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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 Television Consumer Protection and Competition Act	)	MM Docket No. 92-260
	)	
Cable Home Wiring	)	

COMMENTS OF
<u>THE NATIONAL CABLE TELEVISION ASSOCIATION</u>

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SUMMARY

In its Further Notice, the Commission asks whether and to what extent it should restrict exclusivity in contracts between owners of multiple dwelling units ("MDUs") and multichannel video programming distributors ("MVPDs"). Two overriding principles should guide the Commission in addressing this issue:

- First, the Commission may not abrogate *existing* contracts unless it has an unambiguous statutory mandate or authorization to do so -- and the Communications Act provides no such mandate or authorization.

- Second, if the Commission decides to impose any restrictions on exclusive contracts, such restrictions should apply to *all* MVPDs on a nondiscriminatory basis. To allow some providers but not others to negotiate for exclusivity would artificially and unfairly skew competition among MVPDs, so that MDU residents are less likely to be served by the provider that can most efficiently meet their needs and demands. Congress, in the 1996 Act, specifically chose not to give an artificial boost to alternative providers of service to MDUs by imposing unique handicaps on incumbents.

In addition, the Commission proposes to exempt small broadband service providers from the requirement that they report the results of signal leakage tests to the Commission. The reporting requirements provide clear benefits, and they are not unduly burdensome even on smaller entities. There is no need for the proposed exemption, and it should not be adopted.

Finally, the Commission seeks comment on a proposal to require the simultaneous sharing of broadband wiring in MDUs by competing MVPDs. Such sharing simply is not technically or practically feasible, and the proposal should be rejected.

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COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, submits the following comments in response to the Commission's Second Further Notice of Proposed Rulemaking ("Further Notice") in the above-captioned proceeding.

NCTA is the principal trade association of the cable television industry. Its members provide cable services to more than 80 percent of the nation's cable television subscribers. NCTA's members may be significantly affected by the Commission's decision in this proceeding.

I. EXCLUSIVE CONTRACTS.

In its Further Notice, the Commission seeks comment on whether it should impose limitations on exclusive contracts between multiple dwelling unit (MDU) owners and multichannel video programming distributors (MVPDs). The Commission asks, for example, whether it should adopt a "cap" on the length of existing and future exclusive contracts and, if so, whether such a cap should apply to all MVPDs or only to those with "market power." The Commission also asks whether "perpetual" exclusive contracts should be singled out for special treatment, either (1) by presuming that any MVPD that entered into a perpetual exclusive contract possessed market power and should therefore be subject to the cap on exclusive contracts, or (2) by adopting a "fresh look" period that would allow MDU owners to deal with alternative MVPDs notwithstanding their exclusive contracts with incumbents.

Two overriding principles should guide the Commission in addressing the issue of exclusivity in MDUs. First, as a matter of law, the Commission may not abrogate *existing* contracts unless it has a clear statutory mandate or authorization to do so. Nothing in the Communications Act directs or authorizes the Commission to invalidate the terms of existing MDU contracts. Therefore, the focus in this proceeding must be limited at the outset to limitations on exclusivity in MDU contracts entered into in the *future*.

Second, if the Commission decides to impose restrictions on exclusive contracts, any such restrictions should apply to *all* MVPDs on a nondiscriminatory basis. There is, for example, no basis in law or sound public policy for allowing alternative providers to obtain exclusivity while prohibiting incumbents from doing so.

A. **The Commission May Not Abrogate Existing Exclusivity Agreements.**

Contracts between private parties generally establish enforceable rights under state common law. The Commission's authority to abrogate the common law rights established by such contracts is narrowly circumscribed. However broad the Commission's general authority to regulate home run wiring under Title I or Title VI of the Communications Act may be (and we have argued in earlier stages of this proceeding that the Commission has no such authority),[1] its authority does not extend to the abrogation of contractual rights. Only where Congress by a statute unambiguously and specifically authorizes or mandates overriding contractual rights may a federal agency rely on the statute to do so.

The statutory authority must be explicit or truly impel such agency action. Under long-standing Supreme Court doctrine, "a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."[2]

There is no statutory provision that authorizes much less *compels* the abrogation of pre-existing exclusive contractual rights with respect to MDUs. Indeed, as a general matter,

> "[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 [a court] imply such authorization.[3]

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1 *Se,e e.g.*, NCTA Comments, Sept. 25, 1997, at 6-13.

