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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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DEC 23 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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	)	

COMMENTS OF TIME WARNER CABLE

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Dated: December 23, 1997

Its Attorneys

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SUMMARY

The Commission should refrain from interfering with existing exclusive service contracts between MVPDs and MDU owners, and allow arms-length negotiations to govern such contractual issues, because the provision of multichannel video programming service to MDUs is a highly competitive area. Moreover, the Commission lacks jurisdiction to enact home wiring rules that interfere with existing exclusive contracts.

The Commission should adhere to its stated intent not to apply its home wiring rules where the incumbent provider has a contractual right to maintain its home run wiring on an MDU property. Accordingly, the Commission should not adopt rules that abrogate existing exclusive service contracts. The Commission also should not establish a presumption that an MVPD had "market power" over an MDU owner when the parties have entered into an exclusive contract, because, in fact, both parties are equally able to conduct negotiations in such a way that results in an agreement that is mutually beneficial, and the mere existence of an exclusive contract is hardly a proxy for a judicial determination of "market power" under the antitrust laws.

The Commission also should not adopt a "fresh look" approach for any existing contracts, because: (1) such an approach effectively permits abrogation of existing contracts; (2) the Commission lacks the legal authority to apply a "fresh look" approach in the MDU video service context; and (3) the "fresh look" mechanism is a bad fit for MDU video service. Any attempt by the Commission to abrogate the exclusivity term of any exclusive contract should not impact other provisions of that contract, such as the continuing right to offer service to residents of that MDU. The Commission must also be careful to clarify that any regulations pertaining to MVPD service contracts cannot apply in states with mandatory access statutes.

With regard to any rules pertaining to MVPDs' ability to enter into future exclusive service contracts, the Commission must strive for parity among *all* MVPDs, because there is no basis for creating distinctions among various types of MVPDs. Furthermore, any "cap"

on the length of exclusive service contracts should not be tied to the MVPD's recoupment of its investment, but should be left to arms' length negotiations between the parties. It should not be the Commission's role to guarantee that any competitor will recoup its investment, but rather to minimize regulatory barriers which may restrict further competition.

The Commission's single family home wiring rules should apply to all MVPDs, and while Time Warner still disputes the Commission's authority to enact the MDU home run disposition rules, we agree that competitive parity requires that any such rules should apply equally to all MVPDs as well.

Time Warner supports the Commission's decision to apply its signal leakage rules to all broadband service providers that utilize frequencies in the aeronautical and public safety bands where the existence of signal leakage could pose a threat to public health and safety. However, Time Warner does not support the creation of an exemption from the annual CLI reporting requirement for "small" broadband systems because such an exemption would not serve the public interest. Because all MVPDs, regardless of size, are required to conduct signal leakage tests if they use aeronautical and safety frequencies, the burden of filing their test results is minimal when compared to the benefits from the ability to track down the source of any potentially life-threatening leakage.

Finally, Time Warner opposes any regulations that require the shared use of home run wiring. The technical limitations of most cable systems make shared use impossible, and even if the necessary bandwidth were available, cable operators require additional room on their systems to ensure their ability to expand and offer more services in the future. Forced sharing of wiring would also result in an unfair competitive economic advantage for alternative service providers who did not incur the cost of installing home run wiring in an MDU. The Commission also lacks the legal authority to force shared use rules on incumbent providers because cable systems are not subject to regulation as common carriers. Lastly, the forced shared use of wiring would constitute an impermissible taking of private property

under the Fifth Amendment by denying the incumbent provider its right of access to its property, and its right to exclude others from using or physically occupying its property.

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COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., by its attorneys, hereby respectfully submits these comments in response to the above captioned Second Further Notice of Proposed Rulemaking, released by the Federal Communications Commission ("Commission" or "FCC") on October 17, 1997.[1] Time Warner, through various subsidiaries and affiliates, operates cable television systems across the nation.

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[1]Telecommunications Service Inside Wiring, Customer Premises Equipment, Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 94-184, FCC 97-376 (rel. October 17, 1997) ("Second Further Notice").

