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

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

PETITION FOR RECONSIDERATION

THE WIRELESS CABLE ASSOCIATION INTERNATIONAL, INC.

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EXECUTIVE SUMMARY

The Wireless Cable Association International, Inc. ("WCA") believes that the Commission's *Report and Order and Second Further Notice of Proposed Rulemaking* ("R&O") represents a significant step towards defining the "rules of the road" governing the use of the installed base of cabling in the MDU environment when a building owner or an individual tenant wishes to switch service providers. Those rules, however, will not fully address the problems faced by competing MVPDs so long as incumbent cable operators retain the option of removing their home run wiring. So long as the incumbent can threaten to remove existing wiring and raise the spectre that an alternative provider will be required to "postwire" the premises, many MDU owners will be reluctant to permit access to other service providers. ***This is the only reason why an incumbent cable operator ever chooses to remove its wiring from MDU property.*** Thus WCA's membership believes that the Commission's rules will have little if any remedial effect unless the Commission limits the incumbent's options upon termination of service to (1) abandoning the home run wiring or (2) selling the home run wiring to the MDU owner (or, if so designated, the alternative provider) at a predetermined price which provides just compensation to the incumbent.

Furthermore, WCA believes that the Commission's "arbitration" requirement where an incumbent elects to sell" inadvertently gives the incumbent an additional "legal right to remain" where the MDU owner does not wish to submit to binding arbitration. This presents yet another substantial opportunity for incumbents to "game" the election process and can only be eliminated by requiring that the incumbent's wiring be sold at a predetermined price that reflects just compensation. For the reasons set forth herein, WCA believes that a formula based on fully depreciated value will provide "just compensation," given that the wiring has little or no value to the incumbent once it is removed from the building.

WCA also submits that the Commission is incorrect in assuming that its new rules are sufficient to overcome the very significant anticompetitive effects of state mandatory access statutes, and thus requests that the Commission revisit and reverse its determination not to exercise its preemption authority in that area. In addition, the Commission's rules themselves require additional "fine tuning" to eliminate the cable industry's historical anticompetitive practices. In this regard, WCA asks that the Commission (1) prohibit an incumbent from disconnecting its wiring before a new provider is ready to provide service; (2) shorten the procedural time frames for disposal of home run wiring in the unit-by-unit context; and (3) declare that its rules supersede contrary provisions in all existing and future MDU service contracts. Finally, WCA asks that the Commission make certain limited modifications to its signal leakage rules to accommodate the special circumstances of wireless cable operators.

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PETITION FOR RECONSIDERATION

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby submits its Petition for Reconsideration with respect to the *Report and Order and Second Further Notice of Proposed Rulemaking* (the "*R&O*") released by the Commission on October 17, 1997 in this proceeding.[1]

I. INTRODUCTION.

The *R&O* represents the latest and most significant step of a process begun by Congress nearly five years ago to govern access to inside cabling in a manner that enables wireless cable operators and other multichannel video programming distributors ("MVPDs") to more effectively compete with franchised cable operators in single family homes and multiple dwelling units ("MDUs"). WCA has been an active participant on behalf of the wireless cable

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1/ FCC 97-376 (rel Oct. 17, 1997).

industry in this and related proceedings, and has frequently demonstrated that without full and fair access to previously installed inside wiring, wireless cable and other emerging technologies will be unable to fully compete with entrenched franchised cable providers.[2] Indeed, a number of the rules adopted in the *R&O* are substantially similar to recommendations previously advanced by WCA.[3] WCA applauds the Commission's efforts to address its inside wiring rules on an expedited basis, since immediate resolution of inside wiring issues is absolutely necessary if multichannel video programming distributors ("MVPDs") are to have any kind of certainty as to the "rules of the road" when a building owner or an individual tenant wishes to switch service providers.