2 *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907). *See also Bauers v. Heisel*, 361 F.2d 581, 587 (3d Cir. 1966) (en banc), *cert. denied*, 386 U.S. 1021 (1967) ("a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment").

3 *Bell Telephone Co. of Pa. v. FCC*, 503 F.2d 1250, 1280 (3d Cir. 1974).

Certainly nothing in the home wiring provisions of Section 624(i) -- or in any of the other sections of the Act upon which the Commission has based its jurisdiction to regulate wiring outside the premises of individual subscribers -- authorizes or compels any such action by the Commission.

In sum, the issue of exclusivity as applied to *existing* MDU contracts is one that can be addressed at the federal level, if at all, by Congress. And if Congress chooses to interfere with existing contractual rights, it must do so explicitly and unambiguously. It has not done so, and, therefore, the Commission may not itself choose to interfere with such existing rights (nor may it authorize another party to abrogate existing contracts, for example, via a "fresh look" mechanism).

This does not, of course, mean that existing exclusive contracts are wholly immune from scrutiny under federal law. Generally applicable federal antitrust laws -- which *do* explicitly deal with existing contracts in restraint of trade -- apply to such contracts. Nothing prevents private parties or enforcement authorities from seeking to demonstrate, on a case-by-case basis, that the anticompetitive effects of particular exclusive contracts outweigh any procompetitive effects. In addition, state laws typically prohibit and provide remedies for contracts and agreements that are found to unduly harm competition and consumer welfare.[4] Both the federal government and the

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4 "Today, every state except Pennsylvania and Vermont has an antitrust statute of general applicability, as do the District of Columbia, Puerto Rico, and the Virgin Islands." ABA Antitrust Section, Antitrust Law Developments, (3d ed. 1992).

states are thus empowered, under certain circumstances, to act in a manner that disrupts existing contractual rights. But the Commission, particularly with respect to exclusive MDU contracts, is not.

B. Any Rules Governing Exclusive MDU Contracts Should Apply Equally to All MVPDs.

The Commission notes that some alternative providers of multichannel video programming services "have argued that the Commission should limit the ability of *incumbent* cable operators to enter into exclusive contracts with MDU owners."[5] To allow alternative providers to negotiate for exclusivity in competing for access to MDUs while denying this competitive tool to incumbent cable operators would give alternative providers an unfair competitive advantage. And, most importantly, this advantage would have nothing to do with a competitor's superior efficiency to serve MDU subscribers.

As the Commission points out, exclusive contracts "can be pro-competitive or anti-competitive, depending upon the circumstances involved."[6] But whether exclusivity allows a provider to serve an MDU more efficiently (and is, in this respect, pro-competitive) or simply protects the provider from competition (and is, therefore, anti-competitive), allowing some competitors but not others to enter into exclusive contracts would virtually always skew the marketplace in a way that adversely affects subscribers in the MDU. If there is to be a single provider, that provider should be the one that can most efficiently meet the needs and demands of the building's residents. Exclusivity is one factor in a host of give-and-takes between parties to a

5 Further Notice, ¶ 258 (emphasis added).

6 *Id.*

negotiation. But it is not a negotiation attribute that differs depending on whether or not the MVPD is a cable operator.

Competing providers may have different natural advantages and disadvantages based on their technologies, their skills, their size or other factors. These competitive factors may enable some to meet consumer demand more efficiently than others. But when the government imposes artificial regulatory handicaps on the competitors, this increases the likelihood that an MDU will be served by a provider that is not the most efficient. Tilting the playing field in order to give a competitive boost to less efficient or less skilled providers protects those competitors, but does not promote competition.

In any event, Congress has already made clear that its goal of promoting competition in the video marketplace would not be furthered by rules that artificially handicap incumbent cable operators *vis-à-vis* alternative MVPDs in providing service to MDUs. Thus, in the Telecommunications Act of 1996, Congress acted to remove one such artificial handicap. Specifically, Congress amended the "uniform rate" requirement of Section 623, which had previously required franchised cable operators to charge MDU subscribers the same rates that they charged other subscribers in the franchise area, even though cable operators often face competition in MDUs from other MVPDs. As amended, Section 623 now permits cable operators to offer different bulk discounts to different MDUs so long as the discounts are not "predatory."[7]

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7 47 U.S.C. § 623(d).