I. The Commission Should Rely On The Marketplace To Resolve Issues Regarding Exclusive Service Contracts Between MVPDs And MDU Owners.

The provision of multichannel video programming service to multiple dwelling unit ("MDU") buildings is a highly competitive area, and has been for many years. Franchised cable operators have been competing with satellite master antenna television ("SMATV") operators to provide service to MDUs at least since the early 1980s.[2] Competition by SMATV has been increasing steadily, and in the last three years, has continued to experience an increase in both the number of systems and the total number of SMATV subscribers.[3] In August 1994, there were an estimated 3000 to 4000 SMATV systems operating nationwide.[4] Those SMATV systems were serving approximately one million subscribers.[5] By late 1995, industry sources estimated that there were approximately 5200 SMATV operators providing service, and that, by late 1996, SMATV operators were serving approximately 1.05 million residential subscribers.[6] In recent years, alternative providers have offered to deliver multichannel video programming services to MDU residents through a variety of

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[2]The genesis of the SMATV industry can be traced to the Commission's authorization of smaller receive-only earth station antennas in 1977. American Broadcasting Companies, Inc., 62 FCC 2d 901 (1977).

[3]Compare Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report, CS Docket No. 94-48, 9 FCC Rcd 7442, ¶ 92 (1994) ("First Report") with Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report, CS Docket No. 96-133, 5 Comm. Reg. 1164, ¶ 81 (rel. January 2, 1997) ("Third Annual Report").

[4]First Report at ¶ 92.

[5]Id.

[6]Telecommunications Service Inside Wiring, Customer Premises Equipment, Report and Order, CS Docket No. 94-184 and MM Docket No. 92-270, ¶ 286 (rel. October 17, 1997) (hereinafter "Order") (citing Third Annual Report at ¶ 81).

technologies, including 18 GHz operational fixed service microwave, open video systems, and direct broadcast satellite.[7] In some instances, the cable operator has been successful in negotiating an exclusive service contract with the MDU owner, and in other instances, the alternative provider has been successful in negotiating an exclusive service contract. To date, the Commission has wisely stayed away from interfering with the negotiation of such existing exclusive service contracts. Given the high degree of competition for the rights to provide service to MDUs, the Commission should continue to refrain from interfering with contracts that have heretofore been negotiated entirely by the parties involved. The provisions of existing MVPD service contracts involving MDUs should be left to the marketplace, and should be unencumbered by FCC regulations.

Furthermore, the Commission's authority to enact home wiring rules that pertain to exclusive service contracts that may address the use and/or disposition of home wiring within an MDU is highly questionable given the specific, narrow language of the home wiring provision.[8] The home wiring provision directs the Commission to enact rules pertaining to "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."[9] Nowhere in the statute, or its legislative history, is there any indication that this provision could be stretched to encompass rules governing MVPD service contracts entered into by the MVPD and the

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[7]See, e.g., Monica Hogan, "MDU Market Attracts Notice As Competition Enters Field," Multichannel News, December 15, 1997, at 6-7 (cable operators serving MDUs are facing increased competition from private cable operators, direct broadcast satellite companies, wireless cable operators, and phone companies).

[8]See 47 U.S.C. § 544(i).

[9]Id.

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[8]See 47 U.S.C. § 544(i).

[9]Id.

MDU owner. Expansion of the home wiring provision to include authority to enact such regulations is simply not within the Commission's jurisdiction.[10] Indeed, the Commission has expressly determined that its new MDU home run disposition rules will not apply in any situation where a contract between the parties "addresses the disposition of the home run wiring."[11]

A. The Commission's home wiring rules cannot permit the abrogation of existing contracts.

The Commission has previously stated its intent not to apply its home wiring rules "where the incumbent provider has a contractual, statutory or common law right to maintain its home run wiring on the property."[12] In adopting its new MDU home wiring rules, the Commission expressly reiterates that the new "procedures will not apply where the incumbent provider has a contractual, statutory or common law right to maintain its home run wiring on the property.[13] Incongruously, despite the appropriate deference to the sanctity of contracts expressed above, the Commission has requested comment in the Second Further Notice on whether it "can and should take any specific actions regarding so-called 'perpetual' exclusive

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[10]See Time Warner Comments in CS Docket 95-184 and MM Docket 92-260, filed September 25, 1997, at 49-67 ("Time Warner Comments") (thorough discussion of the Commission's authority to enact rules under the home wiring provision). Hereinafter, all citations to Comments or Reply Comments filed by various parties refer to those documents filed in this proceeding on September 25, 1997 and October 6, 1997, respectively.

