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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

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In the Matter of )  
)  
Telecommunications Services )  
Inside Wiring )  
)  
Customer Premises Equipment )  
)  
)  
)  
In the Matter of )  
)  
Implementation of the Cable )  
Television Consumer Protection )  
and Competition Act of 1992: )  
)  
Cable Home Wiring )

CS Docket No. 95-184

MM Docket No. 92-260

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Comments of CableVision Communications, Inc.,  
Comcast Cable Communications, Inc.  
And Tele-Media Corporation of Delaware  
on the Second Further Notice of Proposed Rulemaking

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## EXECUTIVE SUMMARY

The Federal Communication Commission's *Second Further Notice of Proposed Rulemaking* in this Docket addresses certain narrow issues concerning the provision of multichannel video programming to multiple dwelling units ("MDUs"). The key narrow issues to be addressed by the Commission under this *Rulemaking* are: (1) whether the Commission should limit future exclusive contracts between multichannel video programming distributors ("MVPD") and the owners of MDUs; (2) whether the owner of an MDU may take a "fresh look" at existing "perpetual exclusive contracts"<sup>1</sup>; (3) whether the Commission has the authority to expand its cable home wiring rules to all MVPDs; and (4) determining what the current technical, practical and economic feasibility and limitations of sharing home run wiring. CableVision Communications, Inc., Comcast Cable Communications, Inc. and Tele-Media Corporation (hereinafter "CableVision," "Comcast," "Tele-Media," and sometimes collectively referred to as the "Cable Operators"), as providers of cable television services, have a substantial interest in providing such services to residents of MDUs and will be affected by the outcome of this proceeding.

The Commission tentatively concludes that it should "cap" the length of exclusive contracts for all MVPDs. The cap would limit the enforceability of exclusive contracts to the amount of time reasonably necessary for an MVPD to recover its specific capital cost of providing service to that MDU, including, but not limited to, the installation of inside wiring, headend equipment and other start-up costs. *Second Further Notice of Proposed Rulemaking* ("*Second Further Notice*") at ¶ 259.

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<sup>1</sup> Defined as "those running for the term of a cable franchise and any extensions thereof." *Second Further Notice* at ¶ 263.

CableVision, Comcast and Tele-Media believe that the proposed rules and tentative conclusions set forth in the *Second Further Notice* will not achieve the goals and objectives that Congress has set out in the Telecommunications Act of 1996, including the maximization of consumer choice and competition in the marketplace. As a result of the Commission's proposed rules tenants of MDUs will have no greater ability to choose the provider of their multichannel video services than they had before. The only winner as a result of these proposed rules is the MDU owner whose role as gatekeeper will be confirmed and strengthened.

The Cable Operators agree with the Commission when it stated that its intent was not to destroy property rights. *Second Further Notice* at ¶ 50. However, the Cable Operators have watched the Commission reach both tentative and final conclusions that have and will destroy property rights.

With respect to the substantive issues raised by the Commission in its *Second Further Notice*, the Cable Operators assert that:

- any rule established should apply equally to all MVPDs and should only be prospective in nature.
- the cap for the exclusivity period should be five (5) years and it should apply to all MVPDs.
- after the exclusivity period expires and the MVPD has recouped its investment, no further exclusive contracts between that MVPD and MDU owner should be permitted unless additional substantial investment is required.
- no MDU owner should be permitted to prematurely terminate an exclusive service contract, unless it is in accordance with the terms and conditions of the contract.

- any challenge to the length of an exclusive service contract should be resolved by arbitration in the county where the MDU is located.

- all interested parties should be specifically listed as one who may bring a challenge to an exclusivity time period within a service contract that is longer than the "cap" as established by the Commission.

- a limitations period for bringing a challenge to the length of the exclusivity period within a service contract should exist.

- the Commission should preempt local franchise ordinances that conflict with these proposed rules.

- the Commission should not require the forced sharing of a single home run wire by competing broadband service providers.

While the Cable Operators have set forth their comments on all of the above issues, they assert that no matter what this Commission concludes, the Rules established **must** be **uniform** as to all MVPDs, whether they be franchised cable operators, SMATV operators, MMDS operators, or any other provider of multichannel video programming service to residents of MDUs. Uniformity of the rules will assist in accomplishing the goal of greater consumer choice in providers of these services and of competition on a level playing field.