Clearly, the *R&O* lays at least some of the groundwork for achieving full and fair competition in the MDU environment. For example, consistent with a proposal put forth by WCA, the Commission will now require an incumbent cable operator to enforce its "legal right to remain" by obtaining a court order or injunction within 45 days of receiving notice that the

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2/ *See, e.g.* Comments of the Wireless Cable Association International, Inc., MM Docket No. 92-260 (filed Dec. 1, 1992); Reply Comments of the Wireless Cable Association International, Inc., MM Docket 92-260 (filed Dec. 14, 1992); Petition for Partial Reconsideration filed by the Wireless Cable Association International, Inc., MM Docket 92-260 (filed April 1, 1993); Reply of the Wireless Cable Association International, Inc., MM Docket 92-260 (filed May 28, 1993); Comments of the Wireless Cable Association International, Inc., MM Docket 92-260, RM-8380 (filed Dec. 21, 1993); Comments of the Wireless Cable Association International, Inc., CS Docket No. 95-184, (filed Mar. 18, 1996) [the "WCA Comments"]; Reply Comments of the Wireless Cable Association International, Inc., CS Docket No. 95-184, (filed April 17, 1996) [hereinafter cited as "WCA Reply Comments"]; Letter from Paul J. Sinderbrand, counsel to WCA, to Meredith Jones, Chief, Cable Services Bureau, CS Docket No. 95-184 (filed Oct. 2, 1996) [the "WCA Letter"].

3/ *See* WCA Reply Comments, at 3.

MDU owner intends to give a competitor to have access to the building.[4] In addition, incumbents must now decide how they want to dispose of their "home run" wiring within a specific period of time after notice of termination from the MDU owner and, more generally, to cooperate with the MDU owner and the competitor so that a seamless transition of service may take place.[5]

Taken as a whole, however, WCA believes that the rules adopted in the *R&O* still do not give MDU owners sufficient certainty as to their rights upon termination of the incumbent's service, and thus will not materially improve competition in the MDU environment unless the Commission adopts the rule modifications suggested herein. In WCA's view, the heart of the problem here is the Commission's failure to recognize that the cost of cable inside wiring lies primarily in installation and not in the wiring itself, and that salvage value of coaxial cable pales in comparison to the cost of removing the wiring and restoring the premises to its former condition. The marketplace reality is this: ***if MDU owners fear that incumbent cable operators will elect to remove their home run wiring and force a competitor to postwire the premises, the MDU owner often will deny access to competing service providers.*** For the reasons set forth herein, WCA believes that the Commission should eliminate this anticompetitive tactic once and for all by limiting the incumbent's election options to "abandon" or "sell," and, where the incumbent elects "sell," require the incumbent to sell the wiring to the MDU owner at a

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4/ *R&O* at ¶ 78.

5/ *Id.* at ¶¶ 39-58.

Furthermore, the Commission's new rules appear to provide that if the MDU owner seeks to dislodge an incumbent cable operator, the incumbent has the right to force the MDU owner either to acquire the wiring at a price set through binding arbitration or allow the incumbent to maintain its wiring on the premises. This is an absurd result that clearly tramples on the rights of MDU owners who do not wish to purchase an incumbent's wiring through the arbitration process, and is likely to further deter MDU owners from changing service providers. Again, this result can be avoided by setting a predetermined price for home run wiring at a level that reflects just compensation to the incumbent.

In addition, although the Commission acknowledges that MDU owners are often unwilling to give competitors access to their premises because of uncertainty over the MDU owners' rights to wiring, the Commission defers completely to state law to determine whether the cable operator has a legal right to remain on the premises and therefore deny the MDU owner or a competitor access to its installed home run wiring. Thus, the litigation that often occurs when a competitor seeks access is unlikely to be diminished, particularly in "mandatory access" states where the cable operator's "legal right to remain" is unclear. For this reason, WCA believes it is absolutely critical that the Commission reconsider and reverse its decision not to preempt state mandatory access laws.

Finally, certain of the Commission's remaining "home run" wiring rules preclude a seamless transition to a new provider, or otherwise impose unnecessary burdens on wireless cable operators and other MVPDs. Thus, as set forth in greater detail below, WCA urges the Commission to (1) affirmatively prohibit an incumbent cable operator from disconnecting its

wire before a new provider has connected its own facilities and is ready to provide service; (2) shorten the procedural timetable applicable to disposition of home run wiring in the unit-by-unit context; (3) declare that its home run wiring rules have priority over any existing or future MDU service contract whose provisions on disposal of home run wiring are less favorable to competitors; and (4) with respect to signal leakage, refine its definition of "substantially built" to accommodate the special circumstances of wireless cable operators.

II. DISCUSSION.

A. The Commission Should Eliminate the Incumbent's Right to Elect "Removal" and Instead Require the Incumbent to Either Abandon Its Home Run Wiring or Sell It to the MDU Owner or the Alternative Provider at a Predetermined Price That Reflects Just Compensation.

