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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission

PETITION FOR RECONSIDERATION OF MEDIA ACCESS PROJECT AND CONSUMER FEDERATION OF AMERICA

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Media Access Project and Consumer Federation of America ("MAP/CFA") respectfully submit this Petition for Reconsideration of the Commission's *Report and Order and Second Further Notice of Proposed Rulemaking*, FCC No. 97-376 (released October 17, 1997)("*R&O*") in the above captioned proceeding. In the *R&O*, the Commission adopts changes in its rules governing, *inter alia*, the disposition of cable home run wiring[1] and home wiring[2] in multiple

[1]In MDUs with non-loop-through wiring configurations, subscribers have a dedicated line, the "home run," running to their premises from a common "riser" or "feeder line" that serves as the source of video programming signals for the entire MDU. *R&O* at ¶12. The home run wiring starts from the point at which the wiring becomes dedicated to serving an individual subscriber's unit to the "demarcation point" (currently set at 12 inches outside of where the wiring enters the subscriber's home or individual dwelling unit). *Id.*

dwelling units ("MDUs"). *R&O* at ¶2.

In this petition, MAP/CFA seek reconsideration of several portions of the *R&O* which establish rules for the disposition of home run wiring and cable home wiring. In particular, MAP/CFA seek reconsideration of the Commission's decisions to (1) place control of the disposition of MDU wiring in the hands of landlords as opposed to viewers; (2) give incumbent multichannel video programming distributors ("MVPDs") the choice of removing home run wiring prior to offering it for sale to competitors; and (3) refuse to preempt state mandatory access statutes or otherwise apply inside wiring rules in MDUs where the incumbent has a statutory right to remain on the premises. These new rules conflict with the statutory language of Section 624(i), one of the sections of the 1992 Cable Act upon which the Commission relies for jurisdiction, as well as fundamental First Amendment principles. Moreover, by adopting these rules, the Commission has arbitrarily forsaken the mandate of the Telecommunications Act of 1996 ("1996 Act") by failing to promote competition in the MVPD market and provide greater subscriber choice. Instead, the Commission should promulgate rules which rightfully empower subscribers to make the choice among MVPDs, which will lead to the kind of competition Congress intended in passing the 1996 Act.

I. INTRODUCTION AND SUMMARY

This proceeding is vitally important to promote the First Amendment rights of citizens and to ensure the effective functioning of democracy. By placing control over MDU cable wiring

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[2]The Commission has defined "cable home wiring" as "the internal wiring contained within the premises of a subscriber which begins at the demarcation point not including any active elements such as amplifiers, converter or decoder boxes, or remote control units." *R&O* at ¶11 n. 37.

in the hands of MDU owners, as opposed to viewers, the Commission has erroneously misconstrued the statutory provision upon which it relies for jurisdiction, gives inadequate weight to underlying First Amendment principles, and has arbitrarily ignored clear evidence that these rules will be injurious to competition. Instead, the Commission has treated this proceeding as a mere balancing of the property rights of landlords on the one hand and the competitive interests of MVPDs on the other. Its calculations exclude the most important rights of all - those of the public.

The Commission's misinterpretation flows from its failure to recognize that citizens have the primary First Amendment interest at issue here. Their right to choose among a diverse array of information sources is the "paramount" goal of the public interest standard which governs the Commission's decisionmaking. The importance of this right to choose among various speakers cannot be overstated; it resonates with principles that lie at the heart of an equitable society and representative democracy. Under the Commission's *R&O*, however, ***more than one-third of Americans living in MDUs will be denied the right to choose among MVPDs***. *See* discussion below at 18 n.13. In their place, the Commission has substituted a third party - the MDU owner - which it empowers to make self-serving determinations whether a subscriber can receive service from alternative MVPDs. Even in those cases where the owner does allow an alternative MVPD to provide service, MDU dwellers will be subject to the ***owner's*** choice of providers.