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

In the Matter of	)	
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Telecommunications Services	)	CS Docket No. 95-184
Inside Wiring	)	
	)	
Customer Premises Equipment	)	
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Implementation of the Cable	)	
Television Consumer Protection	)	MM Docket No. 92-260
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Comments of CableVision Communications, Inc.,  
Comcast Cable Communications, Inc.  
And Tele-Media Corporation of Delaware  
on the Second Further Notice of Proposed Rulemaking

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Pursuant to 47 C.F.R. §§ 1.415, 1.419, CableVision Communications, Inc., Comcast Cable Communications, Inc. and Tele-Media Corporation of Delaware, through their attorneys, file the following comments in the above-captioned proceeding.

CableVision Communications, Inc. (hereinafter "CableVision") is a multiple system manager of cable systems throughout the United States. The systems CableVision manages serve approximately 320,000 subscribers, many of whom reside in multiple

dwelling units (hereinafter "MDUs"). Comcast Cable Communications, Inc. (hereinafter "Comcast") owns, manages and serves 4.3 million subscribers in 21 states and many of its subscribers also reside in MDUs. Tele-Media Corporation of Delaware (hereinafter "Tele-Media") serves approximately 300,000 subscribers in 15 states, many of whom reside in MDUs. CableVision, Comcast and Tele-Media (sometimes collectively referred to as the "Cable Operators"), as providers of multichannel video services, have a great interest in providing service to subscribers within MDUs and will be affected by the outcome of this proceeding.

#### **I. INTRODUCTION**

The Federal Communications Commission (hereinafter the "Commission") seeks comment on whether it should adopt a "cap" on the length of exclusive service contracts<sup>2</sup> for all MVPDs that would limit the enforceability of exclusive contracts to the amount of time reasonably necessary for an MVPD to recover specific capital costs of providing service to an MDU, including, but not limited to, the installation of inside wiring, headend equipment and other start-up costs. The Cable Operators note that the Commission stated in its October Report and Order and prior Notices<sup>3</sup> its "intent not to 'create or destroy any property rights' by these procedures, we will not create any new right of MDU owners and alternate providers to act on behalf of subscribers in terminating service." (*Second Further Notice* at ¶ 50). Consequently, the Commission should follow its own declarations, and not issue any ruling on presently existing exclusive service contracts, leaving this issue for the

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<sup>2</sup> For this purpose, an exclusive service contract is one that prohibits an MDU owner from granting a right of access to more than the one MVPD in which it has contracted.

<sup>3</sup> See *Inside Wiring Further Notice* at ¶ 146.

open-market to determine, since any decision by the Commission would "create or destroy" contractual rights of the parties<sup>4</sup> to a contract for the provision of multichannel video programming services to tenants of an MDU. Thus any new rules should only be prospective in nature.

If the cable home wiring rules were intended to increase "consumer choice"<sup>5</sup>, meaning allowing the end-user, the person actually watching the video programming, to have the choice of which MVPD provides the service, then neither permitting MVPDs to enter into exclusive contracts nor the building-by-building disposition of cable home wiring as set forth in the Commission's Report and Order dated October 17, 1997 will accomplish that goal.<sup>6</sup> Consequently, because these proposals will not accomplish the goals mandated by Congress, the Commission has acted beyond its statutory authority in enacting these Rules.

However, since the Commission has found, without any explanation and contrary to the empirical data submitted cite prior comments we filed, that the building-by-building disposition of cable home wiring will somehow "benefit consumer choice" (*Oct Report and Order* at ¶ 42) and that exclusive service contracts should not be prohibited (*id.* at ¶ 258),

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<sup>4</sup> The United States Supreme Court has held that a contract is a property right. *United States Trust Co. of New York v. State of New Jersey*, 431 U.S. 1, 19 n.16 (1977).

<sup>5</sup> "We continue to believe, as discussed at length in the *Inside Wiring Further Notice*, that more is needed to foster the ability of subscribers who live in MDUs to choose among competing service providers." *Report and Order*, MM Docket 92-260, dated October 17, 1997 (hereinafter cited as "*Oct. Report and Order*") at ¶ 35 (footnote omitted).