WCA submits that the Commission's inside wiring rules will not promote competition unless the Commission prohibits an incumbent cable operator from removing its home run wiring upon termination of service.

As a practical matter, structural limitations, fear of property damage and related aesthetic considerations often discourage an MDU property owner from allowing multiple providers onto his or her property unless existing wiring can be re-used. Where the drop lines to each subscriber's apartment are installed during the construction of a multiple dwelling unit, the wiring can be placed inside the walls of the building and thus provide access to an individual apartment though an outlet similar to an electrical outlet. This "prewiring," which benefits only the incumbent franchised cable operator, is a cheaper, more aesthetically pleasing and more convenient alternative to "postwiring" the building after construction is complete and the

residents have moved into the apartments. Postwiring requires that wires be strung either on the outside of buildings or on the inside along hallways, or fished through completed walls and ceilings/floors. In addition, because the wires ultimately must run into individual units, postwiring requires coordination with the residents of the building.[6] Understandably, property owners are reluctant to suffer the burdens that postwiring imposes on their properties.[7]

Furthermore, it is well settled that the cost of removing inside wiring far outweighs its salvage value upon termination of service. Indeed, WCA is unaware of any instance where a cable operator has removed any inside wiring from an MDU and used it to provide service to another MDU.[8] Similarly, the record in this proceeding is barren of any substantial evidence indicating that an incumbent cable operator ever reuses inside wiring once it is removed from MDU property. Accordingly, it has been WCA's experience that an incumbent cable operator

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6/ *Cable Investments, Inc. v. Wooley*, 867 F.2d 151, 153 (3rd Cir. 1989) [citation omitted].

7/ *See, e.g.*, Response of WJB-TV Limited Partnership, MM Docket 92-260, at 4 (filed Apr. 15, 1993) ["To replace or, more specifically, to duplicate [inside] wiring might require destruction of walls and floors and disruption to tenants . . . Many owners and tenants would rather avoid this hassle, even if it means retaining their present cable provider."].

8/ As one cable operator candidly conceded in a lawsuit involving a homeowner's right to use internal cabling, "removing the cable was more costly than it was worth, and . . . although the wiring could be removed without causing a great deal of damage, some damage could result from removal of the cable wires." *Metropolitan Cablevision, Inc. v. Cox Cable Cleveland Area*, 1992 Ohio App. LEXIS 356, at 10 (Jan. 30, 1992). See also, e.g., *Continental Cablevision of Michigan v. City of Roseville*, 425 N.W.2d 53, 56 (S. Ct. Mich. 1988) [in case involving ownership of cable house drops, court noted that component parts had little salvage value and that the cable operator had testified that none had ever been removed]; *State Dept. of Assessments and Taxation v. Metrovision of Prince George's County, Inc.*, 607 A.2d 110 (Ct. Ap. Md. 1992) ["Metrovision has never removed, and never intends to remove, a drop cable from the premises of a subscriber"].

will choose to remove its wiring solely to put the MDU owner on notice that a competitor cannot provide service without postwiring the premises. Under these circumstances, the MDU owner invariably elects to continue taking service from the incumbent rather than suffer the significant disruption created by postwiring. Tenants are thus denied access to competitive providers even though the incumbent is not offering the best possible service at an optimal price.

It must also be noted that incumbents have an additional anticompetitive motive for removing inside wiring from buildings which utilize a "loop-through" wiring configuration. In a "loop-through" situation, a single cable is used to provide service to either a portion of or an entire MDU. Wireless cable operator People's Choice TV Corp. ("PCTV") currently provides wireless cable service to a number of older MDU properties in the city of Chicago that utilize a "loop-through" wiring. It has been PCTV's experience that new wiring cannot be installed in such MDUs unless it is tied to the existing wiring and pulled through the conduits in the building. Thus, were the incumbent allowed to remove the existing wiring in a "loop-through" building, PCTV could not install its own wiring in the conduit and provide service.