[11]Second Further Notice at ¶ 67.

[12]Telecommunications Service Inside Wiring, Customer Premises Equipment, Further Notice of Proposed Rulemaking, CS Docket No. 95-184, FCC 97-304, ¶ 34 (rel. August 28, 1997) ("Further Notice").

[13]Second Further Notice at ¶ 69.

contracts (i.e., those running for the term of a cable franchise and any extensions thereof)."[14] Time Warner objects to this proposal on several grounds.

First, Time Warner strongly disputes the notion that a contract which "run[s] for the term of a cable franchise and any extensions thereof" is somehow a "perpetual" contract. A contract that is limited in time by the period of a franchise and any subsequent extensions in time is, by its terms, not perpetual; it is a contract for a clearly defined length of time -- the length of the franchise agreement -- and any franchise renewals are not guaranteed.[15] Renewal of such a franchise is subject to renegotiation of any or all terms by either party at the end of the franchise term.[16] Thus, because an MDU contract which runs for the life of the franchise and any renewals terminates upon the occurrence of a clearly defined contingency, such a contract is not "perpetual" as a matter of law.

Second, the Commission should adhere to its original intent of not interfering with existing contracts -- those that run for the life of the franchise, or otherwise -- and refuse to extend application of the home wiring rules to situations where the right to offer MVPD service and/or the disposition of MDU wiring has already been addressed by contract,[17] because the Commission may only abrogate existing contractual rights where Congress has

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[14]Id. at ¶ 263.

[15]See Chronicle Publishing Co. v. Comm'r of Internal Revenue, 67 T.C. No. 80, Docket 855-74 (March 21, 1977) (allowing depreciation of cable franchises because such an asset has a useful life).

[16]MDU owners, as well as MVPD service providers, benefit from reaching long-term exclusive service contracts because they can lock in payments and other favorable terms for a long period of time. See, e.g., *Ex Parte* Letter of Cole, Raywid & Braverman, L.L.P., CS Docket 95-184, dated December 31, 1996, at 5.

[17]See Jones Intercable, et al. ("Jones") Comments at 16-17 & n.49; Cablevision Comments at 11-13, 29; Time Warner Comments at 24-25.

specifically authorized such an action by statute. Statutory authority to interfere with existing contractual rights must be explicit, or must compel such agency action.[18] In this instance, there is no statutory provision that compels the Commission to interfere with existing MVPD exclusive service contracts. In fact,

> [t]he Communications Act contains no express statement of an intention to authorize unilateral modification or abrogation of privately negotiated contracts. Nor do the various provisions of the Act 'imperatively require' that we imply such authorization.[19]

The Commission, therefore, should not attempt to enact regulations that interfere with existing private contracts between MVPDs and MDU owners.

The Commission has suggested that, under a so-called "market power" approach, a presumption should exist that an MVPD involved in an exclusive service contract with an MDU possessed "market power" when such contract was executed.[20] This issue has already been addressed, and as several parties have recognized, MDU owners and MVPD service providers are equally able to conduct negotiations that result in contracts that are acceptable, and beneficial, to both parties.[21] In fact, exclusive contracts are legitimate business practices that can benefit both parties to such agreements.[22] Thus, the Commission

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[18]See, e.g., Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 437 (1907); Bell Tel. Co. of Pa. v. FCC, 503 F.2d 1250, 1280 (3d Cir. 1974).

[19]Bell Tel. Co. of Pa. v. FCC, 503 F.2d at 1280.

[20]Second Further Notice, at ¶ 263.

[21]See Jones Comments at 16-17; Building Owners and Managers Association International, et al. ("BOMA") Comments at 7 ("building owners [ ] have protected their interests through negotiation or are aware of their rights under state law"); Time Warner Reply Comments at 13-14.