<sup>6</sup> See Comments of Cablevision, Classic and Comcast, dated September 25, 1997 at 13-20; Reply Comments of Cablevision, Classic and Comcast, dated October 6, 1997 at 5-7.

the Commission decision regarding exclusive service contracts must apply uniformly — to both the incumbent (whether it be an incumbent cable operator or an incumbent SMATV operator) and the incoming MVPD (whether it be an MMDS operator or a franchised cable operator). No justification exists to treat an MVPD differently based on the legal classification of the service or based on the transmitting technology used.

## ***II. Reasonable Length of Exclusivity Period***

Because exclusive service contracts often diminish consumer choice, the Commission should keep to a minimum the reasonable period of time for an MVPD to recoup its specific capital costs of providing service to a particular MDU should be kept to a minimum. Instead of five to seven or seven to ten years, as suggested by the Commission (*Second Further Notice* at ¶ 259), the Cable Operators suggest that five (5) years is more reasonable and appropriate. For instance, Comcast is aware of an MVPD in Little Rock, Arkansas, American Telecasting, Inc. ("ATI"), that has told a state court that it "need[s] to have exclusive access to the properties they serve for *some limited period of time* to ensure that they will recoup their investment." (emphasis added) (a copy of this portion of the pleading is attached as Exhibit A). ATI's exclusive service contract with that MDU owner is for only five (5) years. Of course, the MVPD could enter into a longer exclusive service contract, as long as it were prepared to present evidence to an independent expert showing that the longer time period is necessary to recoup its specific investment at that particular MDU. As with the arbitration process for determining the value for the home run cables, should the MDU owner or MVPD decline to submit to binding arbitration, the parties will be prohibited from entering into an exclusive service contract longer than the contract cap to be determined by the Commission to be appropriate and reasonable in this proceeding.

After the exclusivity period is complete and the MVPD has recovered its initial specific capital investment for the provision of multichannel video programming service to the particular MDU, that MVPD should be prohibited from entering into another exclusive service contract with that MDU owner unless a major upgrade or other significant investment of the facilities is necessary because of the age and/or condition of the facilities and/or the addition of new technology. However, an upgrade of the plant in order to add a new service, which is presently readily available, to the MDU such as pay-per-view movies and events or digital radio, should not be considered the addition of a new technology sufficient to add to the length of exclusivity.

A different rule should apply in the circumstance of a monopoly provider of telephone services which is also offering to provide multichannel video programming services in the same franchise area. The potential abuse of exclusivity in a situation of captive local exchange service is extraordinarily high. A local telephone service provider could easily leverage its monopoly status in MDU and planned unit developments<sup>7</sup> to require and/or coerce property owners to enter into exclusive service contracts. This type of abuse is evident from the actual circumstances in Michigan, Ohio, Illinois and Indiana with Ameritech, in which it engaged in a comprehensive marketing program to its local telephone customers offering them discounts on local telephone service, among other things, if the customers would subscribe to Ameritech's affiliated cable service. See Exhibit B attached hereto.<sup>8</sup> Although the precise marketing plan in the "AmeriChecks"

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<sup>7</sup> A single family home development, often known as "PUDs."

<sup>8</sup> That conduct was declared to be unlawful by the Public Utilities Commission of Ohio and a Michigan Administrative Judge. (A copy of the Michigan ruling is attached as Exhibit C).

program is somewhat different than exclusivity, one could easily imagine exclusivity as a demand in negotiations for a broadband network within an MDU or PUD. Consequently, the Commission should promulgate a rule prohibiting exclusive service contracts by a local telephone company where it seeks to also provide cable service in the same development.

The Commission requests comment on whether an MDU owner should be afforded an opportunity to terminate the exclusive service contract and retain the inside wiring, in exchange for a payment to the provider compensating it for unrecovered investment costs. The Cable Operators assert that the only time that anyone should be permitted to terminate a contract is under the specific provisions of the contract or in case of breach by one of the parties to the contract. Once a party, such as an MDU owner, enters into a contract, it should not be given the opportunity to terminate the contract. The Commission must honor the integrity of contracts. However, payment of simply unrecovered investment costs does not make the MVPD whole. The Commission appears to rely upon a faulty reinvestment assumption that the MVPD can simply reinvest that money into another project and obtain the same return on the investment. This assumption is wrong. services to the residents of that MDU, even over the objection of the MDU owner.