These problems will continue to burden cable's competitors for the foreseeable future so long as incumbents retain the option to elect "removal" upon receiving notice of termination from the MDU owner. WCA therefore submits that the only satisfactory way to eliminate the problem once and for all is to take the "removal" weapon out of the incumbent's hands and require the incumbent to either abandon the wiring or sell it to the MDU owner. The only exception should be those cases where the MDU owner has the right to require removal under an existing contract or state law, and invokes that right. As discussed below, eliminating the

removal option raises no Fifth Amendment issue provided that the incumbent receives just compensation for the wiring (assuming the incumbent elects "sell"). Moreover, elimination of the incumbent's removal option will remove a substantial barrier to consumer choice that otherwise has no countervailing public interest or economic benefit whatsoever.

B. The "Sell" Election, As Currently Designed by the Commission, Effectively Gives An Incumbent Cable Operator An Additional Legal Right to Remain on MDU Property Against the MDU Owner's Wishes.

Under the Commission's rules, where the MDU owner has a right to terminate its contract with the incumbent cable operator, it may invoke the Commission's procedures for disposition of home run wiring. If the MDU owner invokes the Commission's procedures and the incumbent elects "sell," the Commission will allow the incumbent and the MDU owner (or, if the MDU owner so designates, the new service provider) to negotiate the price of the wiring. The parties will have 30 days from the date of the incumbent's election within which to negotiate a price for the home run wiring. If the parties are unable to agree on a price, the incumbent must elect to either (1) abandon the wiring without disabling it; (2) remove it and restore the premises consistent with state law; or (3) submit the pricing dispute to binding arbitration by an independent expert. If, however, the MDU owner refuses to go to binding arbitration, the *R&O* provides that the cable operator is no longer subject to the Commission's procedures and, by implication, may remain on the property indefinitely until the MDU owner submits to arbitration. Thus, it appears that an incumbent cable operator who has no right to remain on the premises under state law can secure such a right under *federal* law by choosing binding arbitration in situations where the MDU owner has no interest in acquiring the inside wiring,

either because it is damaged or otherwise of inferior quality. Moreover, because the Commission has provided arbitrators no guidance whatsoever as to how to price inside wiring, the Commission has already created a significant disincentive for MDU owners or alternative service providers to agree to the binding arbitration process. The wide variety of pricing mechanisms advocated in this proceeding illustrate the substantial risks associated with binding arbitration.[9]Thus the "sell" election, as currently designed by the Commission, creates the very sort of federal right to mandatory access that the Commission explicitly rejected elsewhere in the *R&O.*[10]

The Commission has already recognized that the "legal right to remain" problem is a substantial obstacle to competition in the MDU environment.[11] WCA thus submits that the Commission could not have intended to do what it appears to have done here, *i.e.,* give incumbents an additional "legal right to remain" even though they may have no such right under state law. Accordingly, where the MDU owner chooses to invoke the Commission's procedures for disposition of home run wiring and the incumbent elects "sell," WCA believes that the most

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9/ *Compare, e.g.,* Comments of Cablevision Systems Corporation, CS Docket No. No. 95-184 and MM Docket No. 92-260, at 14-15 (filed Sept. 25, 1997) (recommending price of no less than $150 per unit and suggesting that price of up to $600 per unit might be appropriate); Comments of TCI, CS Docket No. 95-184 and MM Docket No. 92-260, at 18 (filed Sept. 25, 1997) (proposing prices of $72, $115 and $184 per unit); Comments of Cox Communications, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 14 (filed Sept. 25, 1997) (setting the price at "replacement cost"); Comments of U S WEST, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 13 (recommending that the price "reflect what it would cost the new provider to put in its own wiring in terms of labor and materials").

10/ *R&O* at ¶¶ 167-180.

11/ *R&O* at ¶ 38.

effective way to remedy the anomalous result described above is to eliminate the "arbitration" piece of the "sell" election and simply require the MDU owner to purchase the wiring within 30 days of the incumbent's election, at a price which provides just compensation as required under the Fifth Amendment. WCA further believes a priced based on depreciated value best reflects just compensation under these circumstances, given that the wiring amounts to little more than scrap once it is removed from the building.[12] This proposal serves the interests of all parties, since (1) it eliminates any "gaming" of the arbitration process and thereby gives MDU owners and competitive providers a date certain as to when the sale of the wiring will be completed; (2) it provides the incumbent all of the compensation it is entitled to under the Fifth Amendment; and (3) it facilitates quicker competitive entry, and thus expanded consumer choice.