[22]See U.S. Dep't of Commerce, Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-233, at 104-06 (1988).

should not adopt a presumption that an MVPD had "market power" over an MDU owner just because they have entered into an exclusive contract. The fact that an MVPD -- be it a cable operator or an alternative provider -- has entered into an exclusive contract with an MDU owner is not a valid basis for concluding that such provider possesses "market power." In antitrust jurisprudence, which is where the term "market power" is used, a determination that the defendant has "market power" is made by the factfinder on the basis of evidence at trial.[23] The Commission cannot use the mere existence of an exclusive MDU contract as the sole basis on which to presume the existence of "market power," the determination of which typically requires a considered analysis of a wide array of factual evidence specific to the instance at hand. For the Commission to create rules grounded on such a presumption of "market power" would thrust the Commission into a role that it is neither equipped nor authorized to assume.

The provisions of any exclusive service contract are negotiated by *both* the MVPD service provider and the MDU owner, and should not be deemed "unfair" or "anti-competitive" by the Commission's rules.[24] MDU owners and MVPDs are equally sophisticated and are able to freely negotiate at arms' length. Parties negotiate the terms of exclusive service contracts with the expectation that those terms will govern their relationship. As BOMA noted in its earlier Comments, neither building owners nor MVPD service providers should have to wonder whether the state law and/or the contract they

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[23]See, e.g., United States Steel Corp. v. Fortner Enterp., 394 U.S. 495 (1969); Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451 (1992).

[24]See BOMA Comments at 6-7.

thought they were operating under is still controlling after the promulgation of new home wiring rules.[25]

Not only should the Commission not abrogate any existing service contracts, but it also should not adopt a "fresh look" approach for life-of-the-franchise exclusive contracts, or any other existing contracts.[26] Adopting a "fresh look" policy for any existing contracts is tantamount to permitting alteration or abrogation of such contracts in contravention of the Commission's stated intent.[27] Furthermore, the Commission lacks the legal authority to apply a "fresh look" approach in the MDU video service context. In adopting a "fresh look" approach involving Title II Common Carriers, the Commission relied upon its broad power under Sections 201 to 205 of the Communications Act which empower the Commission to prescribe just and reasonable changes for tariffed LEC offerings.[28] The Commission does not have such broad authority in the Title VI cable context.[29] The Commission's authority to regulate cable operators is narrowly defined. Section 623(a)(1) prohibits the Commission from regulating cable service rates except to the extent provided in Section 623 of the

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[25]Id.

[26]See Second Further Notice ¶¶ 263-64.

[27]Further Notice at ¶ 34.

[28]See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd 15499, 16044 (1996); Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 7369, 7463-7465; Competition in the Interstate Interchange Marketplace, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 2677, 2681-82 (1992).

[29]See 47 U.S.C. § 541(c) (cable systems "shall not be subject to regulations as a common carrier or utility by reason of providing any cable service").

Communications Act.[30] In the context of MDU rates, Section 623 dictates that rates are presumed reasonable unless proven to be predatory.[31] The Commission is prohibited from regulating cable operators' rates *at all* in areas subject to effective competition.[32] As documented above, MDU owners have enjoyed extensive competitive choices among MVPDs for many years. Accordingly, the Commission does not have authority to apply a "fresh look" or similar policy to cable operators' agreements with MDUs.

Moreover, the "fresh look" mechanism is a bad fit for MDU video service. The Commission's primary reason for adopting the "fresh look" policy in the limited context of certain common carrier agreements was to make way for new entrants where no competitive alternatives previously existed. Indeed, the "fresh look" doctrine was a policy adapted to the context of monopoly common carrier regulation and has been limited to situations where the contracts in question had been rendered unreasonable due to a change in a regulatory policy which had previously protected, and indeed mandated, monopolies.

In the MDU video service context, on the other hand, competitive alternatives to franchised cable operators existed when the subject contracts were entered into. There has been no regulatory structure which has protected, much less mandated, service by cable operators in MDUs on a monopoly basis. As both Congress and the Commission have recognized, the MDU video service providers have faced vigorous competition for almost twenty years, with MMDS, SMATV, DBS and other MVPDs aggressively marketing their

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[30] 47 U.S.C. § 543(a)(1).

