

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

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

COMMENTS IN RESPONSE TO
SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

THE WIRELESS CABLE ASSOCIATION
INTERNATIONAL, INC.

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EXECUTIVE SUMMARY

The Wireless Cable Association International, Inc. (“WCA”) applauds the Commission’s efforts to address the complex issues associated with exclusive contracts between multichannel video programming distributors (“MVPDs” and owners of multiple dwelling units (“MDUs”). Ideally, any rules adopted by the Commission in this proceeding should achieve a balance between (1) preserving the substantial consumer benefits of exclusive contracts and (2) affording a remedy where cable has leveraged its market power into anti-competitive exclusive contracts.

WCA believes that the Commission can best achieve this balance first by adopting rules that, where possible, allow the marketplace to determine the appropriate length and terms of exclusive contracts. The unavoidable fact is that MDU owners simply will not allow multiple sets of equipment and wiring to be installed on their properties, and that in many cases alternative MVPDs cannot afford entry into the MDU environment on a nonexclusive basis. This is especially true of wireless cable operators who are making enormous investments towards upgrading their systems to provide digital and two-way services. WCA thus believes that any attempt by the Commission to impose a “cap” on the length of exclusive contracts is impractical given that each MDU has its own unique needs and characteristics. Accordingly, WCA submits that the Commission’s rules should preserve the right of MVPDs that fact competition to enter into exclusive contracts for whatever period of time the MVPD is able to negotiate with the MDU owner.

Further, as WCA and others have previously demonstrated to the Commission, a significant portion of MDU buildings are served by franchised cable operators pursuant to exclusive right of entry agreements entered into before competitive alternatives had emerged. These contracts now represent a substantial barrier to competition that the Commission can eliminate through application of a “fresh look” policy, that would permit MDU owners to revisit cable-exclusive arrangements prior to the emergence of effective competition. WCA thus reiterates its support for applying a 180-day fresh look period not only to “perpetual” contracts, but to any exclusive access arrangement between a franchised cable operator and an MDU owner/operator that extends either: (i) for the life of the franchise and any renewals thereof; or (ii) for three years or longer. WCA further recommends that the fresh look period remain upon until 180 days after the Commission determines that the franchised cable operator serving the MDU faces is “effective competition.”

Finally, with respect to the Commission’s proposals vis-a-vis shared wiring, the Commission should clarify that where sharing of wiring is possible, the owner of the wiring must be fairly compensated. WCA also supports the adoption of a rule that would exempt any wireless cable system of fewer than 15,000 subscribers from having to submit annual signal leakage reports.

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**COMMENTS IN RESPONSE TO
SECOND FURTHER NOTICE OF PROPOSED RULEMAKING**

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby submits its comments in response to the *Report and Order and Second Further Notice of Proposed Rulemaking* ("R&O," and "*Second Further Notice*," respectively) released by the Commission on August 28, 1997 in this proceeding.^{1/}

I. INTRODUCTION.

WCA applauds the Commission's efforts to address the complex issues associated with exclusive contracts between multichannel video programming distributors ("MVPDs") and owners of multiple dwelling units ("MDUs"). As noted throughout these proceedings by a number of cable's emerging competitors, because the competitive environment demands the

^{1/}*Telecommunications Services: Inside Wiring; Customer Services Equipment*, CS Docket No. 95-184, FCC 97-304 (rel. Aug. 28, 1997)[hereinafter cited as "*Second Further Notice*"].

highest levels of service from alternative MVPDs, the economic realities of the MDU marketplace are such that an alternative MVPD must often secure the exclusive right to serve a given MDU building to ensure that it can recoup the substantial financial investment necessary to construct, service and market a multichannel system in the MDU environment. This is particularly true of wireless cable operators, who are actively pursuing a variety of advanced digital and two-way applications that will require significant infrastructure investments in MDUs. On the other hand, however, the record before the Commission establishes that exclusive contracts have had a severe anti-competitive effect in cases where cable operators have leveraged their local monopoly into long-term agreements that deny emerging competitors a full and fair opportunity to obtain access to MDU properties. Thus, WCA believes that the Commission's task in this proceeding is to craft rules that preserve the consumer benefits of exclusive contracts that derive from competition among MVPDs, while at the same time affording a remedy where cable has leveraged its market power into anti-competitive exclusive contracts.