C. *The Commission Should Revisit Its Decision Not to Preempt State Mandatory Access Laws.*

WCA, the private cable industry and others have urged the FCC to level the playing field vis-a-vis competition within MDU properties by preempting state mandatory access laws which discriminate in favor of franchised cable operators. In the *R&O* the Commission refused to do so, on the theory that its new home run wiring rules are sufficient to eliminate barriers to competitive entry in the MDU environment.[13] For the reasons set forth below, WCA believes

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12/ *See, Second Report and Order*, Docket No. 79-105, FCC 86-63, 51 FR 8498, (¶ 49 n.40), (1986).

13/ *R&O* at ¶ 189.

that the Commission is in error and should preempt state mandatory access statutes as initially proposed by cable's competitors.[14]

Notwithstanding the Commission's view of the potential effectiveness of its new rules, it will be virtually impossible for the Commission to promote a competitive marketplace for multichannel video services unless the Commission preempts all state mandatory access laws which discriminate in favor of franchised cable operators. As already noted by the Commission, a number of states have passed statutes giving cable operators mandatory access to MDUs. These statutes, however, give only the locally-franchised cable operator a right to mandatory access; wireless cable operators and other alternative providers must still obtain the property owner's consent to provide service to the property.[15] Moreover, certain state "right-of-way" statutes have a similar effect of guaranteeing cable operators preferential access to potential

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14/ That the Commission has authority to do so is beyond peradventure. *See, e.g., City of New York v. FCC*, 486 US 57, 64 (1988) ["The statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof."]. *See also New York State Commission on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982).

15/ *See, e.g.,* Conn. Gen. Stat. Ann. § 16.333a(b) (1994) [Connecticut statute requiring owners of multiunit residential buildings to grant access to cable operators upon request by tenants]; Kan. Stat. Ann. § 58-2553 (1994) [Kansas statute prohibiting landlords from interfering with franchised cable service]; Me. Rev. Stat. Ann. tit. 14 § 6041 (1995) [Maine statute allowing property owner to refuse access to cable operator only for good cause]; Nev. Rev. Stat. § 711.255 (1995) [Nevada statute prohibiting landlords from interfering with provision of cable service to tenants]; N.J. Stat. Ann. § 48:5A-49 (1995) [New Jersey statute preventing property owners from preventing tenants from receiving cable service]; and NY Exec Law § 828 (McKinney 1995) [New York State statute prohibiting landlords from interfering with installation of cable television facilities].

subscribers residing in MDUs.[16] This regulatory imbalance works to the decided disadvantage of wireless cable systems: while a cable operator may impose itself on the property owner by dint of state law, a wireless cable system enjoys no such right and thus cannot serve MDU residents unless it convinces the property owner to give his or her consent.

As noted above, structural limitations, fear of property damage and related aesthetic considerations often discourage an MDU property owner from allowing multiple providers onto his or her property unless existing wiring can be re-used. A cable mandatory access statute effectively precludes the possibility of competitive entry, since an MDU owner who is willing to suffer the intrusion of only a single set of wires will invariably deny access to other service providers if by law he or she must provide access to the franchised cable operator.

Clearly, the Commission's new rules do not alleviate this problem where an incumbent has an indisputable legal right to remain on the property under a State mandatory access statute. Where the incumbent does not have a clear right to remain under a state mandatory access statute, the Commission's rules require the incumbent to obtain a preliminary judicial determination of its rights within 45 days of notice of termination. While this is a useful first step, it will not put an end to the very sort of contentious litigation which the Commission has acknowledged is a substantial barrier to competitive entry, particularly if the incumbent exercises all of its appeal rights under state law.

16/ *See, e.g.*, Ia. State Ann., § 477.1 (1995) [Iowa statute giving cable operators right to construct lines on public and private property].

Moreover, the Commission's analysis overlooks a key point: the concerns of MDU owners about property damage arise from their fear of multiple wires running through common areas, which itself is a byproduct of mandatory access (*i.e.*, the competitor must run a second wire to provide service immediately, since the incumbent cable operator has at least a colorable right under state law to remain on the property). Were mandatory access statutes preempted, the need for multiple wires would disappear and thus MDU owners would have little reason to exclude competitors on aesthetic grounds.