[31] 47 U.S.C. § 543(d).

[32] 47 U.S.C. § 623(a)(2).

services to MDU owners.[33] As alternative providers have been a significant competitive presence in MDUs for decades, there is no rational reason why they deserve the extraordinary assistance and protection that was afforded to new entrants in the context of certain unique common carrier services.

To the extent that the Commission attempts to abrogate or cut short the exclusivity term of any exclusive contract, such action should have no impact on other provisions of that contract. For example, if the Commission overrides the exclusivity clause of a life-of-the-franchise exclusive contract, the MVPD would nevertheless retain the right to offer service to residents of that MDU indefinitely, albeit on a non-exclusive basis. There is an important difference between a perpetual right to provide service to an MDU, e.g., pursuant to a recorded easement, and the right to provide such service on an exclusive basis. An MVPD bargains fairly and carefully for the right to serve an MDU for an agreed-upon term, or for permission to maintain absolute dominion over its facilities installed on the premises, even after its right to provide service may have terminated. Provisions in MDU service contracts addressing the term during which service can be provided, or the ability to maintain facilities on the MDU premises, are entirely separate from an exclusivity provision. In the name of promoting competition, the Commission might decide to override an exclusivity clause to allow other MVPD providers to serve the MDU building along with the incumbent provider. However, competition would not be enhanced by any action to restrict the incumbent

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[33]See, e.g., H.R. Rep. No. 204, 104th Cong., 1st Sess. 109 (1995) (recognizing that discounted offerings to MDUs by cable operators is necessary due to the presence of other providers offering the same service); Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Third Order on Reconsideration, 9 FCC Rcd 4316, ¶ 20 (1995) (noting that competitors in the MDU market have become "important footholds for the establishment of competition to incumbent cable systems").

provider's contractual right to continue to serve the MDU, particularly in light of the Commission's express finding that "subscriber choice would be enhanced by the use of multiple wires"[34] and that "in the unit-by-unit context, the MDU owner would be expanding its residents' choices . . ."[35] In any situation where an MDU owner has agreed to allow an alternative provider to offer service in the building, the Commission should assiduously protect the contractual or statutory right of the incumbent provider to continue to offer service in that building, so that MDU residents will have the ability to enjoy the benefits of multiple wire competition.

The Commission must also be particularly careful to clarify that *any* regulations pertaining to contracts for the provision of MVPD service cannot apply in states with mandatory access to premises statutes. In those states,[36] franchised cable operators, and in some instances other MVPDs as well, have a perpetual right to provide service to an MDU and to maintain their wiring within the MDU indefinitely.[37] An MVPD provider's exclusive service contract that contravenes a state's mandatory access statute is illegal and

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[34]Further Notice at ¶ 62.

[35]Id. at ¶ 47.

[36]See, e.g., Conn. Gen. Stat. § 16-333a; D.C. Code Ann. § 43-1844.1; Fla. Stat. § 718.1232; 65 Ill. Comp. Stat. 5/11-52-11.1; Kan. Stat. Ann. § 58-2553; Mass. Ann. Laws ch. 166A, § 22; Me. Rev. Stat. Ann. tit. 14, § 6041; Minn. Stat. § 238.23; N.J. Stat. Ann. § 48:5A-49; N.Y. Pub. Ser. Law § 228; 68 P.S. § 250.503-B (Pennsylvania); R.I. Gen. Laws § 39-19-10; Wis. Stat. § 66.085.

[37]See, e.g., 68 P.S. § 250.503-B (operator who installs cable facilities pursuant to access provisions shall retain ownership of all such wiring and other equipment); see also Time Warner Comments at 32.

unenforceable.[38] Thus, where a cable operator, or other MVPD provider, has a statutory right to provide service to the residents of an MDU, a contractual provision cannot eliminate that right.