For the reasons set forth below, WCA believes that the Commission can best achieve the appropriate balance by declaring (1) that in a competitive environment exclusive contracts are in the public interest and should be permitted, subject to certain limited regulatory constraints, but (2) that full and fair competition in the MDU environment will never become a reality unless MDU owners are allowed a "fresh look" with respect to certain exclusive contracts that were entered into before an effective competitive alternative was available to the MDU owner. WCA

therefore proposes that the Commission adopt the “fresh look” policy previously proposed by WCA and offered for comment in the *Second Further Notice*. In addition, WCA requests that the Commission clarify any rules allowing competing MVPDs to use the same home run wiring in an MDU so as to assure appropriate compensation for the owner of the shared wiring. Finally, WCA recommends that the Commission exempt from its signal leakage reporting requirements any MVPD with fewer than 15,000 subscribers.

II. DISCUSSION.

A. *The Commission’s Rules Should, Where Possible, Allow the Marketplace to Determine The Appropriate Length and Terms of Exclusive Contracts Entered Into By MVPDs.*

As noted by the Commission, there continues to be substantial debate over whether the Commission should permit MDU owners to enter into exclusive contracts with MVPDs.^{2/} This debate has prompted the Commission to inquire as to whether it should adopt a “cap” on the length of exclusive contracts for all MVPDs.^{3/} More specifically, the Commission requests comment on whether the proposed “cap” should limit the enforceability of exclusive contracts to the amount of time reasonably necessary for an MVPD to recover its specific capital costs of servicing the MDU in question, but no longer than seven years.^{4/}

^{2/}*Second Further Notice*, at ¶ 258.

^{3/}*Id.*

^{4/}*Id.*

WCA believes that any discussion of the “cap” issue must begin with the fundamental premise that where alternative MVPDs are concerned, exclusive contracts are the natural result of unavoidable market conditions and ultimately promote competition and therefore the public interest. As much as all MVPDs would prefer to envision a market where they would have unimpeded access to MDU properties, the fact remains that for aesthetic and safety reasons many MDU owners simply will not allow multiple sets of equipment and wiring to be installed on their properties.^{5/} And, while the Commission has undertaken efforts to promote the emergence of wireless cable and other wireless video distribution services in the MDU environment, the reality is that the Commission is unwilling to adopt a federal mandatory access law.^{6/}

Moreover, even where an MDU owner can be convinced to suffer the imposition of multiple providers, the unavoidable structural limitations in any given building in effect mean that a single property can only accommodate so many multichannel providers at the same time.^{7/}

^{5/}*See, e.g., R&O at ¶ 35; Ex Parte Letter from Matthew C. Ames, Counsel for the Building Owners and Managers Association, et al, MM Docket No. 92-260, Attachment A at 2 (filed May 10, 1996) [“A property owner must have the right to enter into a contract with any person who has access — actual or virtual — to the building. This is the only way to rationally manage the asset and to protect the persons and property of all involved.”] [the “BOMA Ex Parte Filing”].*

^{6/}*Second Further Notice at ¶ 178.*

^{7/}*See, e.g., BOMA Ex Parte Filing at Attachment 1 at 2 (“Service providers do not have the absolute right to serve all potential customers - - they will always be constrained by technical, physical and geographic factors. The choices of potential subscribers also are limited by these same factors.”). On this point, it must be remembered that provision of multichannel video service to an MDU property is not solely a matter of obtaining access to the property’s inside wiring. Other equipment for signal reception, processing and/or amplification usually must be located somewhere on the property as well. See Comments of The Wireless Cable*

Accordingly, there is one basic fact which overrides the entire debate over exclusive contracts: *the MDU owner's fundamental right to control access to his or her property, combined with the physical burdens each multichannel service provider imposes in the MDU environment, preclude absolute freedom of subscriber choice.*^{8/} Thus, any Commission regulation that unduly constrains exclusive contracts will never promote unlimited competition in the MDU environment, since such competition may be physically impossible or, from the MDU owner's perspective, undesirable.

It is also a basic economic fact that in many cases alternative MVPDs will not be able to incur the cost of entry into a particular MDU building absent exclusivity. For example, any alternative MVPD that uses wireless technology (e.g., wireless cable operators, private cable operators) must install a complete stand-alone system, including receive dishes, electronics and descrambling equipment, in every building it serves. Particularly because alternative MVPDs face competition from the franchised cable operator for virtually every MDU they serve, these

Association International, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 12-13 (filed Mar. 18, 1996) [the "WCA Comments"].