The Commission's *R&O* also grievously errs by failing to consider this proceeding in light of the pro-competitive goals Congress recently expressed in Section 207 of the Telecommunications Act of 1996 ("1996 Act"). In Section 207, Congress sought to promote a level playing field for DBS, MMDS, and broadcast television, and to ensure the ability of all citizens freely to

receive these services, by directing the Commission "to prohibit restrictions that impair a viewer's ability to receive video programming" through over-the-air reception devices. 1996 Act, §207. As MAP/CFA and other parties have urged previously, these inside wiring rules are an essential part of, and should be considered in light of, the Commission's pending proceeding to implement Section 207. *E.g.*, 1997 MAP/CFA Comments at 4-7; Further Comments of Philips Electronics North America Corp. and Thomson Consumer Electronics, Inc. at 10-11; Further Comments of DirecTV, Inc. at 4. *See Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, CS Docket No. 96-83 and IB Docket No. 95-59, 11 FCC Rcd 19276 (1996).

Similarly, the *R&O* fails to promote competition by allowing the incumbent operators to remove the existing home run wiring without first offering it for sale to the MDU dweller, the alternative MVPD, or the MDU owner. The possibility of removal of this wiring, which would threaten to cause prolonged disruption to common areas of the MDU and even aesthetic or structural damage, could be enough to deter MDU owners from switching MVPDs.

Finally, the *R&O* does not promote competition because it does not apply inside wiring rules in cases where the incumbent has a statutory or contractual right to remain on the premises. In doing this, the Commission is foreclosing the benefits of competition to MDU dwellers in 17 states and many more MDUs in which owners have given incumbents contractual access rights.

The *R&O* not only misconstrues the statute and ignores the First Amendment, but it does so arbitrarily. The Commission has failed to give adequate weight to another alternative, which would place choices properly in the hands of viewers without violating the property rights of MDU owners. That alternative is to move the broadband inside wiring demarcation point to the

point at which it first becomes distinguishable from the common line. This would allow multiple MVPDs to install riser cable and attach to the subscriber's wiring at an easily accessible location, and it would not injure the MDU owner's property rights. Although numerous parties have addressed this option at length at various times in this proceeding, the Commission has failed to offer any reason as to why it favored the home run wiring rules in lieu of this proposal. *See R&O* at ¶149.

Thus, MAP/CFA urge the Commission to promulgate inside wiring rules which remain true to the vision recently espoused by Chairman Kennard:

> Our job at the FCC is to break down barriers to choice.***Common sense tells us that where there is real choice, competition is working and the consumer is king. In fact, competition means that the consumer must have certain fundamental rights in the telecommunications marketplace:
>
> - Consumers must have the right to choose providers - from as wide a variety of providers as the market will bear.
> - Consumers must be able to move from one provider to the other.***
>
> This could be called a Consumer Bill of Rights for Telecom Competition.

William Kennard, Remarks to Practicing Law Institute, (December 11, 1997)(available on FCC website at http://www.fcc.gov/Speeches/Kennard/spwek702.html). Although these remarks were made regarding common carrier competition, they ring equally true - and even more so - when applied to competition and citizen choice among MVPDs.

II. THE *R&O*

The Commission's *R&O* is premised on its determination that "more is needed to foster the ability of subscribers who live in MDUs to choose among competing service providers." *R&O* at ¶35. Specifically, it noted that MVPDs frequently have difficulty obtaining access to the MDU to run additional home run wires to subscribers' units because the MDU owner objects to the installation of multiple sets of home run wiring in the hallways of the property. *Id.* It

adopted the *R&O* in hopes that it would "bring order and certainty to the disposition of MDU home run wiring upon disposition and service." *Id.* at ¶39.

The new procedures for the disposition of home run wiring apply only in those instances in which the incumbent MVPD no longer has an enforceable legal right to remain on the premises, such as a mandatory access statute, a contractually-created right, or a right created under common law. *R&O* at ¶¶41, 49. In those cases, the MDU owner has a choice whether to convert the entire building to a new MVPD, or to allow multiple MVPDs to compete side-by-side for individual units. *Id.* If the owner selects the building-by-building scenario, the incumbent must then elect whether to remove the home run wiring and restore the MDU to its prior condition, abandon and not disable the wiring, or sell the wiring to the MDU owner. *Id.* at ¶41. If the owner selects the unit-by-unit scenario, the incumbent must make a choice, which binds all future subscriber switches, whether it will remove, abandon, or sell the home run wiring dedicated to the individual units. *Id.* at ¶49. MDU dwellers will have the ability to choose their MVPD only in those cases where the incumbent has no right to remain and where the owner chooses to proceed under the unit-by-unit provision. *See generally R&O*.