Prohibiting cable operators from reducing rates to meet competition in seeking to serve MDUs would certainly have boosted the competitive prospects of alternative providers. But Congress recognized that such an artificial boost would not promote consumer welfare and would not serve the pro-competitive objectives of the Act. Barring incumbent cable operators, but not alternative providers, from negotiating exclusive MDU contracts would have the same effects -- and, for the same reasons, would disserve consumers and undermine the goals of the Act.

II. THE COMMISSION SHOULD CONTINUE TO ENFORCE SIGNAL LEAKAGE REPORTING REQUIREMENTS FOR ALL PROVIDERS OF BROADBAND SERVICES.

The Commission has determined to apply the requirement to conduct annual signal leakage tests on all broadband service providers. The Commission asks, however, whether the reporting requirements impose an undue burden on small broadband providers and whether it should therefore exempt small broadband providers from the filing requirements of Section 76.615(b)(7).

In this particular case, once the tests are conducted the reporting burden and resources necessary to complete the report are minor. Consequently, to the extent the Commission feels that reporting facilitates its oversight of potentially harmful signal leakage, it should apply the reporting requirement to all broadband providers, including small providers. If, however, the Commission should choose to adopt an exemption for small broadband providers, that exemption should apply equally to small cable operators.

III. SHARING OF HOME RUN WIRING BY MULTIPLE PARTIES IS TECHNICALLY AND PRACTICALLY INFEASIBLE.

The Commission seeks comment on the technical, practical, economic and legal issues raised by DIRECTV's proposal to require competing broadband service providers to share a single broadband wire in MDUs.

A. Technical Issues.

Simultaneous sharing of a cable operator's home run wiring with another broadband service provider is not technically or practically feasible. The hardware necessary to allow simultaneous usage of the home run owned by the operator is not available. Even if it were available, sharing the home run would result in needless signal losses and other technical performance problems that would place the cable operator in violation of the Commission's rules[8] and reduce the quality and reliability of service to the consumer.[9]

Unlike a telephone company's network, the cable operator generally distributes service to all subscribers simultaneously via RF signals that are combined using frequency division multiplexing. These RF signals are present throughout the cable network on a continuous basis regardless of whether or not the television receiver or other equipment is turned on. Further, the services provided to MDUs are uniquely dedicated and routed to the consumer only at the home run. In contrast, the telephone network provides services uniquely to consumers by connecting them to the central office switch. The connection is made using a line that has been dedicated to

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8 See 47 U.S.C. § 76.605.

9 The dispositive technical limitations make it unnecessary for the Commission to reach the legal/constitutional issues.

the consumer and is only active when the consumer requests service by picking up the telephone handset and dialing. Figures A and B illustrate these network distinctions.

The home run is the point in a cable operator's network at which the services are routed to the individual consumer. Therefore, the home run is also the point at which the second broadband service provider would need to interface if it did not build its own facilities.