^{8/}For instance, space limitations in basements, attics and conduits place a *de facto* cap on the number of competing providers who may serve an MDU property. Similarly, limitations on rooftop space effectively restrict the number of satellite and/or microwave-based multichannel providers who may be given access to a single MDU property. In many MDUs, it simply is not possible to afford every competitor the space it needs to install equipment in common areas. WCA Comments at 13; *see also* Reply Comments of The Wireless Cable Association International, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 21-23 (filed Apr. 17, 1996).

“fixed” costs are often significant, as MDU owners demand a variety of enhanced ancillary services from whichever MVPD ultimately secures the right to serve the building.^{9/}

To recoup its fixed costs within a reasonable period of time, a wireless cable operator must be able to amortize its investment over some number of residents in the building.^{10/} That number will necessarily vary, depending upon the fixed costs incurred to serve the building, the length of the contract, and the number of residents that are likely to subscribe to the alternative MVPD’s service. Whether residents will subscribe to the alternative MVPD, in turn, frequently depends upon on whether the franchised cable service will remain available and, if so, the

^{9/}*See, e.g.*, Comments of Independent Cable & Telecommunications Association, CS Docket No. 95-184, at 45 (filed Mar. 18, 1996).

^{10/}*Id.* at 49; *see also Ex Parte* filing by GTE Service Corporation, CS Docket No. 95-184, at 9-10 (filed Mar. 31, 1997) [“A prohibition on exclusive contracts would effectively restrict a competing provider’s ability to offer efficient pricing options based on its ability to recover costs over a sufficient period of time”].

pricing of that service.^{11/} The net result is that a competing MVPD often may be unable to provide service to a given MDU building without a guarantee of exclusivity.^{12/}

Recent technological developments will further escalate the financial challenges wireless cable operators already face when attempting to serve the MDU market. The recent slow growth of the wireless cable industry can be traced to the coming digitization of many wireless cable systems. Simply stated, many wireless cable operators have been reluctant to expend significant funds in launching new analog systems or adding additional analog subscribers to existing systems when digitization is just around the corner.

The wireless cable industry's conversion to digital, however, will soon come to fruition, as a number of larger wireless cable operators launch digital wireless cable systems in direct

^{11/}As the Commission has previously observed, incumbent cable operators can engage in non-uniform pricing through bulk discounts in MDUs to their advantage:

An incumbent [cable operator] may . . . attempt to disadvantage its rivals by strategic non-uniform pricing. In this regard, the Commission has observed that cable systems often offer bulk discounts to subscribers in MDUs, and has expressed a desire that bulk discounts not be used as a means of displacing competition from alternative MVPDs

Annual Status of Competition in the Market for the Delivery of Video Programming, 11 FCC Rcd 2060, 2155 (1995); see also *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5898 (1993).

^{12/}See, e.g., *Ex Parte* letter from Henry Goldberg, Counsel for OpTel, Inc., CS Docket No. 95-184, at 2 (filed July 23, 1996) ["Private cable companies must install and maintain an entire distribution network at each property. Although a franchised cable operator can amortize the cost of serving an MDU over its entire franchise area, private cable companies must recoup their investment through each MDU served. Thus, exclusivity, for a reasonable period of years, is essential to the ability of alternative video programming distributors to compete."].

competition with the large cable MSOs.^{13/} Moreover, in response to an industrywide initiative, the Commission recently released a *Notice of Proposed Rulemaking* proposing rules which, if adopted as expected by mid-1998, will for the first time permit wireless cable operators to use MDS and ITFS channels to routinely provide two-way services.^{14/} Wireless cable operators thus will have the capability to supplement their digital multichannel video service with a broad variety of two-way and interactive services, including high-speed Internet access^{15/} While these developments will certainly be welcome by residents of MDUs, they will substantially increase the fixed costs wireless cable operators will incur in serving MDUs, increasing the difficulty wireless cable operators will face in constructing MDU infrastructure without the benefit of exclusivity.