Finally, preemption of discriminatory state mandatory access and similar statutes would be consistent with prior Commission preemption of other state laws which effectively hinder the provision of video service via MDS channels.[17] Preemption would also harmonize the Commission's inside wiring rules with other Congressional policies disfavoring state and local initiatives that discriminate against wireless cable operators and other MVPDs. And, perhaps most importantly, the elimination of discriminatory mandatory access and similar laws via federal preemption would break down a substantial barrier to real competition between cable

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17/ See *Orth-O-Vision, Inc.*, 48 F.C.C. 2d 503 (1980), aff'd *New York State Commission on Cable Television v. FCC*, 669 F.2d 58 (2nd Cir. 1982). In the *Orth-O-Vision* case, the Commission preempted the State of New York from imposing franchising requirements on an MATV system that received its programming from an MDS licensee. In so doing, the Commission ruled that the proposed State regulation would have "[inhibited] the growth of MDS in the provision of freely competitive interstate services." 48 F.C.C.2d at 507-09. As to their impact on competition, discriminatory State mandatory access statutes are indistinguishable from franchising requirements: both types of regulation have the effect of precluding or at least substantially delaying the introduction of wireless cable service to MDU properties. Accordingly, WCA submits that the rationale for preemption in the *Orth-O-Vision* case should apply with equal force in the mandatory access context.

operators and alternative providers of multichannel video service, and thus would serve the public interest. As the Commission stated recently:

> [T]he Commission is committed to ensuring access to all technologies including those that compete with cable. . . The federal interest we are protecting is not that of ensuring that the American people can get less costly television service, but rather that they have wide access to all available technologies and information services. If nonfederal regulations are acting as obstacles to this federal interest, they are subject to preemption.[18]

D. *The Commission's Rules Still Do Not Facilitate A Seamless Transition From The Incumbent To A New Service Provider.*

In the *R&O*, the Commission has declined to adopt specific rules requiring the incumbent's cooperation when service is transitioned to a new provider. Instead, the Commission has adopted only a general rule "requiring the parties to cooperate to avoid service disruption to subscribers to the extent possible."[19] Again, though this is a useful first step, it does not go nearly far enough to ensure the "seamless transition" to new service providers that the Commission is trying to achieve in this proceeding.

The Commission's rule is premised "on the good faith cooperation of all parties to protect against [service disruption]."[20] It has been the experience of WCA's members, however, that incumbent cable operators place far more value on frustrating competition than on building goodwill with their subscribers, and thus are unlikely to cooperate with a competitor to minimize

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18/ *FNPRM* at ¶ 15.

19/ *R&O* at ¶ 45.

20/ *Id.*

disruptions. Indeed, the numerous instances of litigation over competitive entry in the MDU environment speaks volumes about the cable industry's unwillingness to cooperate with its competitors once an MDU owner decides to switch service providers. Simply stated, the "seamless transition" desired by the Commission will never become a reality unless the Commission adopts more specific rules that affirmatively prohibit certain incumbent conduct designed solely to disrupt service and thereby create a disincentive for MDU owners to allow entry by cable's competitors.

Of particular concern to WCA is the Commission's refusal to adopt a rule prohibiting the incumbent from disconnecting its wiring unless and until the new provider has entered the property, connected its own wire and is ready to provide service.[21] Clearly, certainty and efficiency are lost where an incumbent has the power to disconnect its wire immediately upon receipt of notice of termination and thereby deprive tenants of *any* multichannel video service for an indefinite period of time until the new provider connects its facilities to the building. There is an especially high risk of this type of situation where the incumbent has no legal right to remain in the building, and thus cannot continue providing service unless it convinces the MDU owner that any transition to a new provider will be as difficult and disruptive as possible. The Commission must recognize that in those circumstances the incumbent has no incentive whatsoever to ensure a smooth transition to the new provider, and that the only way to prevent

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21/ *R&O* at ¶ 45 n.134.

the resulting detriment to consumers is to affirmatively prohibit the incumbent from disconnecting service before the new provider has connected its own wire.[22]

In the same vein, WCA also believes that the Commission should consider some limited "fine tuning" of its procedural timetables to facilitate a smooth transition where an MDU owner allows the incumbent and the new entrant to compete head-to-head in the same building. Under the Commission's current timetables for unit-by-unit disposition of home run wiring, an incumbent cable operator has 90 days lead time before it must allow a competitor to have access to each unit in the building (*e.g.*, the MDU owner's 60-day notice that it intends to allow a competitor to enter the property, plus the incumbent's 30-day period within which to make a uniform "remove, abandon or sell" election for all home run wiring in the building).[23] This provides the incumbent with an almost insuperable marketing advantage, since the 90-period gives the incumbent more than ample time to price or restructure its service offerings and/or lock individual subscribers into long-term service contracts before its competitor even arrives on the property. Clearly, this chills competition by tilting the playing field far too much in favor of the incumbent, and thus does not serve the public interest.