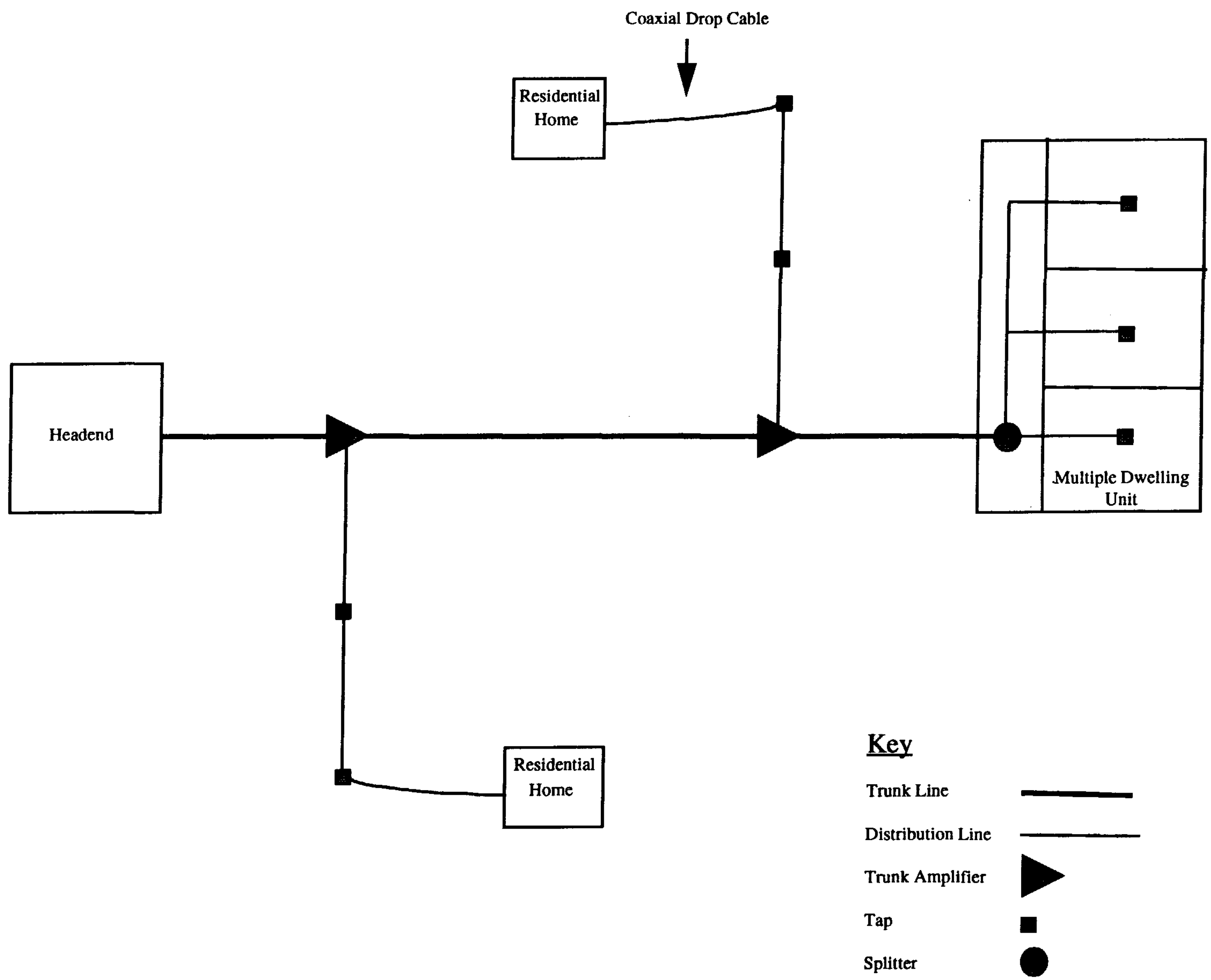
Figure C shows a simple, yet typical configuration used by the cable operator to serve the consumer. The tap is a device used to route the services from the distribution system onto the home run. At this point, the home run is routed to the set-top box for use in, among other things, descrambling secured premium cable signals and selecting the channel to be viewed. The home run could also be split to connect with a high speed cable modem or perhaps another unit that provides telephony services.

Figure D shows the same configuration with the addition of the second broadband provider. As is clearly shown, simultaneous use of the home run cable adds a great deal more technical complexity. For example, it is likely that the second provider will distribute its service in a frequency spectrum that is similar to the cable operator's up to the home run cable location (i.e., 50 to 750 MHz). At the home run location, the second provider would have to convert this bandwidth to one that is higher (above 1 GHz) so that it does not conflict with the cable operator. But this is not technically feasible. The device that would be used for this conversion -- a frequency upconverter, that could accommodate a frequency spectrum conversion to above 1 GHz -- does not exist. Furthermore, it is questionable whether the home run can support that high of a frequency spectrum without reaching the electrical and physical limitation of the cable.

In addition to converting to a higher frequency, the second provider may need to add an amplifier capable of handling frequencies above 1 GHz. This amplifier is required because