^{13/}See, e.g., Gibbons, "PCTV's Story: Waiting for Digital," *Multichannel News*, at 54 (Dec. 9, 1996); Barthold, "A Foggy Road Ahead," *Cable World*, at 21 (Jan. 27, 1997); Barthold, "Going Digital," *Cable World*, at 22 (Jan. 27, 1997); Breznick, "BellSouth Eyes Atlanta, New Orleans, Miami for '98 MMDS Launches," *Cable World*, at 12 (Dec. 2, 1996); Estrella, "Is L.A. the MMDS Industry's Last Stand?," *Multichannel News*, at 39 (June 23, 1997).

^{14/}*Amendment of Parts 1, 21, and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, MM Docket No. 97-217 (rel. Oct. 10, 1997).

^{15/}The Commission has already recognized on several occasions that wireless cable's ability to compete effectively is hampered by its inability to provide the same range of service offerings as its competition. See, e.g., *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 9 FCC Rcd 7442, 7485 (1994); *Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, 9 FCC Rcd 7665, 7666-67 (1994); *Amendment of Part 74 of the Commission's Rules Governing Use of the Frequencies in the Instructional Television Fixed Service*, 9 FCC Rcd 3360, 3364 (1994).

WCA believes that any attempt by the Commission to impose a cap on the length of exclusive contracts is impractical given that each MDU has its own unique needs, characteristics, number of units and demographics. As a result, the length of time necessary for an MVPD to recoup its investment will vary significantly from building to building, depending upon the size of the investment, the number of resident likely to subscribe to the MVPD's service offering, and the pricing structure for that service offering. Under these circumstances, it will be virtually impossible for the Commission to devise an exclusivity "cap" that accommodates every possible economic model for providing multichannel service in the MDU environment. Indeed, some of cable's more prominent competitors have already made this point before the Commission.^{16/} Not surprisingly, there is little agreement among commenting parties in this proceeding as to what amount of time would be appropriate for an across-the-board "cap."^{17/} Moreover, in the wake of the Commission's refusal to become involved in the process of setting a "default price" for "home run" wiring,^{18/} it is very difficult to imagine that the Commission's limited resources would be any better suited to making far more complicated judgments on a case-by-case basis as to how much time an MVPD needs in order to recoup its capital investments.

Accordingly, WCA believes that any rules adopted in this proceeding should preserve the right of MVPDs that face competition to enter into exclusive contracts for whatever period of

^{16/}See, e.g., *Second Further Notice*, at ¶ 259 n.740 and the comments cited therein.

^{17/}See, e.g., *id.* at ¶ 259 (noting that commenting parties have suggested "caps" of five, six, seven and seven to ten years).

^{18/}*R&O*, at ¶ 47.

time the MVPD is able to negotiate with the MDU owner. The simple fact is that the MVPD and MDU owner, not the Commission, are in the best position to know when the MVPD can expect to recoup its capital investments. This sort of market-based solution will serve the interests of MDU owners and residents, since it will ensure that the provider at least has an opportunity to negotiate a period of exclusivity which enables it to provide the best possible service to an MDU building. As noted by private cable operator OpTel, Inc.:

Exclusive rights-of-entry provide important consumer benefits. The availability of exclusive rights-of-entry or "broadband easements" allows landlords to bargain with service providers for the best telecommunications services and products available. Landlord can require service providers to make a significant investment in the technology and services for the MDU because they can guarantee access to a stable supply of customers over a long period of time. Service providers will install the state-of-the-art facilities because the right of entry agreement permits them to recover their investment over time and earn a reasonable rate of return. Residents of the MDUs benefit by having access to top quality communications and multichannel video services.^{19/}

By contrast, an arbitrary time limitation or "cap" on exclusive contracts may have the undesired effect of keeping competitors out of properties they otherwise are more than willing to serve on freely negotiated terms, or eliminating their ability to provide advanced services that MDU residents want.

Further, WCA does not believe the Commission should adopt its proposal to prohibit an MVPD from entering into any future exclusive contracts with an MDU owner once it has

^{19/}Comments at OpTel, Inc., CS Docket No. No. 95-184, at 7 (filed Mar. 18, 1997).
Comments at 7.

recouped its investment in the MDU owner's property.^{20/} Again, the parties themselves are the best arbiters of whether continued exclusivity is in their best interests, and, in a competitive market, MDU owners will have sufficient leverage to negotiate all future contracts with incumbents on fair and equitable terms.