The *R&O* also adopts new procedures for the disposition of cable home wiring in both building-by-building and unit-by-unit switches. In cases where the MDU owner terminates service for the entire building, the *R&O* gives the owner (or if the owner declines, the alternative provider) - and not the MDU dweller - the opportunity to buy the home wiring, except in units where the resident already owns it. *R&O* at ¶¶116-18. The Commission declines to allow individual residents to purchase the home wiring because it believes that it would be "impractical

and inefficient for the incumbent provider to deal with each individual subscriber." *Id.* at ¶116.[3] In unit-by-unit switches, however, the terminating subscriber (or, if the subscriber declines, the MDU owner) may purchase the home wiring. *Id.* at ¶122.

III. THE COMMISSION HAS ERRONEOUSLY INTERPRETED THE PROVISIONS OF SECTION 624(i) OF THE 1992 ACT AND SECTION 207 OF THE 1996 ACT.

The Commission bases its jurisdiction to adopt the new home run and cable home wiring rules on its conclusion that they are consistent with Section 624(i) of the 1992 Cable Act. *R&O* at ¶¶92-95. While MAP/CFA agree that Section 624(i) is a proper and adequate basis for the Commission's jurisdiction, 1997 MAP/CFA Reply Comments at 3-9, the Commission's decision to place control of the disposition of MDU inside wiring in the hands of MDU owners ignores the plain language of Section 624(i) and the clearly expressed Congressional intent to give ***subscribers*** - not their landlords or condominium associations - a right to choose among MVPDs.

Section 624(i) reads, in part,

> the Commission shall prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber.

1992 Cable Act, Section 624(i), *codified at* 47 USC §544(i). This statutory language discusses only the "***subscriber*** to a cable system terminat[ing] service," not the MDU owner. 47 USC §544(i)(emphasis added); 1997 MAP/CFA Comments at 17. Landlords and condominium associations are not "subscribers", tenants are. Congress could have written Section 624(i) for

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[3]In making this determination, the Commission not only misconstrued the plain language of Section 624(i), *see* discussion below at 7-8, but it failed to give any consideration to MAP/CFA's observations that: (1) determining whether individual subscribers wish to purchase their home wiring is very similar to the billing, installation, and service functions MVPDs already perform, and (2) MVPDs will still have to perform this determination for unit-by-unit switches and single dwelling unit properties. 1997 MAP/CFA Comments at 18.

MDU owners instead of their tenants, for example by using "property owner" instead of "subscriber." It did not. In creating this right out of thin air, the *R&O* oversteps agency authority and perverts Congressional intent.

Even if there were ambiguity in the plain language, it is resolved by clear evidence of Congressional intent that is flatly inconsistent with the Commission's interpretation of the statute. As MAP/CFA note in their 1997 Comments, both houses of Congress explicitly and clearly stated their intent to provide ***individual subscribers*** with the option to purchase home wiring. 1997 MAP/CFA Comments at 17. The Senate Commerce Committee stated that it was addressing what happens to inside wiring "when a ***subscriber*** terminates service." S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991) at 23 ("S. Rep.")(emphasis added). It took notice of Commission policy allowing "consumers" to remove and have access to telephone wiring, and it directed that "this is a good policy and should be applied to cable....[T]he FCC should extend its policy to permit ownership of the cable wiring by the homeowner." S. Rep. at 23.[4] Similarly, the House Energy and Commerce Committee stated its belief that "***subscribers*** who terminate service should have the right to acquire wiring...." H.R. Rep. No. 102-628, 102d Cong., 2d Sess. (1992) at 118 ("H.R. Rep.")(emphasis added).