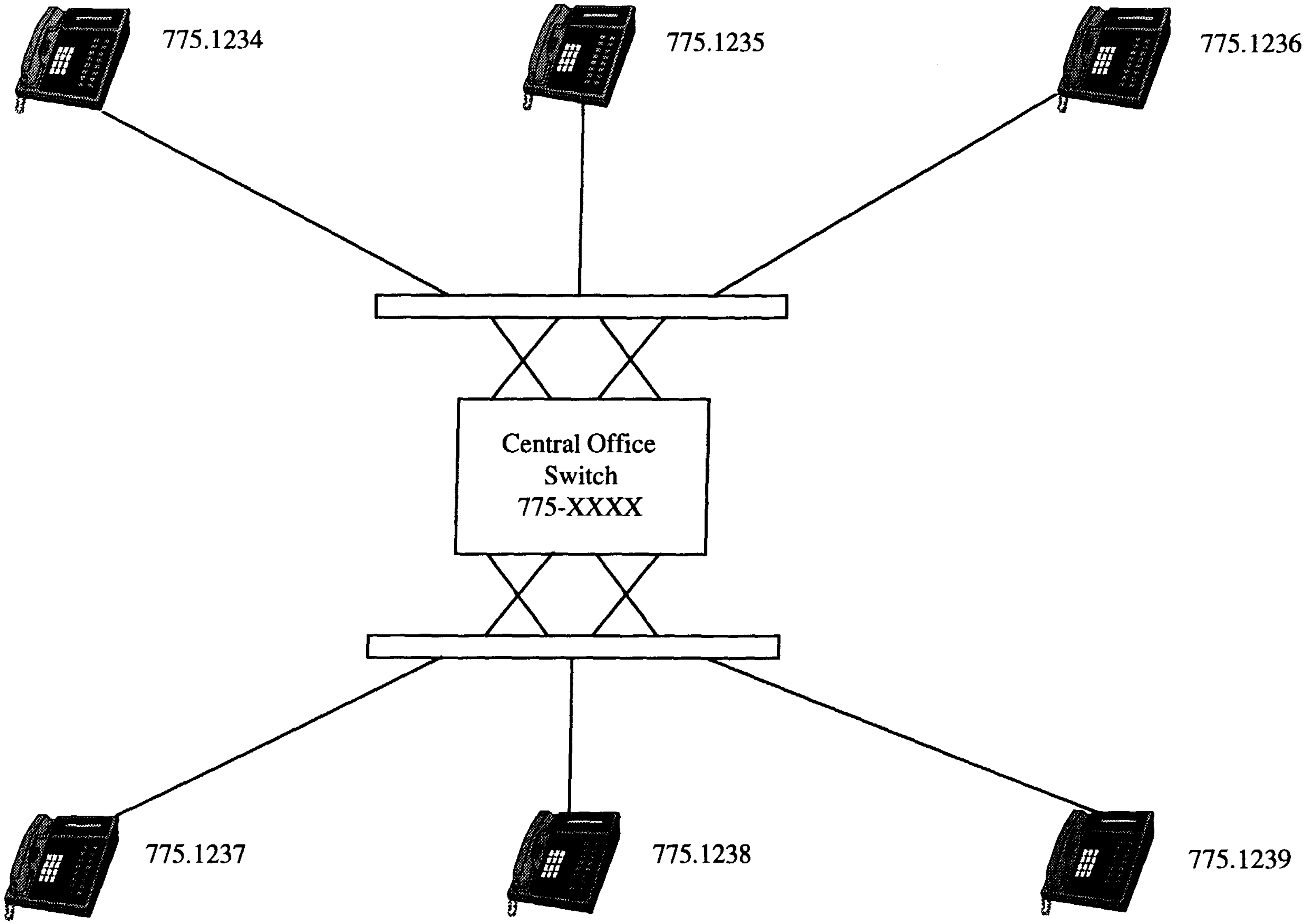
CABLE NETWORK

FIGURE A



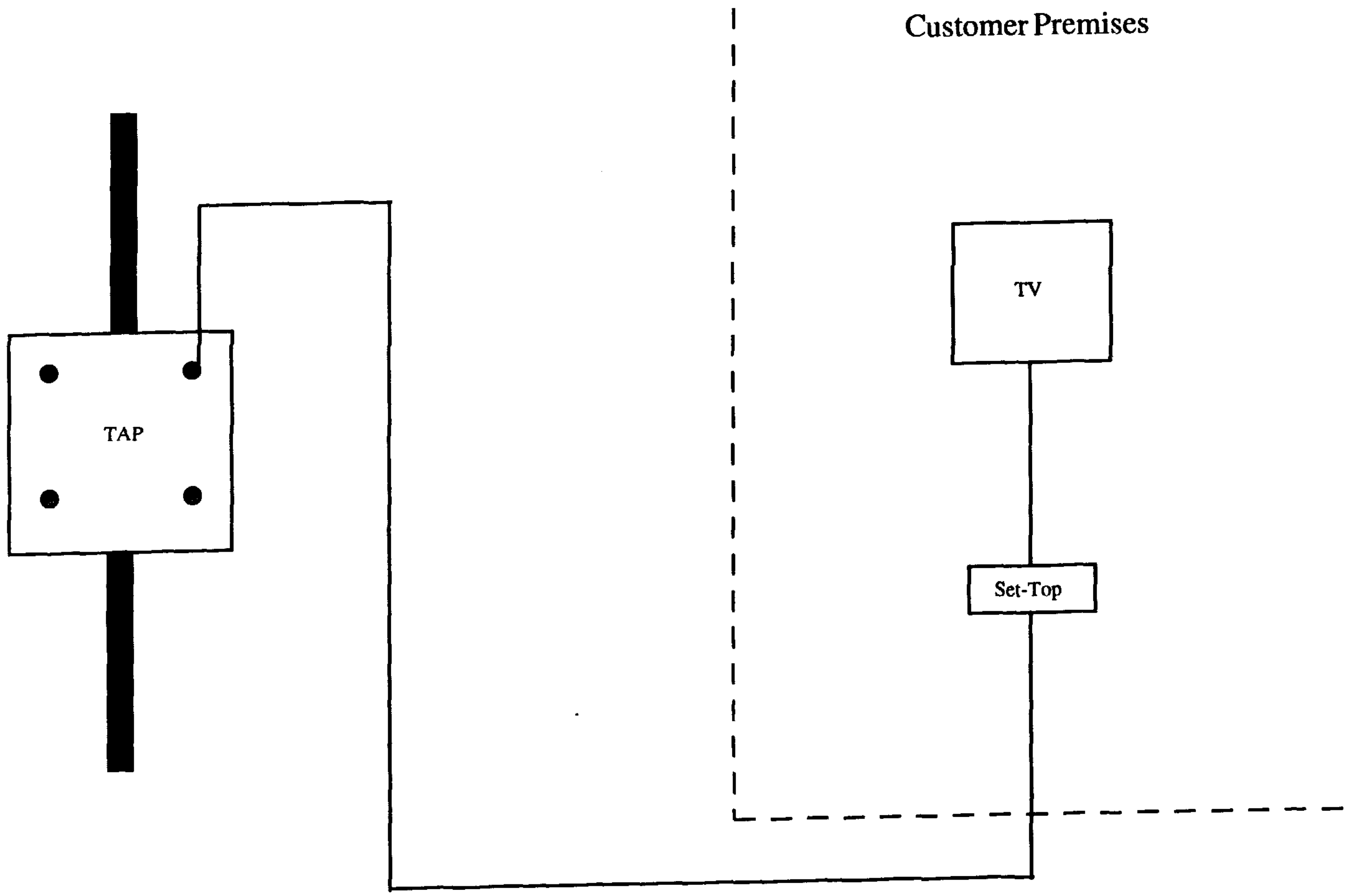
TELEPHONE NETWORK

FIGURE B



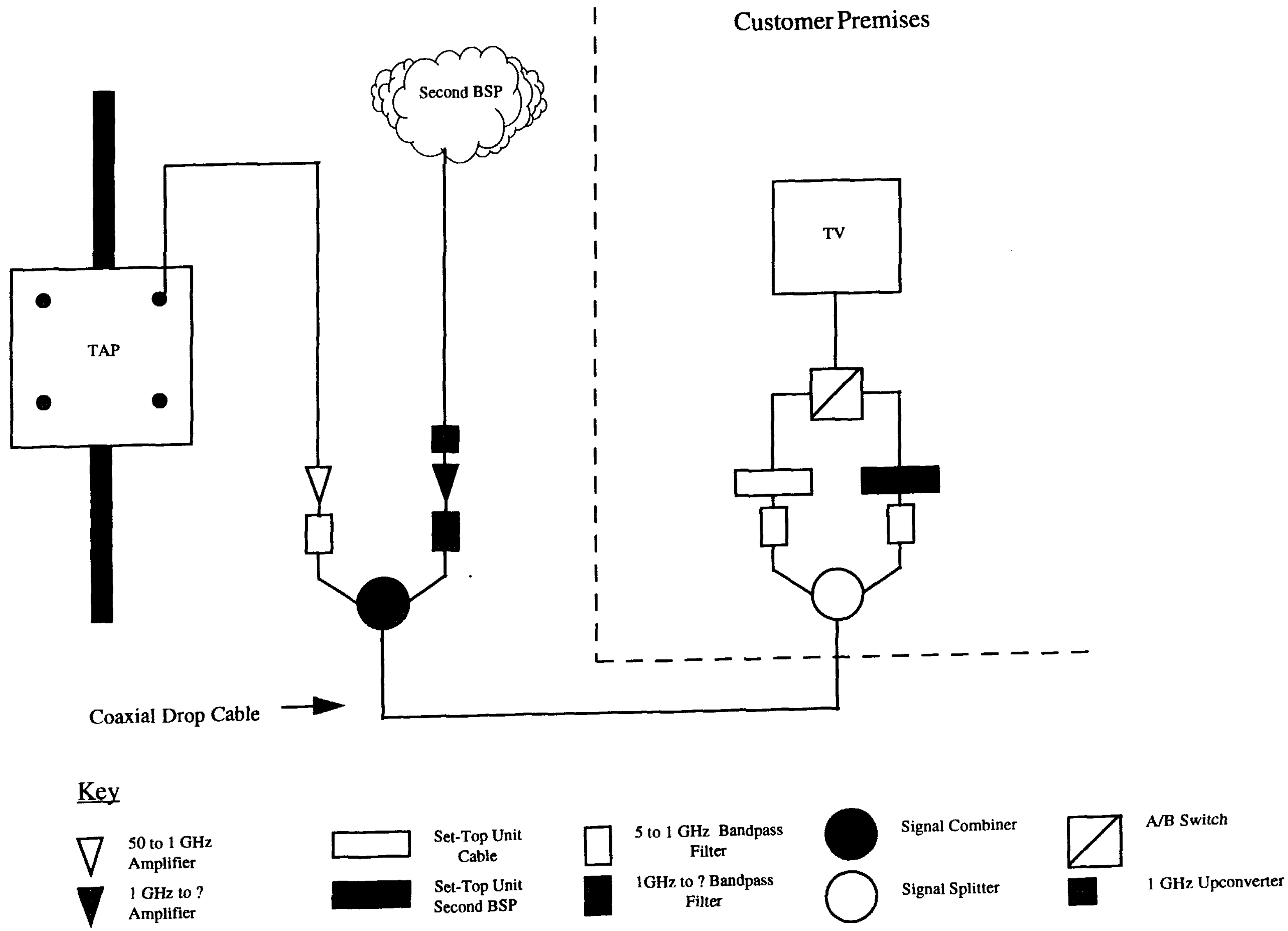
CURRENT COAXIAL DROP CABLE

FIGURE C



SHARED COAXIAL DROP CABLE

FIGURE D



coaxial cable attenuates (degrades) signal strength more at higher frequencies than at lower frequencies. Here again, this amplifier is not commercially available and the technical feasibility of manufacturing these amplifiers is at best uncertain. Without this amplification, the signal strength and quality delivered to the customer may be unacceptable. The second provider would need to add a filter to keep unwanted spurious signals from entering into the cable operator's frequency spectrum.

Moreover, even if these hardware components could be obtained, the frequency spectrum from the second provider would need to be combined with those from the incumbent cable network and routed to the consumer. At this point, the