B. The Commission Should Adopt WCA's "Fresh Look" Proposal.

As WCA and others demonstrated earlier in this proceeding, a significant portion of MDU buildings are served by franchised cable operators pursuant to exclusive right of entry agreements entered into before competitive alternatives had emerged.^{21/} Alternative MVPDs are frequently finding that MDU building owners/operators are refusing access, not because they do not desire to provide wireless cable services to their residents, but because they entered into exclusive contracts with the local cable operator before the emergence of a competitive marketplace. These contracts now represent a substantial barrier to competitive entry that the

^{20/}*Second Further Notice*, at ¶ 260.

^{21/}*See, e.g.*, Letter from Paul J. Sinderbrand, Esq., Counsel for The Wireless Cable Association International, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 2 (filed Oct. 2, 1996 [the "Sinderbrand Letter"]; Letter from Henry Goldberg, Esq., Counsel for OpTel, Incl and MultiTechnology Services, L.P., CS Docket No. 95-184 and MM Docket No. 92-260, at 3-4 (filed Jul. 23, 1996); Comments of GTE, CS Docket No. 95-184, at 21 (filed Mar. 18, 1996) ["As incumbent monopolist, cable operators today have established many long-term *exclusive* contracts with MDUs, in an over attempt to thwart competition. Indeed, in those markets where competition is looming, cable operators have redoubled their efforts to "lock up" MDUs before alternative providers can provide service. Thus, when alternative providers enter the market, the cable operator claims that any contact with MDUs under contracts constitutes interference with contractual or business relationships, thereby exposing the alternative provider to tort liability. This is proving to be a convenient method to significantly inhibit competition in those markets where MDUs are prevalent because only the existing monopolist currently has the ability to offer service."].

Commission can eliminate through application of a “fresh look” policy that would permit MDU owners to revisit exclusive arrangements entered into with cable operators prior to the emergence of effective competition.

“Fresh look” will yield substantial benefits to consumers. If existing cable-exclusive contracts are allowed to remain in force, incumbent cable operators will not be confronted with the possibility that a property owner might choose an alternative supplier of similar services that can tailor programming and rates to the needs and interests of the tenant community, and/or can provide better customer service.^{22/} Without a “fresh look” policy, property owners will be denied the most effective consumer protection remedy available - - expulsion of the incumbent cable operator and the substitution of an alternative provider.^{23/}

There is little question that the Commission has the authority to apply a “fresh look” policy to exclusive contracts under these circumstances. In 1992, for example, the Commission adopted a “fresh look” policy when it sought to open the market for “special access” services (*i.e.*, dedicated lines used for local connections between a customer and an interexchange carrier) to competitive entry.^{24/} Concerned about the ability of local carriers to “lock up” their respective markets, the Commission gave telephone subscribers having long-term access arrangements with the incumbent LEC an opportunity to terminate those agreements, without penalty, and avail

^{22/}See, *e.g.*, ICTA Comments at 45.

^{23/}*Id.*

^{24/}*Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7463-64 (1992) *aff'd* 8 FCC Rcd 7341, 7345 (1993).

themselves of competitive alternatives. Similarly, the Commission adopted a “fresh look” policy to promote competition in the market for toll-free “800” service. In that context, the Commission gave existing customers the option to terminate contracts for toll-free service, without liability, for a period of time after “800” numbers became portable among service providers.^{25/}

The *Second Further Notice* seeks comment on whether “fresh look” should be limited to “perpetual” agreements or should be applied more broadly.^{26/} WCA reiterates its earlier proposal that “fresh look” be applied as broadly as possible, and not only to “perpetual” contracts.^{27/} Wireless cable operators have encountered a variety of exclusive contracts that, while not “perpetual,” nonetheless foreclose competition for the foreseeable future. The record before the Commission in this proceeding establishes that wireless cable operators and others have been refused access to buildings because the owner/operator entered into an agreement giving the franchised cable operator exclusive access for the life of its cable franchise and any renewals or extensions. While these arrangements are not “perpetual” in the strict sense of the word, their

^{25/}*Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5905-06 (1991). Moreover, as a general matter, courts have recognized the Commission’s authority to prescribe a change in contract rates when it finds them to be unlawful and to “modify other provisions of private contracts when necessary to serve the public interest.” *Western Union Tele. Co. v. Federal Communications Commission*, 815 F.2d 1495, 1501 (D.C. Cir. 1987). For a further discussion of the Commission’s authority to abrogate cable-exclusive MDU service contracts via a “fresh look” policy, see GTE *Ex Parte* Filing at 14-15.