Indeed, the Commission's rules contradict its ***own*** reading of Section 624(i). Even though the new rules fail to empower MDU dwellers to choose among MVPDs, elsewhere in the *R&O*

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[4]It should be noted that nowhere in this discussion does the Senate Report distinguish between homeowners and renters. *See generally* S.Rep. at 23. Indeed, the Senate Report stated that it was that body's intention to extend the policy for telephone inside wiring to cable inside wiring, and control over telephone wiring in MDUs had rested with the MDU dweller and not the owner. This indicates that the Senate wanted to give MDU dwellers, not owners, control over the disposition of cable inside wiring.

the Commission recognizes that Section 624's "underlying purpose" is to "promot[e] consumer choice and competition by permitting ***subscribers*** to...receive an alternative video programming service." *R&O* at ¶36, 94 (emphasis added). It has declared that "Congress intended for Section 624(i) to ***promote individual subscriber choice whenever possible***." *FNOPR* at ¶81 (emphasis added). In the *R&O*, it states, "We continue to believe...that more is needed to foster the ability of ***subscribers*** who live in MDUs ***to choose*** among competing service providers," *R&O* at ¶35, and asserts that it wishes to "promote competition and ***consumer choice***." *Id.* at ¶39 (emphasis added). The Commission's rules already promote this choice for non-MDU subscribers and in MDUs where the owner chooses to switch on a unit-by-unit basis. *1996 Inside Wiring Further Notice*, 11 FCC Rcd 4561. It would be arbitrary and capricious for the Commission to leave the choice to landlords, since landlords are not "individual subscribers" under any possible construction, and giving them discretion does not promote "consumer choice."

IV. THE COMMISSION'S *R&O* FAILS TO CONSIDER, LET ALONE PROMOTE, THE FIRST AMENDMENT RIGHTS OF MDU RESIDENTS TO CHOOSE AMONG A VARIETY OF EDITORIAL VOICES.

By placing control over a viewer's choice of MVPDs in the hands of MDU owners, the Commission's *R&O* arbitrarily fails to consider that in this proceeding, as in any exercise of Commission's authority relating to the mass media, it must place the needs and interests of ***viewers*** before the interests claimed by MDU owners and assorted industry competitors. This ordering of the Commission's priorities has been fixed as a matter of well-established constitutional law. Moreover, the primacy of the rights of viewers is intrinsic to, and inseparable from, the Commission's statutory mandate to serve the public interest. 47 USC §§303 (sets out Commission's powers and duties in broadcast regulation to be exercised "as public convenience, interest,

or necessity requires"); 521(4). *Cf. U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

The First Amendment affords viewers the right to choose among a diverse range of speakers. MVPD subscribers, specifically, have a right to choose among a variety of editorial packages provided by different services. To that end, Congress has found and reiterated that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§2(a)(6) ("1992 Cable Act"). Echoing prior sentiments, Congress defined these goals to include assurance that cable provides "the widest possible diversity of information sources and services to the public" and "to promote competition in cable communications...," 47 USC §§521(4), (6), and stated that its policy was to "promote the availability ***to the public*** of a diversity of views and information through cable television and other video distribution media." 47 U.S.C. at §2(b)(1) (emphasis added).

Time and time again, the Supreme Court has asserted the First Amendment principle that government should ensure that citizens can choose from the "widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). It has held that "the people as a whole retain their interest in free speech...and their collective right to have the medium function consistently with the ends and purposes of the First Amendment...It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969). *See e.g., Metro Broadcasting v. FCC*, 497 U.S. 547, 567 (1990)("[I]ntegral component" of FCC's mission is to safeguard the public's right to receive a diversity of views and information); *FCC v. National*

Citizens Comm. for Broadcasting, 436 U.S. 775, 795 (1977)(consistent with statutory scheme for Commission to allocate licenses to promote diversification of the mass media as a whole); *US v. Midwest Video Corp.*, 406 U.S. 649, 667 (1971)(Upholding FCC regulation of cable in order to, *inter alia*, promote "long-established" regulatory objectives of "increasing the number of outlets for...self-expression and augmenting the public's choice of programs and types of services")(citation omitted).

The Court has found that these principles carry no less weight today. In the cable context,[5] the Court has only recently found that:

> [A]ssuring that the public has access to a multiplicity of information sources is ***a governmental purpose of the highest order***, for it promotes values central to the First Amendment. Indeed, it has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is ***essential to the welfare of the public***.'