By its own admission, the Commission has no expertise in interpreting contractual rights, and therefore has wisely abstained from interfering in such matters in the past.[39] The Commission should not now interject itself into the negotiation of contracts between private parties, and should most certainly not adopt any presumption that interferes with the contractual rights of an incumbent MVPD to remain on the premises of an MDU when such right was fairly bargained for.

B. All MVPDs must be treated the same with regard to their ability to enter into exclusive service contracts in the future.

The Commission has asked whether it should limit exclusive contracts "where the MVPD involved possesses market power."[40] As explained above, the mere fact an MVPD may have entered into an exclusive MDU contract cannot be used as a proxy for concluding that such MVPD has exercised "market power." Furthermore, the Commission should not engage in implementing any rules regarding the ability of MVPDs to enter into exclusive

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[38]See, e.g., Key Bank v. Crawford, 600 F. Supp. 843, 845-46 (E.D. Pa. 1985) ("[a]n agreement between parties which violates a statute is illegal, unenforceable, and void *ab initio* only if the subject of the agreement is specifically proscribed by statute"); West Corp. v. Diversified Brokerage Agencies, Inc., 1986 U.S. Dist. LEXIS 17636, *7 ("[C]ourts 'must apply the general rule that an agreement between parties which violates a provision of a statute, or which cannot be effectively performed without violating said statutes is illegal, unenforceable and void *ab initio*.'" (quoting Gramby v. Cobb, 422 A.2d 889 (Pa. 1980)).

[39]See Jones Comments at 14; North American Communications Corp., 51 FCC 2d 1171, ¶¶ 12-13 (1975) (the Commission will not "interpret the obligations of parties to an existing agreement, or force parties into new contractual relationships"); see also Connecticut Cable Television Ass'n, Inc., 4 FCC Rcd 476, 478 (1988).

[40]Second Further Notice ¶ 261.

contracts in the future that create distinctions among various MVPDs. Rather, the Commission should strive for parity among *all* MVPDs, including cable operators, with regard to any regulations pertaining to future exclusive service contracts. There is no basis for treating one MVPD differently from another MVPD when all MVPDs have the same ability to negotiate with MDU owners for the exclusive right to provide service to that MDU. Any attempt to differentiate among MVPDs is contrary to Congress' goal of fostering competition among all types of MVPDs.[41] If the Commission opts to prohibit future exclusive contracts, then it must ban all MVPDs from entering into such contracts. Conversely, if the Commission allows any MVPDs to enter into exclusive contracts in the future, it must allow all MVPDs to do so.

The Commission also seeks comment on whether it should adopt a "cap" on the length of exclusive contracts "that would limit the enforceability of exclusive contracts to the amount of time reasonably necessary for an MVPD to recover its specific capital costs of providing service to that MDU."[42] Any "cap" on the length of exclusive service contracts should not be tied to the MVPD's recoupment of its investment, but should instead be left to arms' length negotiations between the MVPD and the MDU owner. Any "cap" which attempts to gauge the length of time for recoupment of investment would be virtually impossible to implement because the recoupment period can vary widely and is affected by a multiplicity of factors, such as the type of technology, services offered, demographics, efficiency of the service provider, etc. More fundamentally, however, the concept of establishing a period of exclusivity to allow the recoupment of investment will place the

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[41]See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460, § 2(b) (1992) (statement of policy).

[42]Second Further Notice ¶ 259.

Commission in the position of guaranteeing the economic success of a particular MVPD. The role of the government should be to foster competition, but not to guarantee that any particular competitor, no matter how inefficient or lacking in service quality, will recoup its investment. When cable operators invest millions to rebuild and upgrade their infrastructure in a particular community, they are not entitled to an exclusive franchise for a period of years to allow recoupment of that investment. Under the Commission's new MDU home run wiring rules, alternate providers can now begin offering service to MDUs for minimal capital investment since they can simply free ride on the home runs installed by the incumbent operator at a significant cost. Under such circumstances, providing such alternate providers with any special period of exclusivity to shelter them from competition would be particularly inappropriate and unjust.