composite signal must be split, and each group of frequency spectrum filtered from each other (separated) so they can be delivered to the appropriate set-top unit. Without the use of filters, the additional frequency spectrum allowed to enter the set-top units would create an unacceptable level of distortion that would adversely affect the quality of service.

Finally, even if all the foregoing technical problems could be overcome, a rule requiring shared use of wiring would effectively create an artificial cap on the incumbent's system bandwidth. The incumbent could not expand its bandwidth without approval of and with its competitor. Such a result would be squarely at odds with Congress's intent in the 1996 Act, to promote expanded and advanced system architectures.[10]

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10 NCTA further believes that even if the sharing of home run wiring were technically and practically possible, requiring such sharing would raise serious legal and constitutional issues. The Commission's statutory jurisdiction to require sharing is dubious. Moreover, requiring such sharing in the absence of a clear statutory mandate to do so, would raise serious constitutional issues.

IV. CONCLUSION.

The Commission lacks authority to abrogate existing exclusive contractual rights to serve MDUs. With respect to exclusivity in future MDU agreements, the Commission should treat all MVPDs alike in order to foster true and efficient marketplace competition.

The Commission should not adopt its proposal to exempt small broadband service providers from signal leakage regulatory requirements. The benefits of compliance with these requirements outweigh the minimal burden on small providers.

Finally, the Commission should reject the proposal to require sharing of broadband wiring in MDUs because such sharing is both technically and practically infeasible.

Respectfully submitted,

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