Turner Broadcasting System v. FCC, 114 S.Ct. 2445, 2470 (1994), *quoting Associated Press v. United States*, 326 U.S. 1, 20 (1945) (citation omitted, emphases added). *See also Turner Broadcasting System v. FCC*, 117 S.Ct. 1174, 1187-88 (1997)(goal of providing diversity of information sources is not satisfied by limiting alternatives to a bare minimum).

The D.C. Circuit has recently endorsed the importance of the goal of promoting citizen choice from among a multiplicity of information sources. In upholding the provisions of the 1992 Cable Act that require DBS operators to reserve a portion of their channel capacity for noncommercial educational and informational programming, the D.C. Circuit relied upon the fact that "[a]n essential goal of the First Amendment is to achieve 'the widest possible dissemination of

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[5]This is the same principle which, in the broadcasting context, impelled the Court to declare that, "[i]t is the right of the viewers and listeners...which is paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

information from diverse and antagonistic sources'....This interest lies at the core of the First Amendment." *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 975 (1996)(citations omitted).

The Commission's *R&O*, however, erroneously places citizens' First Amendment rights ***last,*** leaving MDU residents with virtually no ability to choose between MVPDs. Instead, it confers exclusive power to choose among MVPDs upon landlords and condominium associations. MDU dwellers will be deprived of their rights simply because they cannot afford, or choose not to own, their own houses.[6] They may be forced to buy the incumbent MVPD's service or the owner's choice of alternative services, even though it may offer less diversity and or fail to meet their needs for specific, niche programming readily available from other competing MVPDs.

V. THE COMMISSION'S *R&O* ERRONEOUSLY FAILS TO CONSIDER THE MDU INSIDE WIRING RULES IN LIGHT OF SECTION 207 OF THE 1996 ACT.

Several parties, including MAP/CFA, urged the Commission to consider the inside wiring rules in conjunction with Section 207 of the 1996 Act, which requires the Commission to "prohibit restrictions that impair a viewer's ability to receive video programming services" by means of antennas and DBS dishes. 1996 Act, §207. *See* 1997 MAP/CFA Comments at 4-7; 1997 Philips/Thomson Comments at 10-11; 1997 National Association of Broadcasters Comments. These parties asserted that whatever the Commission has done, or will do in the future, under Section 207 to prohibit local regulations and private restrictions that inhibit viewers from receiving video programming through DBS dishes, MMDS or over-the-air broadcast antennas, will be rendered useless if it does not also make home run and home wiring readily available

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[6]In the case of condominiums, even those viewers that do own their property outright will be denied their right to choose.

to subscribers. *Id.* In addition, several of these parties argued that rules that do not make wiring easily accessible violated Section 207's plain language mandate that the Commission "prohibit restrictions that impair a viewer's ability" to receive different video services. *E.g.*, 1997 MAP/CFA Comments at 6; 1997 Philips/Thompson Comments at 10-11.

In the *R&O*, however, the Commission quickly dismisses these parties' concerns solely on the basis that Section 207 is "the subject of an ongoing Commission proceeding." *R&O* at ¶36 n. 106. But that merely states the obvious - the entire thrust of MAP/CFA and others' arguments was that even though the Section 207 proceeding is separate, the Commission could not promulgate its inside wiring rules without at least considering the effect they would have on its Section 207 proceeding. The *R&O* completely fails to address this concern, nor does it address how its new rules are consistent with the plain language of Section 207.

Thus, the Commission erred in not considering the effect of its inside wiring rules on its implementation of Section 207. It has also erred in promulgating rules that violate the plain language of Section 207. As discussed throughout this Petition, the Commission's decision to give MDU owners control over what tenants watch necessarily will "impair a ***viewer's*** ability to receive video programming services" of their choice.

VI. THE ORDER ABUSES COMMISSION DISCRETION BECAUSE IT WOULD FRUSTRATE THE ESTABLISHED PUBLIC POLICY GOALS OF CONGRESS IN PROMOTING COMPETITION AND PROVIDING COMMUNICATIONS SERVICES TO ALL AMERICANS.