### **III. Forum**

The forum for determining any disputes raised concerning the entry and/or enforceability of an exclusive service contract remains a critical issue. The most appropriate forum is arbitration in the county in which the MDU is located, similar to the Rules proposed by the Commission for the determination of the purchase price of the home run wiring in both the building-by-building and unit-by-unit disposition procedure. (*Oct. Report and Order* at ¶¶ 46 and 53). Under that scenario, the parties would have seven days to agree on an independent expert or to each designate an expert who will pick

a third expert within an additional seven days. The independent expert will be required to assess within 90 days whether the length of the exclusive contract is proper in order for the MVPD to recoup its capital investment for the provision of service to that particular MDU.

For the forum to be anywhere else (such as the Commission in Washington, D.C.) would render the process of making the determination of the length of the cap and whether the MVPD will be able to reasonably receive a return on its investment, or a challenge to the entry of an exclusive contract, too burdensome to make it worthwhile for the MVPD or the MDU owner to even consider challenging or pursuing.

#### ***IV. Standing to Challenge***

Equally as important as selecting the appropriate forum, is for the Commission to determine who may challenge the entry of or the length of an exclusive service contract. The Commission should establish a list of parties aggrieved by the entry of an exclusive service contract that exceeds the time period established by the Commission to be reasonable (i.e., the "cap"). Without setting forth those persons who may bring an action or a challenge, one omitted from that list may be denied the opportunity to participate in the arbitration proceedings when the Commission actually meant for that party to participate by bringing a challenge. The Cable Operators suggest that the cable operator(s) duly franchised in the county where the MDU is located should be among those able to challenge the entry of or length of an exclusive service contract. Additionally, any MVPD<sup>9</sup> that actually submitted a bid to the owner (or the owner's agent) in order to provide service to that MVPD, but did not receive a contract for access and service should be able

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<sup>9</sup> Including the incumbent franchised cable operator.

to bring a challenge in order to review the length of an exclusive service contract between the MDU owner and another MVPD.

Finally, the question arises of whether should a tenant or resident of the MDU should be able to bring a challenge to review the entry of or length of an exclusive service contract? The initial argument to allow the resident to bring the challenge is that he/she is the one directly effected by the entry of the exclusive service contract, which may severely limit his/her choices of MVPD for the period of time that the exclusive service contract is in effect. However, for those residing in a condominium, cooperative or other form of MDU where the resident is a part owner of the premises and has a vote in deciding which MVPD to choose, the length of the service contract, and whether that service contract is exclusive or not, they should not have the right to challenge the exclusivity provision of the service contract. On the other hand, for those renting a unit within an MDU who have absolutely no choice in the determination of the MVPD, the service contract, and/or the length of the exclusivity period, that consumer should be able to challenge the exclusivity portion of such a service contract. The tenant/consumer has no choice in the matter, especially if he/she is in the middle of a lease, and rarely will break a lease or move to another MDU because his/her choice of MVPD providers has been denied.

#### ***V. Limitations Period***

The Cable Operators next assert that there should be some limitations period for those permitted to challenge the length of the exclusive period of the service contract. Consequently, the Cable Operators suggest that if an MVPD desires a period of

exclusivity, the MDU owner should be required to notify by certified mail<sup>10</sup> those parties able to challenge the length of the exclusivity period of the service contract prior to the execution of the service contract if it is longer than the cap chosen by the Commission. Those permitted to challenge should then have 7 days from receipt of notification to notify the MVPD or the owner of the MDU of its challenge. A hearing should then be held before an arbitrator (the independent expert) within 30 days of the date receiving the challenge. Once notified that a party will challenge the length of the exclusivity period, or that the arbitrator's decision is that the exclusivity period is unreasonable, the MVPD has the option to renegotiate the term of the exclusivity period or not enter into the service contract at all.