II. The Commission's Single Family Home Wiring Rules Should Be Applied To All MVPDs.

The Commission's Further Notice proposes to apply its cable home wiring rules for single family homes to all MVPDs in the same manner that they apply to cable operators. Similarly, the Commission proposes that subscribers of any MVPD service, whether franchised cable or some alternative technology, have an equal right, prior to termination of service, to install their own home wiring and to connect additional home wiring to the wiring installed by the MVPD. The Commission reasons that "applying those rules to all MVPDs would promote competitive parity and facilitate the ability of a subscriber whose premises was initially wired by a non-cable MVPD to change providers."[43]

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[43]Order at ¶ 267.

In its Order, the Commission has applied its new MDU home run wiring disposition rules "regardless of the identity of the incumbent video service provider involved."[44] This approach was adopted to "ensure competitive parity among MVPDs and ensure that MDU owners are able to benefit from these procedures regardless of the MVPD that initially wired their buildings."[45] The Commission's jurisdiction to apply these rules to all MVPDs is addressed at paragraphs 100-101 of the Order. While Time Warner continues to dispute the Commission's jurisdictional basis for its MDU home run disposition rules, we agree that competitive parity requires that any such rules apply equally to all MVPDs. Thus, the Commission should also expand its existing home wiring rules for single unit installations to encompass all MVPDs.

III. Signal Leakage Reporting Requirements Should Apply To All MVPDs.

In its Further Notice, the Commission has requested comment "on whether certain categories of broadband service providers should be exempted from the filing requirements of Section 76.615(b)(7) and, if so, what criteria the Commission should use in defining those providers."[46] Significantly, the Commission does "not propose to exempt any broadband service providers from the testing requirements of Section 76.615(b)(7), but simply the requirement to report the results of such tests to the Commission."[47]

Time Warner wholeheartedly supports the Commission's decision to make its signal leakage rules applicable to all broadband service providers that utilize frequencies in the

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[44]Id. at ¶ 80.

[45]Id.

[46]Further Notice at ¶ 269.

[47]Id.

aeronautical and public safety bands where the existence of signal leakage could pose a threat to public health and safety. This is clearly a vital FCC function.[48] The Commission's rules governing the use of frequencies in the aeronautical frequency bands and the prevention of signal leakage have been in force for two decades,[49] and the Commission has correctly characterized the safety of life and property as crucial regulatory objectives which must be strictly enforced.[50] Time Warner believes that in an era of increasing competition among existing MVPDs and the deployment of new broadband platforms, such as OVS, realization of these critical regulatory objectives would be severely undermined by failing to account for the potential threat to air safety represented by these entities. By expanding its signal leakage and aeronautical frequency use rules to all closed broadband facilities that utilize critical public safety communications and navigation frequencies, the Commission properly recognizes that it is not the nature of the service provided, but rather the portion of the spectrum being used, that creates the possibility for leakage and the concomitant threat to public safety.

For these same reasons, Time Warner does not believe that creating some sort of exemption from the annual CLI reporting requirement for "small" broadband systems or operators would serve the public interest. To the contrary, such an exemption would not

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[48]The authority of the Commission to apply its signal leakage rules to all MVPDs, including so-called "private cable" or SMATV systems, is evident, *inter alia*, from Section 1 of the Communications Act, which states that one of the fundamental purposes for which Congress established the Commission was to promote "safety of life and property through the use of wire and radio communication." 47 U.S.C. § 151.

[49]Report and Order, Docket No. 21006, 65 FCC 2d 813 (1977).

[50]See Memorandum Opinion and Order re: Oxnard Cablevision (Mimeo No. 20594) (rel. August 24, 1979).

significantly reduce the burden of compliance for small operators yet would substantially increase the risk of interference with aeronautical communications and navigation.

The Commission's regulatory scheme governing operation in the 108-137 MHz and 225 to 400 MHz bands was last revised in 1984. The 1984 revisions to the Commission's regulatory scheme rested on a foundation of three pillars. Without exception, cable operators desiring to operate in the aeronautical frequency bands were required to: 1) comply with new mandatory frequency offsets; 2) develop and implement a comprehensive signal leakage monitoring program on an ongoing basis; and 3) calculate and file with the Commission an annual cumulative leakage index for each of their cable systems. The Commission justified this revised regulatory scheme based on a number of instances where signal leakage from cable systems was shown to have the potential for interference with aeronautical communications.[51]

In adopting these tripartite requirements, the Commission emphasized that the yearly CLI reporting requirement served a vital function separate and apart from the need for ongoing leakage monitoring and system maintenance.

