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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matters of)
)
Telecommunications Services)
Inside Wiring)
)
Customer Premises Equipment)
)
Implementation of the Cable Television)
Consumer Protection and Competition)
Act of 1992)
)
Cable Home Wiring)

CS Docket No. 95-184

MM Docket No. 92-260

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby replies to pleadings filed by the National Cable Television Association ("NCTA") and Time Warner Cable ("Time Warner") opposing WCA's Petition for Reconsideration of the *Report and Order and Second Further Notice of Proposed Rulemaking* (the "*R&O*") in this proceeding.^{1/}

I. INTRODUCTION.

In its Petition, WCA urged the Commission, among other things, to preempt state mandatory access laws that discriminate against wireless cable operators in favor of franchise fee-paying cable operators, and to amend its rules so that an incumbent service provider cannot deter competitive entry into an MDU through *in terrorem* threats to remove existing wiring. In each case, WCA established that the proposed changes to the rules adopted by the *R&O* are necessary to eliminate

^{1/} Petition of The Wireless Cable Association International, Inc., CS Docket No. 95-184 and MM Docket No. 92-260 (filed Dec. 15, 1997) [hereinafter cited as "WCA Petition"].

one of the greatest impediments to competition in the MDU environment -- the unwillingness of many landlords to suffer the "postwiring" of their properties by an alternative MVPD service provider.

As the Commission considers the issues raised by WCA, it must not forget the marketplace environment in which wireless cable operators and others are attempting to introduce competitive alternatives to consumers. Since the filing of the WCA Petition, the Commission released its annual assessment of the status of competition in markets for the delivery of video programming (the "*Fourth Annual Report*").^{2/} Therein the Commission made the following findings:

- Cable operators are still the dominant providers of multichannel video programming service in the United States, and remain in vigorous financial health.^{3/}
- The cable industry's large share of the MVPD audience (87%) is a "cause for concern" insofar that it "*reflects an inability of consumers to switch to some comparable source of video programming.*"^{4/}
- The Commission's inside wiring rules, along with other pro-competitive initiatives, "are critical to the development of a competitive marketplace that, one day, will render superfluous cable rate regulation and other rules."^{5/}

For these and other reasons set forth below, WCA submits that the Commission should reject the cable industry's attempts to return the Commission's inside wiring rules to the *status quo ante*,

^{2/} *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, FCC 97-423 (rel. Jan. 13, 1998).

^{3/} *Id.* at ¶¶ 14-26. When viewed in this context, Time Warner's suggestion that incumbent cable operators are handicapped vis-a-vis their competitors by virtue of franchising and other public service obligations rings very hollow. Opposition to Petitions for Reconsideration filed by Time Warner Cable, CS Docket No. 95-184 and MM Docket No. 92-260, at 7-9 (filed Jan. 15, 1998) [hereinafter cited as "Time Warner Opposition"].

^{4/} *Fourth Annual Report* at ¶ 8 (emphasis added).

^{5/} *Id.* at ¶ 10.

and adopt the procompetitive proposals set forth in WCA's Petition.

II. DISCUSSION

A. *The Record Supports A Commission Preemption of Discriminatory State Mandatory Access Statutes.*

Significantly, while both NCTA and Time Warner oppose WCA's call for a federal preemption of discriminatory state mandatory access statutes, neither effectively refutes WCA's demonstration that, as a practical matter, state mandatory access laws that discriminate in favor of the local cable operator deter competition. As WCA pointed out, many landlords who must give the local hardwire cable company access to their premises are unwilling to undergo the inconveniences associated with having a second provider.^{6/} That view has been confirmed by the real estate community.^{7/} Indeed, Time Warner concedes that "the real impediment to competition and choice is . . . landlords . . . restricting MVPD access to their buildings."^{8/}

WCA does not disagree that in many cases, landlord reluctance to permit multiple entrants is the source of the problem.^{9/} Note that WCA has never called for a federal preemption of any and all mandatory access statutes. Although such an approach might have the inadvertent effect of

^{6/} See WCA Petition, at 10-14.

^{7/} See Opposition of Building Owners and Managers Ass'n Int'l, *et al.*, CS Docket No. 95-184 and MM Docket No. 92-260, at 3-4 (filed Jan. 15, 1998).

^{8/} Time Warner Opposition, at 4.