^{26/}See *Second Further Notice*, at ¶ 264.

^{27/}Sinderbrand Letter at 2-3.

impact is the same given how infrequently franchise renewals are denied. In effect, these agreements foreclose building owners and operators from providing residents access to competitive video services for so long as the franchised cable operator is in business. In other cases, franchised cable operators have taken advantage of the lack of competitive alternatives by securing contracts assuring them of exclusive access to MDU properties for an extended period of years, foreclosing the possibility of competition for some time to come.

Thus, WCA reiterates its support for applying a 180-day “fresh look” not only to “perpetual” contracts,^{28/} but to any exclusive access arrangement between a franchised cable operator and an MDU owner/operator that extends either: (i) for the life of the franchise and any renewals thereof; or (ii) for 3 years or longer.^{29/} This comports with the Commission’s decision in *Expanded Interconnection with Local Telephone Company Facilities*, where the Commission determined that the existence of certain contracts with access arrangements of three years or more raised potential anti-competitive concerns by tending to “lock up” the market and prevent customers from obtaining the benefits of new, more competitively priced services.^{30/} Given the general philosophy behind “fresh look” -- that consumers who entered into long-term agreements when there was not competition should be entitled to enjoy the benefits once competition

^{28/}*Second Further Notice*, at ¶ 264.

^{29/}Sinderbrand Letter at 2-3.

^{30/}*See* n. 24, *supra*.

emerges -- WCA believes that this suggested approach is the best option for providing MDU owners a fair opportunity to provide residents access to competing service providers.

WCA has heretofore called upon the Commission to permit MDU owners to abrogate exclusive contracts entered into with cable operators that did not face effective competition at the time exclusivity was granted.^{31/} WCA shares that Commission's concern "about the administrative practicability of making market power determinations on a widespread, case-by-case basis,"^{32/} and has proposed the use of the well-established "effective competition" test as a means of determining whether an exclusive agreement should be subject to "fresh look."^{33/} Requiring a case-by-case determination of "market power" would tax the Commission's limited resources, while offering cable's competitors very little certainty as to their right to enter MDU property where an incumbent is already occupying the premises.

For similar reasons, the Commission should *not* adopt a separate "fresh look" period for each MDU building.^{34/} Because of the plethora of competitors entering the marketplace, it makes little sense to tie the closing of the "fresh look" window to the conduct of any particular competitor with respect to any particular building. The objective of the "fresh look" policy is to provide MDU owners a reasonable opportunity to abrogate contracts entered into prior to the

^{31/}Sinderbrand Letter at 3.

^{32/}*Second Further Notice*, at ¶ 262.

^{33/}Sinderbrand Letter at 4.

^{34/}*Id.* at 3-4.

emergence of competition once competitive alternatives emerge. Thus, the timing of the “fresh look” window should be dependent on the emergence of competition, not on whether one particular competitor desired to provide service to the MDU building in question.

Moreover, a building-by-building approach would likely prove to be a nightmare for competitive service providers and the Commission’s staff alike. Since no competitor other than the one making the initial contact with the MDU would necessarily know about the initial contact, it will be impossible for competitors of the Commission to know when the “fresh look” period will close for any particular building. As a result, the Commission invariably would find itself embroiled in disputes between franchised cable operators, MDU owners and competitors as to when the “fresh look” period for any specific building had occurred.

Allowing the “fresh look” period to remain open until 180 days after the Commission determines that the franchised cable operator serving the MDU faces “effective competition” is a simple solution to these potential problems. Because the Commission cannot find “effective competition” to exist until competitive alternatives are generally available in the marketplace, WCA’s approach will assure that MDU owners have a reasonable opportunity to avail themselves of truly competitive alternatives. Moreover, MDU building owners/operators, franchised cable operators, and all emerging competitors will know with precision when the

“fresh look” period expires. Thus, the Commission should not find itself embroiled in the disputes that would be inevitable under a building-by-building approach.^{35/}

Finally, WCA supports the opening of a 180-day “fresh look” window starting upon the effective date of any rules adopted in this proceeding for those markets where effective competition has already been found to exist.^{36/} WCA believes this is a fair approach that will put MDU owners and cable’s competitors on sufficient notice that existing exclusive contracts may be renegotiated, and will also give alternative providers adequate time to market their services to any MDU owner who wishes to take advantage of “fresh look”.