As noted above, the *R&O* would deprive most, if not all, MDU dwellers of the statutorily guaranteed right to exercise choice among sources of video programming and information. This represents an abuse of Commission discretion because it would conflict with the pro-competitive

purpose of the 1996 Act. *See e.g.*, 1996 Act, Preamble.[7] Similarly, it would obstruct the Congressional goal of expanding the public's access to telecommunications services, a goal that was meant to apply to "***all*** Americans," not just homeowners. *Id.* at preamble, §254.

Congress explicitly resolved that it would rely upon competition, rather than direct regulation, to provide for viewer choice. This determination comports with the Supreme Court's declaration that there is "always" a "substantial" government interest in eliminating restraints on fair competition, even when the anticompetitive individual or entity is engaged in expressive activity. *Turner Broadcasting System*, 114 S.Ct. at 2470. *See also FCC v. NCCB*, 436 U.S. at 795 (Commission is permitted to take antitrust policies into account in making licensing decisions pursuant to the public interest standard). The Commission's *R&O*, however, abandons these determinations - and its own, as discussed above at 8-9 - by foreclosing MDU dwellers from the benefits of competition.[8]

A. The *R&O* Fails To Give Adequate Weight To The Goal Of Promoting Consumer Choice And MVPD Competition.

In the multichannel video market, cable remains the Goliath to the David that is DBS and

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[7]The conference report stated that the Act was designed "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition...." S. Conf. Rep. 104-230, 104th Cong., 2d Sess. preamble (1996)("1996 Act, Preamble").

[8]The effects will be felt not just by MDU dwellers, but by all Americans. This is because, as competing programmers and MVPDs are closed out of fully one-third of their potential market, they may be driven out or persuaded not to enter. *See* discussion below at 15-16. Long-hoped-for competition may never develop under such a scenario.

MMDS.[9] If the Commission cares about promoting a truly competitive environment, it should adopt rules ***promoting*** these fledgling competitors, instead of allowing landlords to hinder them. The *R&O* fails even to consider this goal, much less to promote it. Instead, it forecloses MDU dwellers from sharing in any of the benefits competition could bring, for the sole reason that their economic status or housing preference caused them to rent instead of owning their homes. As a result, many of these citizens will be deprived of their preferred sources of information, face higher subscription fees and installation charges,[10] or endure poor customer service and technical quality.

The Commission's failure to promote competition with its inside wiring rules is especially significant because it threatens to hamstring alternative MVPDs that are in the initial phases of market entry, or may dissuade some providers from entry altogether. As noted below, at 18 n.13, in the second quarter of 1996, over one-third of all homes were not owned. Few new businesses could keep up with their competitors if they were barred from reaching one-third of their potential market. MDUs are an especially important part of the market because the concentration and proximity of subscribers makes it easier and less expensive to advertise to them

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[9]One satellite industry newsletter recently estimated that in October, 1997, there were about 5.75 million high-power DBS customers in the United States. "DTH Subscriber Counts," SkyREPORT Newsletter, (downloaded 12/10/97 from http://www.skyreport.com/dthsubs.htm). In comparison, for the same time period cable claimed to have approximately 64 million subscribers. "The History of Cable Television," NCTA Website (downloaded December 10, 1997 from http://www.ncta.com/history.html).

[10]Of course, the cable operator would only be free to charge monopoly rates after the rate deregulation compelled by the 1996 Act, or where the operator's rates were deregulated earlier because it faced effective competition in its market as a whole. 1996 Act, §301(b).

and to initiate service.[11]

Specifically, the *R&O* forecloses competition in 3 ways. First, it leaves MDU dwellers with one, and only one, MVPD. Second, the "remove, sell, or abandon" rule permits incumbents to remove the wiring without first offering to sell it to the viewer, alternative MVPD, or MDU owners. Third, the *R&O* fails to preempt state mandatory access laws and private exclusive contracts.