#### **VI. *Constitutional, Statutory or Common Law Implications***

The Commission concluded that it possesses jurisdiction to issue the *Oct. Report and Order* on this issue based upon its statutory authority to regulate cable service rates under Section 623 of the Cable Television Consumer Protection and Competition Act of 1992. However, Section 623(a)(2) provides for a preference for competition, stating that “[i]f the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a state or franchising authority under this section.” Thus, it should equally follow that if determination has been made that a cable operator is faced with “effective competition” in a franchise area, which would render rate regulation inapplicable, then the Commission’s ability to regulate the disposition of cable home wiring and exclusive service contracts (including the proposal to allow property owners a “fresh look”

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<sup>10</sup> For the tenant, the posting of a notice to all residents in a conspicuous place where the landlord posts other notices of interest to the residents should be sufficient.

at existing service contracts containing an exclusivity provision) within an area of effective competition should also be inapplicable.

Additionally, the Cable Operators are aware of certain franchise ordinances that absolutely prohibit exclusive service contracts between franchised cable operators and the owners of MDUs which will conflict with the proposals set forth by the Commission in this *Second Further Notice*. Consequently, in order to ensure uniformity, the Commission should conclude that any Rule that permits the entry of an exclusive service contract, even for a limited and capped period, would expressly preempt any state, county or city ordinance in conflict with such a Rule. This conclusion would place franchised cable operators on an equal playing level with non-franchised MVPDs who may not be subject to such franchise ordinance prohibitions.

#### ***VII. Applicability of Rules to Single Family Home Developments***

While single family home developments or PUDs are different from MDUs when it comes to home run wiring, which means that the building-by-building and unit-by-unit disposition of home run wiring would not apply to a PUD, the Commission's consideration of exclusive service contracts could certainly apply to service contracts entered into by MVPDs and the owner/developer or the homeowners associations of the PUDs. Again, if the goal of the Commission is to ensure that the subscriber has the ultimate choice of which MVPD he/she is able to choose, the Commission needs to obtain further information concerning whether its proposed rules concerning exclusivity periods should apply to service contracts for the provision of multichannel video programming service to PUDs.

### **VIII. Simultaneous Use of Home Run Wiring**

Finally, the Commission seeks comment on DIRECTV's suggestion that it require multiple, competing broadband service providers to share a single home run wire in an MDU. In particular, the Commission "seeks comment on the current technical, practical and economic feasibility and limitations of sharing of home run wiring." *Second Further Notice* at ¶ 271. Further, the Commission seeks comment on its "legal authority to impose such a requirement and whether such a requirement would constitute an impermissible taking of private property under the Fifth Amendment." *Id.* at ¶ 271.

The Commission notes in the *Second Further Notice*:

Cable operators generally oppose DIRECTV's suggestion that two video service providers may share a single wire, stating that the alternative provider would have to use different frequency bands to avoid interference, and, while theoretically possible, most systems do not have sufficient bandwidth capacity to carry multiple MVPDs. *Id.* at ¶ 270 n. 750.

The Cable Operators generally agree with the above statement. What has been observed when two competing broadband providers attempt to use the same home run wire when there is not sufficient bandwidth is interference with the picture on the subscriber's television that can get so great that the subscriber is unable to watch the programming. When interference in the picture occurs, the subscriber often blames the cable operator for the inability to watch the video programming service. The cable operator's service is disparaged, even when the interference might well have been caused by the other provider of broadband service sharing the home run wire.

Moreover, the forced sharing of home run wiring often results in technical nightmares for the cable operator who must cause a service truck to roll every time that a subscriber complains about picture interference.<sup>11</sup> Additionally, the cause of picture interference can often be difficult to detect when the home run wire is being shared by another provider of broadband services. Thus, there is also a financial impact on the cable operator when it is forced to share the home run wiring.