^{9/} In other cases, however, the economics of serving a particular MDU may dictate that an exclusive contract be employed, particularly in cases where residents desire access to advanced services that require extensive infrastructure improvements. As WCA discussed in detail in its response to the *Second Further Notice of Proposed Rulemaking* in this proceeding, the Commission should readily permit those MVPDs that face competition to enter into exclusive contracts. See Comments in Response To Second Further Notice of Proposed Rulemaking filed by The Wireless Cable Association International, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 10-16 (filed Dec. 23, 1997).

denying benefits to residents of those buildings where exclusivity is required in order to support the provision of advanced services, a statute which provides all MVPDs with equal access to MDU properties would certainly be an improvement over the current discriminatory statutes. What Time Warner and NCTA conveniently ignore is that every mandatory access statute adopted to date discriminates against wireless cable operators and other alternative MVPDs in favor of the local, franchise fee-paying hardwire provider.

There is simply no basis for the misleading claims by NCTA and Time Warner that state mandatory access statutes are pro-competitive because they promote two-wire competition.^{10/} Mandatory access only promotes competition by permitting the hardwire cable operator to “overbuild” the facilities of an alternative MVPD, and does nothing to address the more common situation where an alternative MVPD is denied access to an MDU served by the hardwire cable operator. While Time Warner trumpets the fact that there are some cases of two-wire competition in states with discriminatory mandatory access laws, neither addresses the Commission’s own finding in this proceeding that of the 353 MDUs where cable operator Cablevision Systems Corp. had alleged that two-wire competition had developed despite a discriminatory mandatory access law, the cable operator was the second entrant in over 95% of the cases.^{11/} In other words, the record establishes that where discriminatory mandatory access exists, the cable operator can readily overbuild an alternative MVPD, but it is rare for an alternative MVPD to gain access to a MDU

^{10/} See Time Warner Opposition, at 7-8; NCTA Opposition, at 8.

^{11/} See *Further Notice of Proposed Rulemaking*, CS Docket No. 95-184 and MM Docket No. 92-260, at ¶ 30 (rel. Aug. 28, 1997).

already served by cable.^{12/}

In short, notwithstanding the most recent filings by NCTA and Time Warner, the record before the Commission is devoid of any evidence that discriminatory state mandatory access statutes serve any public interest. To the contrary, the record is clear that in many cases these statutes are a deterrent to true competition by alternative MVPDs. Preempting discriminatory mandatory access statutes, while not an absolute assurance that two-wire competition will develop in all MDUs, will clearly increase the potential for alternative MVPDs to serve residents of MDUs.^{13/}

^{12/} Nor does Time Warner's effort to distinguish the obligations imposed on it from those imposed on other MVPDs pass muster. *See* Time Warner Opposition, at 7-8. Like cable, wireless cable operators are subject to retransmission consent obligations (47 U.S.C. § 325(b)(1), 47 C.F.R. § 76.64), equal employment opportunity rules (47 C.F.R. § 76.71), obligations relating to the closed-captioning of video programming (46 C.F.R. § 79.1), requirements relating to the blocking of sexually-explicit materials (47 C.F.R. § 76.227) and exacting technical standards, (47 C.F.R. §§ 76.605(a)(12), 76.610, 76.611, 76.612, 76.614, 76.615(b)(1)-(7), 76.616 and 76.617). In addition, while wireless cable operators do not have to pay local franchise fees because they do not employ public rights of way, the Commission did auction 13 of the channels employed by wireless cable (47 C.F.R. § 21.921) and requires operators to lease the remaining 20 of the 33 available channels from educational entities (47 C.F.R. § 74.931(e)). Moreover, in most cases a wireless cable operator is required to construct substantial transmission facilities for those educational entities, who then are required to program a substantial amount of educational material (47 C.F.R. § 74.931(e)(2)). In other words, many of the requirements cited by Time Warner to justify special treatment are, in fact, directly applicable to wireless cable, while other requirements, although not directly applicable to a wireless technology, are similar to requirements imposed upon the wireless cable industry.

^{13/} WCA notes with regret that Ameritech New Media, Inc. ("Ameritech") has retreated from its usual pro-competitive agenda and also opposed a preemption of state mandatory access laws. *See* Comments of Ameritech New Media In Response To Petitions For Reconsideration, CS Docket No. 95-184, at 5 (filed Jan. 15, 1998)[hereinafter cited as "Ameritech Comments"]. While WCA recognizes that Ameritech is the beneficiary of discriminatory mandatory access laws because it has chosen to secure overbuild franchises, WCA is constrained to note that Ameritech provides no reasoned argument as to why cable operators, but no other competitors, should be entitled to preferential access.

B. Incumbent Cable Operators Have Submitted No Factual or Legal Arguments Which Justify Retention of the Commission's Current Rule Allowing Incumbents To Remove Their Home Run Wiring Upon Termination of Service.