1. The New Inside Wiring Rules Will Still Give Viewers Just One Choice Of MVPDs.

Where the MDU owner fails to allow alternative providers to compete for subscribers, MDU dwellers will be stuck with the incumbent. *R&O* at ¶41, 49. Even if the landlord does switch providers, this does no more than replace one MVPD with another of the landlord's choosing. MDU dwellers would still have no choice of MVPDs. If some residents of the MDU wish to switch back to the first MVPD, or to switch to a third MVPD, they may be unable to because of the significant costs involved in converting the building's home run wiring.[12]

2. The New Inside Wiring Rules Will Permit Incumbents To Remove The Wiring Without First Offering It For Sale.

MDU owners will be less likely to switch providers or consent to unit-by-unit competition

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[11] Seen in this light, the Commission's failure to take into account the goals of Section 207, as discussed above at 12-13, becomes even more egregious because it will hinder the DBS and MMDS industries - which both are especially poised to bring viewers greater video programming choices - in their efforts to compete with cable.

[12] Even in the unit-by-unit scenario, the Commission's *R&O* appears to contemplate that it would be the owner who would choose the two MVPD competitors. *R&O* at ¶49. There is no basis in law or fact to give owners the power to limit subscribers' choices among providers, rather than permit all willing MVPDs to offer service. Moreover, and in any event, there appears to be no evidence in the record as to how frequently MDU owners might permit unit-by-unit competition to occur.

because the new home run wiring rules permit the incumbent to remove the wiring without first offering it for sale to the viewer, the alternative MVPD, or the MDU owner. *R&O* at ¶¶41, 49. Owners will therefore perceive that switching MVPDs carries with it the threat, explicit or not, of potential construction, damage, and other disruption to the common areas. This may increase the reluctance of MDU owners to switch MVPDs. The Commission erred by failing to take this reluctance into consideration. *See* Petition for Reconsideration of DirecTV, Inc., to be filed today in this docket, at 3.

3. The New Inside Wiring Rules Will Fail To Preempt State Mandatory Access Laws Or Private Exclusive Contracts.

The Commission's new rules arbitrarily refuse to provide any relief in jurisdictions where the incumbent has a right to remain on the premises. *R&O* at ¶¶41-49. Nearly twenty states have statutes, and in many other jurisdictions common law or contracts provide similar rights, that give the incumbent such rights. *See* Petition for Reconsideration of Consumer Electronics Manufacturers Association, to be filed today in this docket at 1-2 n. 2. Therefore, even in those cases where the landlord is willing to ***receive*** service from an alternative provider, the alternative provider may not be able to ***provide*** it.

B. The *R&O* Failed To Consider The Disproportionate Impact That The New Inside Wiring Rules Will Have On Minorities, Lower Income Americans, And Single Mothers.

The new rules are also an abuse of Commission discretion because they arbitrarily thwart the directive of the 1996 Act to provide the benefits of expanded access and a competitive telecommunications market to ***all*** Americans. *See e.g.*, 1996 Act, Preamble (purpose of the Act was to provide competitive market for telecommunications and information technologies "to all Americans"); §254 (ensuring universal service to rural and low income Americans). The

Commission's order would limit renters' choice of video programmers merely because they are not fortunate enough to, or choose not to, own their own, freestanding homes.

The *R&O* gives inadequate consideration to the many issues surrounding the ability of all Americans to participate ***equally*** in the new, competitive video programming marketplace. Minorities, lower income households, and single mothers make up a large part of the renting population. *See* Joint Comments of CFA, *et al.* in IB Docket No. 95-59, CS Docket No. 96-83. By failing to allow viewer choice in many rental properties, the *R&O* will cause an inequitable distribution of the benefits of competition as it shuts out large portions of minority groups.[13] Renters also tend to have a lower income than homeowners.[14] Among the renting population, about 25 percent have an income below the poverty level. Our Nation's Housing at 10. Finally, single mothers constitute a large proportion of the renting population, with only about one-third owning their own homes. Our Nation's Housing at 5, 18.[15]

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[13]MAP/CFA have already shown the Commission that a larger percentage of minorities than non-minorities do not own their own homes, according to recent data from the U.S. census bureau. *See* Joint Comments of CFA, *et al.* in IB Docket No. 95-59, CS Docket No. 96-83. For example, in the second quarter of 1996, the homeownership rate for the U.S. as a whole was 65.4 percent. U.S. Census Bureau, *Housing Vacancy Survey: Second Quarter 1996*, released July 22, 1996, at 3 ("Census Housing Survey"). In the same quarter, the proportion of Whites owning their own homes was 71.7 percent, but it was only 44.0 percent for Blacks, 43.9 percent for Hispanics, 52.6 percent for American Indians, and 51.2 percent for Asians. Census Housing Survey; Timothy Grall, U.S. Department of Housing and Urban Development and U.S. Census Bureau, *Our Nation's Housing in 1993*, released October, 1995, at 5, 19 ("Our Nation's Housing").