Additional problems that have been experienced by cable operators would have to be resolved by the Commission before it could **require** cable operators to share its home run wiring. These problems include determining which competing broadband service provider should the Commission hold responsible should a signal leakage problem occur. It may not be simple to determine whose plant is leaking the signal when the two providers are sharing one home run wire. Second, some type of monetary payment, such as a rental payment to the cable operator, would need to be required to be paid by the alternate provider to the cable operator, who initially invested the capital to purchase, install and maintain the home run wire. Since the Commission recognizes that MVPDs should be able to recoup their initial capital investment for start-up at an MDU, that same investment must be recognized in this situation. Moreover, alternate providers, like DIRECTV, should not be permitted a "free ride", giving them a competitive advantage in pricing over the incumbent MVPD.

The Cable Operators, though, are aware of continuing and cooperative testing of the technical and practical feasibility of sharing a single home run among cable operators and alternative broadband service providers. Even in advanced cable systems where the

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<sup>11</sup> The Cable Operators understand that the national average is that each truck roll for a service call costs between \$45 and \$50, plus the time for the technician.

cable operator has expanded to 750 MHz, service providers such as DIRECTV provide service at a higher frequency, above 950 MHz. Thus, while it should be technically feasible for both providers to share one home run wire, as set out above, the practical problems of interference still exist. The Cable Operators contend that voluntary and cooperative testing should bring a resolution to the interference problem. However, **forced** sharing of the home run wire before it is technically and practically feasible will not accomplish the Commission's goals nor will it advance the technological advances being made by cooperative testing by the parties.

#### **IX. CONCLUSION**

The Cable Operators assert that the Commission, throughout this proceeding concerning cable home wiring, has set out goals that have not been accomplished and has acted beyond its statutory authority and Congressional mandate to accomplish greater consumer choice of multichannel video programming service providers. The Cable Operators assert that any disturbance of existing service contracts containing exclusivity provisions destroy contractual rights of the parties, which the Commission has stated that it would avoid. See *Second Further Notice* at ¶ 50.

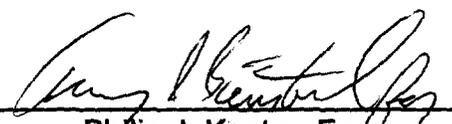
Whether the Commission finally determine to "cap" future exclusive service contracts at five (5) years or ten (10) years and whether the Commission determines that once the initial term of the exclusive service contract has expired and the MVPD has recouped its investment and cannot enter into future exclusive service contracts with that particular MDU, the Cable Operators will, of course, abide by the Commission's decision on these issues. However, the Cable Operators assert that for subscribers to multichannel

video service residing within MDUs to receive the greatest choice possible, these proposed Rules **must** be uniform and apply to **all** MVPDs providing service to MDUs.

Respectfully submitted,

  
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Comcast Cable Communications, Inc. and  
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**— EXHIBIT A —**

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**FILED**

**IN THE CHANCERY COURT OF PULASKI COUNTY, ARKANSAS  
FIRST DIVISION**

**96 OCT -4 PM 3:00**

**STEPHEN C. SINES  
CHANCERY CLERK  
PULASKI COUNTY, ARKANSAS**

**COMCAST CABLEVISION OF ARKANSAS, INC.**

**PLAINTIFF**

v.

96-5826

**GENERAL PROPERTIES, INC.,  
FOOTHILLS APARTMENTS LIMITED PARTNERSHIP,  
FOOTHILLS ASSOCIATES,  
THE CRESTWOOD COMPANY,  
FOOTHILLS CORPORATION,  
FOOTHILLS II APARTMENTS LIMITED PARTNERSHIP,  
FOOTHILLS II ASSOCIATES  
APARTMENT HOUSE BUILDERS, INC.  
AMERICAN TELECASTING, INC., and  
AMERICAN TELECASTING OF LITTLE ROCK, INC.**

**DEFENDANTS**

**MEMORANDUM IN SUPPORT OF DEFENDANTS'  
MOTION TO DISMISS COMCAST'S COMPLAINT**

*11/11/96*

Defendants General Properties, Inc., Foothills Apartments Limited Partnership, Foothills Associates, The Crestwood Company, Foothills Corporation, Foothills II Apartments Limited Partnership, Foothills II Associates (collectively "Foothills"),<sup>1/</sup> American Telecasting, Inc., and American Telecasting of Little Rock, Inc. (collectively "American Telecasting") submit this memorandum in support of their motion to dismiss (the "Motion to Dismiss") the complaint (the "Complaint") filed by Comcast Cablevision of Arkansas, Inc. ("Comcast") in the above -referenced action. As shown below, none of the six counts of the Complaint state a claim upon which relief can

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<sup>1/</sup> Apartment House Builders, Inc., the other defendant herein, is represented by separate counsel in this action. It is our understanding that Comcast may soon voluntarily dismiss this entity from the case.