22/ On this point, it should be noted that the Commission already prohibits an incumbent from using any ownership interests they may have in property located on or near the home run wiring, such as molding or conduit, to prevent, impede or in any way interfere with the ability of an alternative MVPD to use the home run wiring. *R&O* at ¶ 141 n.129. WCA thus submits that it makes little sense for the Commission to allow an incumbent to achieve the same disruption of service simply by disconnecting its wire before the new provider is ready to provide service.

23/ *FNPRM* at ¶ 39.

Accordingly, WCA proposes the following timetable for unit-by-unit disposition of home run wiring:

> (1) an MDU owner must give the incumbent *fifteen* (as opposed to sixty) days notice that it intends to allow a competitor to provide service on its property;
>
> (2) on the fifteenth day, the incumbent must make its "remove, abandon or sell" election for all home run wiring in the building;
>
> (3) where the incumbent elects to remove its home run wiring, it cannot do so until at least seven days after the new entrant has connected its own home run wiring to the individual unit;[24]
>
> (4) where the incumbent elects to abandon its home run wiring, the abandonment becomes effective for all units immediately;
>
> (5) where the incumbent elects to sell its home run wiring, it must offer a firm price for all home wiring in the building on the election date;[25]
>
> (6) if the parties fail to agree on a price within thirty days of the incumbent's election to sell, then on the thirtieth day the incumbent must elect to either remove (subject to the new entrant's prior right to attach) or abandon the wiring (such abandonment to take effect for all home run wiring in the building immediately).

For the reasons set forth above and in ICTA's comments on the *FNPRM*, WCA believes that this timetable will more effectively accomplish a fair and seamless transition that balances the needs

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24/ This is necessary only if the removal electon is retained.

25/ To lend greater certainty to the Commission's timetables for building-by-building disposition of home run wiring, WCA similarly recommends that a similar time frame for a firm offer of sale also be applied to situations where the MDU owner seeks to replace the incumbent with a new provider rather than allow both to compete head-to-head in the same building.

of incumbents and new service entrants and thereby promotes MVPD competition demanded by MDU owners and their tenants.

Finally, WCA believes that the Commission's treatment of existing and future MDU service contracts, unless clarified, will create a very large, cable-friendly loophole that in many instances will negate the intended effect of the Commission's inside wiring rules. Specifically, the Commission states that it "[does] not intend to affect any contractual rights the parties may have to terminate service in a different manner,"[26] and that parties "may rely upon any existing contractual rights upon termination, in addition to the procedures we are adopting."[27] In addition, the Commission has adopted a generic rule requiring that all contracts entered into after the effective date of the new rules must "include a provision describing the disposition of the home run wiring upon the contracts's termination."[28] Where the parties' contract "clearly and expressly addresses the disposition of the home run wiring," the Commission's new rules will not apply.[29]

The Commission has already recognized that the contractual "rights" alluded to above are the source of the very same mischief which the Commission is trying to eliminate in this proceeding:

26/ *R&O* at ¶ 41, n. 126.

27/ *Id.* at ¶ 67.

28/ *Id.*

29/ *Id.*

> The record indicates that, where the property owner or subscriber seeks another video service provider, instead of responding to competition through varied and improved service offerings, the incumbent provider often invokes its alleged ownership interest in the home run wiring. Incumbents invoke written agreements providing for continued service, perpetual contracts entered into by the incumbent and the previous owner, easements emanating from the incumbent's installation of the wiring, assertions that the wiring has not become a fixture and remains the personal property of the incumbent, or that the incumbent's investment in the wiring has not been recouped, and oral understandings regarding the ownership and continued provision of services. Written agreements are frequently unclear, often having been consummated in an era of accepted monopoly, and state and local law as to their meaning is vague. Invoking any of these reasons, incumbents often refuse to sell the home run wiring to the new provider or to cooperate in any transition. The property owner or subscriber is frequently left with an unclear understanding of why another provider cannot commence service. The litigation alternative, an option rarely conducive to generating competition, while typically not pursued by the property owner or subscriber, can be employed aggressively by the incumbent. The result is to chill the competitive environment.[30]