[14]For example, the median annual family income among renters was almost $19,000 in 1993, which was about one-half the median income for homeowners. Our Nation's Housing at 10, 16. Among urban renters, the median income level was an even lower $17,152. *Id.* at 10.

[15]In comparison, the homeownership rate was 56 percent among single fathers and over 75 percent for married couples with children. *Id.* Homeownership among women in nonfamily households is also well below the national average, at only 53 percent. *Id.*

Yet these are groups which society can least afford to leave without the benefits of information access. By failing to follow the mandate of the 1996 Act to expand access for all citizens, the *R&O* will widen the disparity between information haves and have-nots, with the greatest negative impact being felt by these groups. These individuals are even less likely than the average American to obtain the benefits of information access - news and information, social and economic interaction, and participation in democratic processes - from other sources.

VII. THE COMMISSION FAILED TO GIVE ADEQUATE CONSIDERATION TO MOVING THE DEMARCATION POINT TO THE PLACE WHERE THE COMMON LINE MEETS THE INDIVIDUAL LINE.

In response to the Commission's proposal, which it has adopted in the *R&O*, and in previous phases of this proceeding, a large number of commenters repeatedly urged the Commission to move the 12 inch demarcation point to where the individual line meets the common line, most often at the "gem box" located on each floor. *E.g.*, 1997 MAP/CFA Comments at 3; 1997 Philips/Thomson Further Comments at 11-14; 1997 DIRECTV Comments at 9; 1997 CEMA Comments at 4-8; 1996 NYNEX Comments at 7-8; 1996 USTA Comments at 2-4; 1996 Liberty Cable Comments at 2-11; 1996 DIRECTV Comments at 2.

These comments asserted variously, *inter alia*, that moving the demarcation point thusly would (1) place control of the wire in viewers' hands; (2) be consistent with Section 624(i); (3) be less cumbersome and destructive; (4) foster competition between MVPDs; and (5) present no constitutional problems if incumbent MVPDs are compensated for the wire. *Id.* Indeed, the Independent Cable and Telecommunications Association, which developed the Commission's proposal here, continues to advocate that:

> the best means to advance competition in the MDU marketplace [is] to authorize a wholescale [sic] movement of the demarcation point to the junction where the

> common wire meets the individual wire dedicated to a particular residential unit. This remains ICTA's preferred solution.

1997 ICTA Comments at 2.

Yet despite the heavy emphasis given to this alternative by viewers and alternative MVPDs, the Commission virtually ignores it, saying only that

> [A]t this time we will [not] 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 conclusion here on the merits of such proposed modifications.

R&O at ¶71.

The Commission erred in failing to address the merits of the proposal to move the demarcation point to where the individual line meets the common line.[16] For the reasons stated above, this alternative proposal was a more viable, a more sound, and a superior option to that which the Commission has adopted here. On reconsideration, the Commission must give it serious and considered attention.

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[16]MAP/CFA do not seek reconsideration of that portion of the *R&O* that requires the demarcation point to be moved to a place where it is "physically accessible." *R&O* at ¶¶150-151.

CONCLUSION

The Commission's decision to empower MDU owners to determine whether and when their tenants may choose an alternative MVPD flies in the face of the plain language of Section 624(i) of the 1992 Cable Act and Section 207 of the 1996 Act, and pays mere lip service to Congressional intent and the Commission's own findings that subscriber choice should be promoted. Even more arbitrarily, the Commission fails to consider its actions in light of the public's First Amendment rights to receive information from the widest possible variety of sources and Congress' mandate that the Commission promote competition in the MVPD market.

Wherefore, MAP/CFA ask that the Commission grant its Petition for Reconsideration, reverse the home run and cable home wiring portions of its *R&O*, adopt its proposal to move the demarcation point, and grant all such other relief that may be just and proper.

Respectfully Submitted,

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