

unable to charge a reasonable fee for the use of the molding by alternative providers. Similarly, a competitor is no more entitled to freely place its wiring in "empty" space in a hallway molding than is a cable operator entitled to freely attach its wires to "excess" pole capacity or run wiring through "empty" space in utility conduits.

This situation can easily be rectified. The Commission should amend its rule such that whenever an incumbent is forced to allow additional home run cables to be installed within its moldings, the parties should be required to negotiate in good faith regarding reasonable compensation for such occupancy.³⁵ Where such compensation cannot be agreed upon, the Commission should, upon submission of an appropriate petition, determine the rate in accordance with the principles applicable to cable television occupancy of utility conduits. Alternatively, the parties should be entitled to submit the matter to arbitration. Such a simple, straight-forward mechanism, similar to the mechanism used to value the use of telephone company poles by cable operators' attaching their wiring, would compensate incumbent providers for the use of their molding, and thereby alleviate constitutional concerns in this regard.

VI. The New Procedures Should Be Unavailable To OVS Providers.

Open Video System ("OVS") providers should not be eligible to utilize the new procedural rules because they are legally required to construct end-to-end facilities all the way to end user MDU residents, and therefore have no basis to claim the right to use pre-existing MDU home run

³⁵Time Warner further objects to the rule that MDU owners be the sole arbiters of whether hallway molding can accommodate additional wires. Order at ¶112. The incumbent MVPD's input is essential because only it, not the MDU owner, can actually provide an accurate, unbiased technical analysis as to the capability of its existing molding to carry additional wires. Where an incumbent MVPD determines that there is insufficient room in its molding to accommodate additional wires, the new MVPD should then be permitted to remove the existing molding and replace it with larger molding at its own expense, thereby eliminating any ability of an incumbent to act as a bottleneck in the building by denying access to its molding.

wiring. Such a restriction is essential in order for unaffiliated OVS video programming providers to be guaranteed *bona fide* access to and use of the OVS system to provide service to end user MDU subscribers. Without such a restriction, unaffiliated OVS programmers may be able to use the OVS system as a video transport distribution system, but because use of the home runs will likely be exclusively allocated to the OVS system's affiliated programmer, they will have no opportunity to actually provide service to MDU residents without installing their own home runs.³⁶

As Congress' intent in establishing OVS was that multiple program providers would be guaranteed non-discriminatory access to an entire OVS system in order to serve subscribers, OVS operators have an obligation to construct end-to-end facilities to the demarcation point of each subscriber residence and MDU unit within its service area.³⁷ Accordingly, an OVS operator must be required to construct its own complete distribution system within an MDU, including analogous portions of home run wiring connecting the OVS system's main MDU distribution riser and equipment to individual subscriber residences. As it is therefore unnecessary for OVS operators to utilize the home run wiring in their networks, the new procedural rules should be amended to clarify that OVS operators are ineligible to take advantage of the new inside wiring rules.

VII. MVPDs Should Be Required To Get The Affirmative, Written Consent Of The Affected Customer Prior To A Switch In Service.

In the Order, the Commission declined to restrict the ability of MDU owners and alternative MVPDs to act as a subscriber's agent in providing notice of a subscriber's desire to

³⁶See Order on Reconsideration, Metropolitan Fiber Systems/New York, Inc. d/b/a MFS Telecom of New York, and Metropolitan Fiber Systems/McCourt, Inc., FCC 97-169 (rel. May 16, 1997).

³⁷See Telecommunications Act of 1996, at § 302(a), adding a new Section 653 to the Communications Act of 1934, 47 U.S.C. § 653.

change service.³⁸ As it noted in its comments, Time Warner's greatest concern in this regard is unauthorized switches ("slamming") and the problems associated with this practice. On reconsideration, the Commission should adopt specific curbs against slamming before widespread abuses occur.

This is not an insignificant problem. It is not uncommon in buildings that permit unit-by-unit competition or are located in right of access states for the building owner or a competing MVPD to switch the service of MDU residents over from one service provider to a new provider without the affirmative consent from the affected residents. In New York City, Time Warner MDU subscribers have been repeatedly switched without their knowledge or consent. Time Warner is often not notified on a timely basis of a subscribers' switch to a new service provider by the subscriber's so-called agent, aggravating former customers who are mistakenly billed even though they no longer receive service from Time Warner.³⁹ There is no valid reason, in a building subject to a right of access statute or where residents have the right to receive video service from multiple providers, why any third party should be allowed to deprive an MDU resident of their MVPD of choice without their consent.

³⁸Order at ¶50.

³⁹Slamming also often results in extensive damage to the property and equipment of the video service provider that is displaced. Because they are often at odds with the incumbent providers, MDU owners and new video service providers have little incentive to protect the incumbent's equipment between the time that a customer switchover has occurred and the time that the incumbent is informed of the switch, and has an opportunity to retrieve its converter boxes and other equipment. Many times, Time Warner's equipment has never even been returned. To alleviate these problems, in any situation where an MDU owner or new video service provider acts as an agent for an MDU resident, there should be an affirmative obligation on the part of the agent to inform the incumbent operator prior to the switch so as to allow the incumbent to remove and retrieve its equipment beforehand. If an agent fails to comply with this requirement, the agent should be fully responsible for the full value of an incumbent provider's equipment to the extent it is damaged or lost.

The Commission should now amend the new rules to include an outright prohibition against slamming before more widespread abuses develop. The Commission must send a clear signal that such behavior is contrary to the stated public policy goal of promoting consumer choice and is not in any manner sanctioned by the Commission. The Commission should not allow either the MDU owner or the competing MVPD to act as the agent of the MDU resident unless the incumbent MVPD has expressly agreed to such an arrangement, and unless the affected subscriber has agreed to appointment of the agent in writing. Slamming should lead to monetary sanctions against the masquerading agent such that it is fully responsible for the accrued monthly service charges between the time the subscriber's service was terminated, and the time that the agent notifies the former provider of the switch.

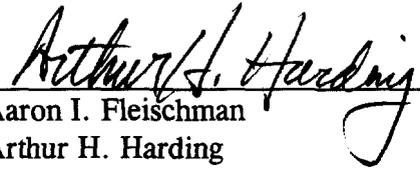
VII. Conclusion.

WHEREFORE, Time Warner Cable petitions the Commission to reconsider its Report and Order and Second Further Notice of Proposed Rulemaking adopting procedures for inside wiring and amend its rules to include the changes suggested herein.

Respectfully submitted,

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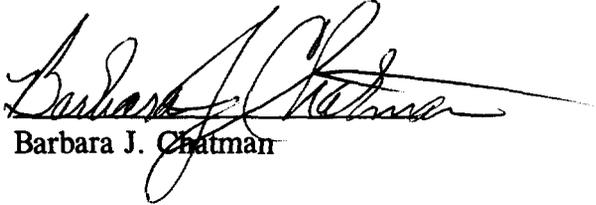
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