> The standards, procedures, and techniques that are used in determining cable signal leakage performance are extremely important to ensure that cable signal emissions are within acceptable limits and pose little or no danger of harmful interference to aeronautical radio operations. The basic annual signal leakage performance standards should not be confused with regular and routine monitoring and neither should the standards, procedures and techniques for the signal leakage tests be confused with those utilized for monitoring. We note that some parties, in their comments, failed to appreciate the distinction between the proposed basic signal leakage performance standard and regular and routine monitoring requirements. The purposes and objectives of the proposed two separate sets of requirements are indeed different. Simply stated, the basic annual signal leakage performance requirements are intended to provide periodic assessment of a system; whereas regular and routine monitoring requirements are intended to assure that a cable operator

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[51]Second Report and Order, Docket No. 21006, 99 FCC 2d 512 (1984).

> undertakes responsible steps and appropriate procedures to detect and correct signal leakage sources throughout the year.[52]

As the foregoing illustrates, the necessity of the annual CLI testing to the success of the Commission's regulatory scheme cannot be overstated; nor can the importance of filing the annual CLI report with the Commission be overlooked. Filing with the Commission ensures that CLI testing is conducted properly and in a timely fashion wherever aeronautical frequencies are in use. Filing the test results with the Commission also ensures that should an interference problem arise, the potentially responsible parties can be quickly identified so that corrective action can be implemented without delay. Clearly, a reporting exemption for small broadband systems could result in a major delay in resolving cases of potential interference if one or more potentially responsible parties cannot be identified from the Commission's records.

For these reasons, the Commission should not be seeking to relieve entities from signal leakage reporting obligations, but rather should be seeking to revise its signal leakage monitoring procedures to take into account the possibility that several operators may serve the same or overlapping geographic areas. With several providers operating on the same frequencies, standard flyover or ground-based measurement techniques, although adequate to detect the presence of leakage, may not be able to pinpoint the source of a particular leak. It might be helpful to require each service provider to use a unique carrier frequency to help assign responsibility for any particular leak. Furthermore, service providers should be required to inform their competitors of leaks found in the competitor's plant so that those leaks can be promptly repaired and eliminated. Obviously, this not only will help alleviate the threat to public safety communications resulting directly from the leakage, but would also

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[52] Id. at ¶ 40.

reduce the possibility that cumulative leaks in the plant of one service provider could be masking and preventing detection of leaks in the plant of a co-located service provider. Simply stated, an increasing competitive environment creates the need for more, not less reporting and information exchange if the Commission's regulatory policy is to continue to function effectively.

It should also be recognized that the burden of complying with the Commission's CLI requirements is entirely attributable to the process of undertaking the required ground-based or airspace measurements and performing the subsequent mathematical calculations. Once these steps are complete, it is a simple and easy task to fill out the two page FCC Form 320 and mail it to the Commission. Exempting small systems from this minor and relatively painless task would not substantially reduce the burden of compliance, though it would substantially reduce the effectiveness of the regulatory program.

As a final matter, creating an exemption for small systems or operators runs directly counter to the Commission's longstanding policy of excluding signal leakage monitoring and reporting requirements from the regulatory relief generally afforded to certain classes of small systems. When the Commission first decided to define a class of small systems which would be subject to lighter regulatory burdens, it expressly provided that such systems would nevertheless be required to comply with the full panoply of leakage monitoring, technical and reporting requirements should those systems operate in frequency bands other than those allocated to over-the-air broadcasting.[53] The same concerns that led the Commission to exclude signal leakage testing and record keeping from the regulatory obligations that would

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[53]First Report and Order, Docket No. 20561, 63 FCC 2d 956, ¶ 61 (1977). This exclusion continues to be embodied in Section 76.601(e) [formerly subsection (f)] of the Commission's rules.