**EXHIBIT A**

termination of the 1984 Agreement and disobeyed Foothills' demand that Comcast leave Foothills' Property on August 27, 1996. Instead, on August 23, 1996, with apparently no intention of leaving the Property as ordered by Foothills, Comcast filed its six count Complaint against Foothills and American Telecasting. As of this date, Comcast is still providing its service to the Property. Therefore, Foothills and American Telecasting have been unable to perform as contemplated under the agreement between them, initially executed in February 1996, which provides that American Telecasting shall be the exclusive video services provider on the Property.<sup>1/</sup>

#### Additional Background

Comcast has been the exclusive provider of video services on Foothills' Property for the last twelve years -- from 1984 through 1996, pursuant to the 1984 Agreement, excepting its current post-termination holdover status. Comcast is now attempting to use that same Agreement -- even though it has been terminated -- to prevent Foothills from ever allowing any other provider to be the exclusive provider on Foothills' Property.

Unlike in 1984, when property owners such as Foothills had no choice but to use the cable operator who is franchised by the local franchising authority (e.g., Comcast), there are now several options from which property owners may choose. Some of those options include medium-sized companies (that are relatively small compared to Comcast) who need to have exclusive access to the properties they serve for some limited period of time in order to ensure that they will recoup their

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Termination Letter, and Comcast does not and cannot allege to the contrary.

<sup>1/</sup> The current state of affairs at the Property, as well as some of the additional background set forth in the next section below, is provided merely to allow this Court to put the dispute in context. Defendants are not relying upon any facts in requesting that this Court grant the Motion to Dismiss other than those alleged in the Complaint and as reflected in the Exhibits to the Complaint.

investment. One of those companies is American Telecasting, which provides virtually all of the most popular channels at a low price, and which uses microwave in conjunction with cable wire to transmit the signals to its customers. American Telecasting's operations and services are regulated by the Federal Communications Commission. Congress, in enacting the 1996 Telecommunications Act, expressly indicated that it wished to open the telecommunications field to more providers so that competition in the industry could be furthered. H. R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 1 (1996).

Comcast, however, wants to thwart companies such as American Telecasting from competing in Arkansas. Comcast seeks to eliminate the competition by claiming that agreements such as the 1984 Agreement - which we understand to be a standard form agreement that exists on numerous properties throughout Arkansas - give Comcast the right to serve such properties in perpetuity. Therefore, if Comcast prevails here, any company that needs exclusive access to serve a property will never be able to serve any property in which Comcast has an agreement like the 1984 Agreement. Moreover, other providers, such as phone companies, may also avoid properties where they cannot get exclusive access for some limited period of time. The bottom line is that if Comcast prevails here, property owners throughout Arkansas may be stuck with Comcast forever regardless of whether they want Comcast or not. Many of these property owners, including Foothills, never even executed video service agreements with Comcast, but instead entered into agreements with predecessors or companies who assigned their rights to Comcast.

Notwithstanding the foregoing, Comcast is asking this Court to hold that property owners such as Foothills cannot terminate Comcast's service, exclude Comcast from the property owners' own property, or select the video service provider of their choice, in the year 2000, the year 2010,

**CONCLUSION**

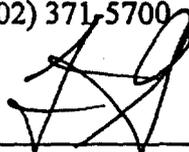
In light of the foregoing, this Court should dismiss Comcast's Complaint.

Respectfully submitted,



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FOOTHILLS CORPORATION,  
FOOTHILLS II APARTMENTS  
LIMITED PARTNERSHIP,  
FOOTHILLS II ASSOCIATES  
AMERICAN TELECASTING, INC., and  
AMERICAN TELECASTING OF LITTLE ROCK,  
INC.

Dated: October 4, 1996

**— EXHIBIT B —**