In calling for the Commission to eliminate the option afforded cable operators to remove their home run wiring, even if the MDU owner (or the successor MVPD) desired to acquire it, WCA emphasized that the salvage value of coaxial cable pales in comparison to the cost of removing the wiring and restoring the premises to its former condition.^{14/} Indeed, the record in this proceeding is barren of any substantial evidence indicating that an incumbent cable operator has ever reused inside wiring once it is removed from MDU property.^{15/} Thus, WCA has been concerned that an incumbent cable operator will announce an intention to remove its home run wiring solely for the *in terrorem* impact upon an MDU owner that desires to avoid postwiring the premises. Under these circumstances, the MDU owner will invariably elect to avoid the disruption created by postwiring and allow the incumbent to remain on the premises, denying residents access to a competitive provider even though the incumbent is not offering the best possible service at an optimal price.^{16/} WCA's concerns in this regard were shared by others.^{17/}

NCTA and Time Warner have not disputed any of these basic facts. Instead, they mischaracterize WCA's proposal and argue that requiring an incumbent to sell its "home run" wiring to an MDU owner or competitor amounts to an unconstitutional taking of private property under the

^{14/} WCA Petition at 3.

^{15/} *See id.* at 6.

^{16/} *See id.* at 6-7.

^{17/} *See, e.g.,* Ameritech Comments, at 6; Petition for Reconsideration filed by DIRECTV, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 2-4 (filed Dec. 15, 1997).

Fifth Amendment.^{18/}

To avoid any confusion, allow WCA to make its position clear. It is not saying, as Time Warner implies, that an incumbent should never have the right to remove its wiring.^{19/} Subject to any contrary provisions of state property and contract law, if an MDU owner or the successor MVPD elects not to purchase the incumbent's home run wiring, the incumbent should be free either to remove the wiring and restore the premises to its prior condition, or abandon the wiring. What WCA is proposing is that if the MDU owner or successor MVPD elects to purchase the incumbent's home run wiring, it should have the right do so at a price equal to depreciated value. DirecTV, Inc., GTE Service Corp. and Ameritech have advocated similar approaches.^{20/}

The short answer to the Fifth Amendment arguments advanced by NCTA and Time Warner is that WCA has never suggested that an incumbent not receive just compensation for its wiring. To the contrary, WCA has proposed that the incumbent receive compensation equal to the depreciated value of the wiring.^{21/} This is all that incumbent cable operators are entitled to under the Fifth Amendment, and thus WCA's proposal does not raise the "unconstitutional takings" problem alleged by NCTA and Time Warner.^{22/}

^{18/} NCTA Opposition at 3-5; Time Warner Opposition, at 9-10.

^{19/} See Time Warner Opposition, at 9-10.

^{20/} See Opposition and Comments of DirecTV to Petitions for Reconsideration, CS Docket No. 95-184, at 15 (filed Jan. 15, 1998); Ameritech Comments, at 6-7; Opposition and Comments of GTE Service Corp., CS Docket No. 95-184, at 14-15 (filed Jan. 15, 1998).

^{21/} Opposition to Petitions for Reconsideration filed by The Wireless Cable Association International, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 13 and at n.35 (filed Jan. 15, 1998) [the "WCA Opposition"].

^{22/} Time Warner relies on *Bell Atlantic Telephone Cos. v. FCC* and *Florida Power Corp. v. FCC*,
(continued...)

The Commission rejected a similar argument when it deregulated the installation of simple inside wiring and maintenance of all inside wiring installed by telephone companies.^{23/} Initially, the Commission required telephone companies to relinquish ownership when their inside wiring costs had been expensed or fully depreciated. With respect to expensed inside wiring, the Commission noted:

[W]e see no essential difference between [inside] wiring installed by the telephone companies who may claim a continuing ownership interest and inside wiring installed by other nonregulated parties who do not claim a continuing ownership interest. In both cases, the costs considered in terms of time, labor and materials have been recovered.^{24/} In both cases the investment is labor intensive and the value of the wire itself is low in

^{22/} (...continued)

both of which are inapposite here. Time Warner Opposition at 10 n.25 and 11, citing *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) and *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1546 (11th Cir. 1985). As recognized by the United States Supreme Court, the Fifth Amendment does not prohibit "takings," only uncompensated ones. See *United States v. Riverside Bayview Homes*, 474 U.S. 121, 128 (1985). Indeed, the court in *Bell Atlantic* did not hold that an agency may never "take" property; the court acknowledged that, as a constitutional matter, takings are unlawful only if they are not accompanied by "just compensation." *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15810-11 (1996) [discussing *Bell Atlantic*]. At no time has WCA suggested that an incumbent cable operator should not receive just compensation for its wiring; to the contrary, WCA has agreed that the incumbent should receive compensation equal to the depreciated value of the wiring (since the wiring amounts to little more than scrap once it is removed from the building), and that it does not oppose arbitration where the only issue before the arbitrator is the correct depreciated value of the wiring. WCA Opposition at 13 and at n.35. WCA's proposal thus satisfies *Florida Power's* requirement that "just compensation" be determined via adjudication rather than legislative fiat. *Florida Power*, 772 F.2d at 1546.