When viewed in this context, it is very difficult to understand why the Commission is now willing to allow its inside wiring rules to be eviscerated by existing and future MDU service contracts between incumbent cable operators and MDU owners. As the Commission itself has recognized, many existing MDU service contracts were negotiated when MDU owners did not have a choice of service providers, and thus do not contemplate that the incumbent's home run wiring will be made available to the MDU owner or the incumbent's competitor under the terms set forth in the Commission's proposed rules. Moreover, many of these contracts either run with the cable operator's franchise or otherwise will remain in effect for a number of years, thereby

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30/ *FNPRM* at ¶ 31.

rendering the Commission's rules null and void for the foreseeable future. Accordingly, to ensure that the cable industry's private contractual practices do not continue to impede full and fair competition in the MDU environment, the Commission should clarify that existing contractual provisions regarding disposition of home run wiring are *not* grandfathered to the extent that they are less favorable to cable's competitors than the Commission's rules.[31]

Further, the Commission's generic rule as to future contracts also comes too late in the day, since many incumbent cable operators have already locked up MDU properties with existing long-term contracts, and thus will be unaffected by such a rule for the foreseeable future. Moreover, allowing the cable industry to govern itself via private contracts has not promoted competition in the MDU environment, and it is beyond debate that cable operators are unlikely to abandon their anticompetitive tactics unless the Commission adopts specific requirements that they do so. It also clearly is not in the best interests of administrative efficiency to drag the Commission into debates over whether language in future contracts sufficiently "describes" the disposition of home run wiring upon termination. Simply stated, the Commission's generic rule requiring that future contracts only address disposition of home run wiring in some undetermined manner is a cable-friendly loophole and should be rejected in favor of rigorous enforcement of the Commission's inside wiring rules.

31/ WCA does not believe that such action would qualify as a prohibited "retroactive rulemaking" as defined by the United States Supreme Court. *See, Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988); *id.* at 219 (Scalia, J., concurring) ("A rule with exclusively future effect . . . can unquestionably *affect* future transactions . . ., but it does not for that reason [become a retroactive rule]."); *Multistate Communications, Inc.* v. *FCC*, 728 F.2d 1519, 1526 (2nd Cir. 1984).

E. The Commission's Signal Leakage Rules Should Be Modified to Accommodate the Special Circumstances of Wireless Cable Operators.

Though WCA does not object in principle to the Commission's requirement that all MVPDs be subject to its signal leakage rules, it must be remembered that those rules were designed with the cable industry in mind only, and thus were not drafted under the assumption that they would be applied to fundamentally different technologies such as wireless cable. This is especially true with respect to the Commission's "substantially built" requirement. As set forth in the *R&O*, the Commission has decided to give wireless cable systems a five-year exemption from most of its signal leakage rules if they are "substantially built" by January 1, 1998.[32] For this purpose, the Commission defines "substantially built" as having 75% of the distribution plant completed.[33]

Unlike a traditional wired cable system, a wireless cable system does not "build out" plant by gradually laying coaxial cable or fiber within a precisely defined franchise area. Instead, a wireless cable system delivers programming to subscribers via a direct microwave link between a transmitter and a rooftop antenna installed at the subscriber's home. Thus the "75%" concept is far more difficult to apply to wireless cable. WCA thus submits that the Commission can eliminate this anomaly simply by declaring that a wireless cable system will be considered as "substantially built" when its headend/transmitter facilities are constructed and operational.

32/ *R&O* at ¶ 239.

33/ *Id.*

III. CONCLUSION.

Again, WCA commends the Commission for issuing the *R&O* on an expedited basis. WCA believes, however, that the Commission's inside wiring rules still require additional "fine tuning" as described above if they are to achieve the Commission's fundamental objective of maximizing MVPD competition in the MDU environment. WCA thus urges the Commission to adopt the rule modifications suggested here and thereby create more opportunities for subscribers to enjoy the benefits of that competition.

WHEREFORE, for the reasons set forth herein, the Wireless Cable Association International, Inc. requests that the Commission reconsider its *R&O* and adopt the rule modifications proposed herein.

Respectfully submitted,

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