C. The Commission Should Clarify Any Rules It Adopts To Address Sharing Of Wiring To Deter Piracy.

The *Second Further Notice* solicits comment on the possibility of multiple service providers sharing a single home run wire in MDUs.^{37/} While sharing is possible under some circumstances, the Commission must assure that any rules regarding sharing provide that the owner of the wiring is properly compensated.

^{35/}WCA does not believe it is necessary for the Commission to open a subsequent “fresh look” window to accommodate every new technology that enters the marketplace after the initial “fresh look” window has closed. *Second Further Notice*, at ¶ 264. It is expected, for example, that LMDS systems may be up and running as early as next year. Where a wireless cable or DBS operator successfully negotiates an exclusive contract during the initial fresh look period, there is little equity in eliminating those contractual rights just months later once an LMDS operator enters the market. Under this scenario, it is impossible to expect a competing provider to make substantial investments in servicing MDU properties, which is exactly the *opposite* of what the Commission is trying to achieve in this proceeding.

^{36/}*Id.* at ¶ 265.

^{37/}*See Second Further Notice*, at ¶ 271.

A number of wireless cable operators have entered into or are in the process of negotiating joint marketing agreements with DBS provider DirecTV. In the typical case, the wireless cable operator provides a single rooftop satellite dish and wireless cable antenna and the equipment necessary to combine the two services so that they can be delivered to any given unit over a home run wire that the operator owns and/or controls. The wireless cable operator then jointly markets both a wireless cable and DBS service to residents. Although the DBS programming is addressed so that it can only be received by authorized subscribers to the DirecTV service, a resident of the MDU could bypass the wireless cable operator by purchasing his own digital converter box, securing an authorization code directly from DirecTV, and connecting the set-top box to the wireless cable operator's home run wire and antenna without paying the wireless cable operator the required fees for the service. Accordingly, the Commission should make clear that where sharing is possible, the owner of the wiring must be fairly compensated.

D. WCA Supports the Commission's Proposal to Exempt "Small Operators" From Its Signal Leakage Reporting Requirements.

Historically, wireless cable operators have not cause harmful interference when operating on aeronautical frequencies, and thus as a general matter WCA does not oppose the imposition of signal leakage requirements on wireless cable operators. Indeed, the Commission has already recognized that wireless cable operators operating in the digital mode will not be operating at the minimum power level necessary to trigger application of the signal leakage rules at all.^{38/} In addition, the Commission has recognized that its signal leakage rules were originally adopted exclusively for the cable industry, and, in recognition of the burdens that those rules may impose on wireless providers, has given alternative MVPDs a five-year exemption from most of its signal leakage requirements if their systems are "substantially built" as of January 1, 1998.^{39/}

WCA believes that the underlying policy rationale behind the Commission's approach to the application of its signal leakage issue to non-cable providers is sound and thus militates in favor of an exemption for smaller operators from the Commission's annual signal leakage reporting requirements. Again, in general WCA does not oppose the imposition of signal leakage requirements on smaller systems. As recognized by the Commission, however, the annual signal leakage reporting requirement may impose undue burdens on smaller operators, particularly where, as here, the operators have had a long history of not creating interference in the aeronautical frequency bands. Accordingly, WCA recommends that the Commission include

^{38/}*R&O* at ¶ 239.

^{39/}*Id.* at ¶ 239.

a provision in its rules that exempts any wireless cable system of fewer than 15,000 subscribers from having to submit annual signal leakage reports. As noted by the Commission, this represents the definition of a "small cable system" for purposes of cable rate regulation and, in WCA's view, will encompass a sufficiently large number of smaller operators and reduce the Commission's processing burden, without creating any additional risk of harmful interference to aeronautical operations.

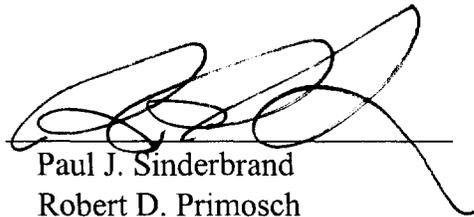
III. CONCLUSION.

WHEREFORE, the Wireless Cable Association International, Inc. hereby supports the *Second Further Notice*, subject to the comments set forth above.

Respectfully submitted,

THE WIRELESS CABLE ASSOCIATION
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