^{23/} *Second Report and Order* in CC Docket No. 79-105 (Detariffing the Installation and Maintenance of Inside Wiring), FCC 86-63, 51 FR 8498 (rel. March 12, 1986) [the "*Telephone Inside Wiring Second Report and Order*"].

^{24/} Similarly, with respect to fully amortized inside wiring, the Commission noted that "When fully amortized the net book value [of the wiring] will be zero and that will adequately approximate the economic value of the embedded wiring to the telephone company. Carriers will have received 'just compensation' because they will have been fully compensated for their investment." *Telephone Inside Wiring Second Report and Order* at ¶ 49 n.40.

relation to the total cost of installation; and with respect to the wire itself, the physical in-service characteristics are the same with respect to low salvage value and location - - on the premises of someone other than the telephone company and, in many cases, permanently affixed. In such circumstances, prudent business practice would dictate abandonment of the wire. In view of full recovery and the absence of any characteristics which would distinguish it from wiring installed by others, valid ownership claims already seem to have been surrendered.^{25/}

Accordingly, the Commission concluded that its relinquishment requirement did not raise a Fifth Amendment "takings" issue, since the telephone companies were being justly compensated for their inside wiring costs before being required to relinquish ownership.^{26/}

Each of the Commission's above-quoted observations as to the post-installation value of telephone inside wiring apply with equal force to cable inside wiring, and neither NCTA nor Time Warner have submitted anything which suggests otherwise.

III. CONCLUSION.

In his separate statement in support of the *Fourth Annual Report*, Chairman Kennard was exactly right in observing that "[t]enants would see more choice and better prices if an incumbent faced a competitive environment sooner."^{27/} As demonstrated above and in the other pleadings filed by alternative MVPDs, the cable industry is advocating the opposite result, *i.e.*, preservation of the current noncompetitive *status quo*. Having come so far toward facilitating maximum competition

^{25/} *Telephone Inside Wiring Second Report and Order* at ¶ 46; *see also id.* at ¶ 49.

^{26/} *Id.* at ¶¶ 48-50. On other grounds, the Commission eventually eliminated the mandatory relinquishment requirement in favor of simply precluding telephone companies from restricting the removal, replacement, rearrangement or maintenance of inside wiring by subscribers. *Detariffing the Installation and Maintenance of Inside Wiring*, 1 FCC Rcd 1190, 1195-96 (1986) [the "*Detariffing Reconsideration Order*"]. The Commission did not, however, retreat from its earlier conclusion that its relinquishment requirement was permissible under the "takings" clause of the Fifth Amendment.

^{27/} *Fourth Annual Report*, Separate Statement of Chairman William E. Kennard, at 4.

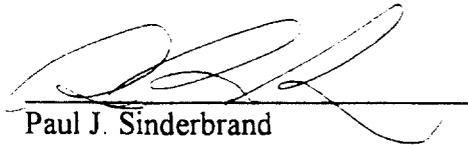
in the MDU environment, WCA believes that the Commission must put aside the cable industry's continuing efforts to derail these proceedings and instead must continue to "fine tune" its inside wiring rules to ensure that its pro-competitive objectives are achieved. WCA thus once again urges the Commission to adopt the rule modifications suggested by WCA and thereby create more opportunities for subscribers to enjoy the benefits of that competition.

WHEREFORE, for the reasons set forth herein and in WCA's Petition, WCA urges the Commission to grant WCA's Petition.

Respectfully submitted,

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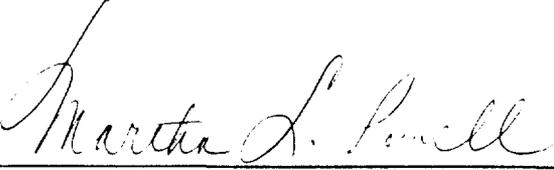
CERTIFICATE OF SERVICE

I, Martha L. Powell, hereby certify that the foregoing Reply to Oppositions to Petition for Reconsideration was served this 28th day of January, 1998, by depositing a true copy thereof with the United States Postal Service, first-class postage prepaid, addressed to the following:

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A handwritten signature in cursive script that reads "Martha L. Powell". The signature is written in dark ink and is positioned above a horizontal line.

Martha L. Powell