonprofit foundation, corporation, or association"); 47 C.F.R. § 76.56;

see also Turner Broadcasting System v. FCC, 113 S.Ct. 2445, 123 L.Ed.2d 642 (1993) (finding 47 U.S.C. § 535 to be "presumptively constitutional").

Congress has yet to impose the same public service obligations on alternative video providers such as SMATV operators. As discussed above, after terminating an incumbent cable operator, the Commission's rules give a MDU owner a tremendous financial incentive to enter into an exclusive contract with a SMATV operator. If this occurs, the residents of the MDU will be denied access to public interest programming that cable operators are required to provide pursuant to the Communications Act. Surely the Commission cannot intend such a result. This policy outcome is clearly contrary to the public interest, and fails Chairman Kennard's "communications serving communities" and "common sense" tests.

IV. The Commission Lacks Jurisdiction to Adopt Rules Regulating the Disposition of Home Run Wiring

The Commission lacks jurisdiction to adopt rules regulating the disposition of home run wiring.⁴ Section 624(i) of the Communications Act of 1934 specifically directs the Commission to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber." 47 U.S.C. § 624(i) (emphasis added). Home run wiring, however, plainly does not constitute wiring "within the premises" of a subscriber. Because the Commission seeks to regulate the disposition of MDU wiring

⁴ See September 25, 1997, Comments filed separately by US West, Inc., pp. 4-6; National Cable Television Association, Inc., pp. 6-10; Cable Telecommunications Association, pp. 3-9; Tele-Communications, Inc., pp. 4-8; Jones Intercable, et al., pp. 2-4; and Time Warner Cable, pp. 49-62.

located outside a subscriber's premises, the rules clearly exceed its authority delineated in section 624(i).

The Commission, moreover, cannot rely on its general rulemaking authority found in sections 4(i) or 303(r) of the Communications Act as a basis for regulating the MDU wiring outside the subscriber's premises. Section 4(i) states that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions," whereas Section 303(r) permits the Commission 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." Unlike section 624(i), neither section 4(i) nor 303(r) makes an explicit reference to the disposition of wiring after a subscriber terminates an operator. Thus, the Commission has only a weak statutory basis for overriding Congress' specific limitation on its authority to regulate the wiring found "within the premises of such subscriber."

V. State Courts Are the Proper Entities to Determine Whether an Incumbent Operator Has a Right to Keep its Home Run Wiring on the Premises After Termination

The Commission states that the new rules will pertain only to those incumbent operators that lack a cognizable legal right to remain in an MDU. Assuming the Commission actually has the jurisdiction to issue these rules, the threshold question is whether the incumbent operator has an enforceable legal right to remain on the premises after termination. This question, as with most issues involving property and contract rights, is a matter of state substantive law. Obviously, the Commission lacks the expertise and the resources to render determinations in up to fifty states whether operators retain a legally enforceable right to remain on the premises after termination.

Accordingly, a cable operator should be entitled to initiate a state court proceeding to demonstrate that it has an enforceable right to remain on the premises.⁵

In light of the above, the Commission should reconsider its presumption in the new rules not to stay its procedures until all judicial proceedings in state court are terminated.⁶ It is simply not the province of the Commission to establish such a sweeping presumption when an operator's property and contract rights lie in the balance. After all, no presumption can account for the nuances and variations contained in the laws of the fifty states. For example, many cable operators enjoy a right of access by virtue of independent written easements, which vary significantly from state to state. A generic presumption would seriously prejudice an operator's rights and constitute a violation of the guarantee of Due Process Clause of the United States Constitution.

In addition, the existence of the state court process will facilitate the development of facilities-based competition. MDU owners, faced with having to allow the incumbent cable operator to remain will simply build their own facilities to create competition. This is precisely what has happened in litigation with which the undersigned counsel is familiar.⁷

⁵ See September 25, 1997, Comments filed separately by National Cable Television Association, Inc., pp. 14-20; Tele-Communications, Inc., pp. 12-15; Jones Intercable, *et al.*, pp. 12-15; and Adelphi Cable Communications, *et al.*, pp. 8-10.

⁶ Report and Order, p. 40, ¶ 77.

⁷ See supra note 3 and accompanying text.

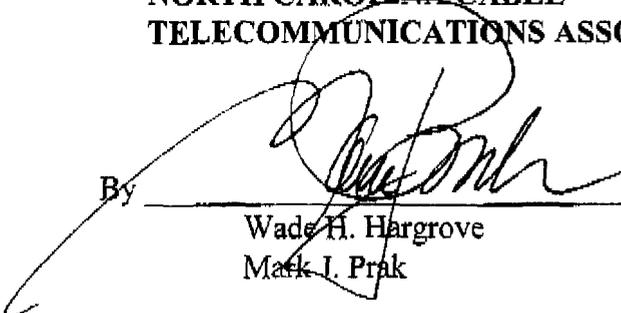
Conclusion

The Commission's revisions to the inside wiring rules clearly fail the Chairman's simple and logical three-part test which emphasizes "competition serving consumers," "communications serving communities," and "common sense." Whatever the Commission does, its first mission should be to "do no harm." The rules contained in the Report and Order, however, do considerable harm to those citizens who reside in MDUs and therefore merit reconsideration.

For the reasons discussed above, the Commission should eliminate revised paragraphs (a) and (g) and paragraphs (l) from Section 76.802; and paragraphs (a)(1)-(4), (b)(1)-(4), (c), and (e) from Section 76.804.

Respectfully submitted,

**NORTH CAROLINA CABLE
TELECOMMUNICATIONS ASSOCIATION**

By 

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Its Attorneys

November 17, 1997

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