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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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

JOINT REPLY COMMENTS

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JOINT REPLY COMMENTS

Joint Commenters[1] submit these reply comments in response to the *Second Further Notice of Proposed Rulemaking* (the "*Second FNPRM*") in the captioned proceeding.

I. SUMMARY

Joint Commenters strongly oppose any rules that would restrict cable operators, but not other multichannel video programming distributors ("MVPDs"), from enforcing or entering into exclusive agreements with MDUs. Such rules would deprive MDU residents of the advanced services and lower per-channel rates that cable operators provide. Moreover, rules that handicap cable's ability to compete for MDU access threaten to restrict the development of MDU services

[1] Charter Communications, Inc., Greater Media, Inc., Jones Intercable, Inc., Marcus Cable Operating Company, L.P., Benchmark Communications, and Century Communications Corp.

while forcing MDU residents to pay more. If the Commission adopts such rules, many MDU residents will be relegated to an underclass of customers in the broadband video and telecommunications services markets. In addition, a policy that allows all MVPDs except cable to enter into or to enforce exclusive MDU service agreements runs counter to Congress' intent in the Telecommunications Act of 1996 to promote, through competitive neutrality, technological and service advances with lower rates, which the Commission has otherwise sought to encourage through its own rules and orders.

Aside from policy considerations, the Commission lacks the necessary statutory authority to adopt a fresh-look approach in the context of MDU agreements. Where, as here, the Commission seeks to alter existing contractual relationships, the Commission may not act without express statutory authority. Moreover, a fresh-look approach would effect an unconstitutional taking, unless cable operators are fully compensated for not only the investment costs but also any consideration paid in connection with the agreements as well as the value of the business as a going concern.

The Commission should carefully consider its action in this proceeding in light of the statutory and consitutional limits on its authority as well as the Congress' and the Commission's larger goals to promote advanced technologies through open competition.

II. THE COMMISSION SHOULD NOT DEPRIVE MDU RESIDENTS OF BENEFITS OF CABLE'S COMPETITIVE OFFERINGS.

The reality of the video services market is that MDU owners often auction the right to provide exclusive video service to their MDU buildings in order to secure the highest payments

and the best deals for themselves.[2] If the Commission precludes cable operators from bidding for the right to provide exclusive service to these MDUs, then MDU owners will have every motivation to strike a deal with a non-cable MVPD, and no rational economic incentive to allow a cable operator to serve the building. In effect, cable operators will be unable to provide service to the residents of these buildings.

Artificial restraints on cable operators' ability to compete for exclusive access to MDUs would thus inhibit competition, and would promote the higher per-channel prices that the Commission has recognized are charged by cable's competitors.[3] Moreover, MDU residents would have no access to the local programming found only on cable. SMATV providers can point to nothing that warrants a rule that would create such an underclass of multichannel video customers. As long as non-cable MVPDs are permitted to bid for exclusive access to MDUs, cable operators must be permitted to compete as well.

A. Without Cable's Competitive Presence, MDUs Will Become the Backwater of the Growing Tide of Telecommunications Services.

In enacting the Telecommunications Act of 1996 ("1996 Act"), Congress sought to "accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to

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[2] *See* Appendix to Comments of CableVision Communications, Inc., *et al.* in CS Docket No. 95-184 and MM Docket No. 92-260 (filed Sept. 25, 1997); Motion to Dismiss Petition for Special Relief filed by Jones Intercable on December 16, 1996 in *OpTel, Inc. v. Jones Intercable,* CSR 4620 (concerning competitive bidding that transpired between OpTel and Jones Intercable, Inc. for access to an MDU).

[3] *See Fourth Annual Report, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141 (Jan. 13, 1998) at ¶

competition."[4] As part of its effort to ensure that consumers benefit from new technologies and services, Congress also enacted anti-slamming provisions aimed at protecting consumers' ability to choose their communications providers.[5] The Commission likewise has relied on these overriding principles to guide its implementation of provisions affecting local competition in telephone service,[6] universal service,[7] cable television rates and services,[8] electric utility expansion into telecommunications,[9] direct broadcast satellite,[10] and internet access.[11] Indeed, in

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[4] H.R. Conf. Rep. No. 104-458, at 1 (1996).

[5] 47 U.S.C. § 258.

[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* (First Report and Order) 11 FCC Rcd. 15499 ¶ 21(1996), *rev'd on other grounds, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) , *cert. granted*, 66 USLW 3387, 3484, 3490 (Jan. 26, 1998).

[7] *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 (1992) at ¶ 587.

[8] *Implementation of Cable Act Reform Provision of the Telecommunications Act of 1996*, 11 FCC Rcd. 5937, 5938 at ¶ 5, FCC 96-154 (April 6, 1996); *Continental Cablevision, Inc. Amended Social Contract*, 11 FCC Rcd. 11118 (1996).

[9] *See, e.g., Applications of Southern Telecom Holding Co*, DA 96-052 File No. ETC-96-8 et al. (General Counsel, June 14, 1996).

[10] *Proposal to Consolidate and Simplify DBS Service Rules*, IB Docket 98-21, (Announcement, Feb. 19, 1998).

[11] *Report & Order*, Implementation of Section 703(e) of the Telecommunications Act of 1996 - Amendment of the Commission's Rules and policies Governing Pole Attachments, CS Docket No. 97-151 (Feb. 6, 1998) ("We again emphasize the pervasive purpose of the 1996 Act and the premise of the Commission's *Heritage* decision to encourage expanded services . . ."); *Report & Order*, Access Charge Reform, 12 FCC Rcd 15982 (1997); *Access Charge Reform/Price Cap Performance Review for Local Exchange Carriers/Transport Rate Structure and Pricing/End User Common Line Charges*, 12 FCC Rcd 15982 (1997) at ¶ 50. Indeed, even before the 1996 Act, the Commission sought to promote advanced technologies. *See, e.g., Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Co.*, 6 FCC Rcd 7099 (1991), *recon. dismissed*, 7 FCC Rcd 4192 (1992), *aff'd*, *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

this proceeding, the Commission asks how it can ensure that MDU tenants "receive the benefits of technological improvements most expeditiously."[12] One powerful answer is that the Commission should not adopt any rule that would compel MDU owners to categorically exclude cable operators from even bidding on the rights to serve residents of MDU buildings.[13]

Only cable operators provide an ever growing amount of highly-rated and valued programming, plus significant local programming content, and advanced services like high-speed internet access. They continue to pump billions of dollars into network improvements for greater capacity and flexibility in delivering various services. At the end of 1996, the average cable system had channel capacity of approximately 53 channels.[14] Most significantly, the average per-channel rate for cable service is less than the per channel rate charged by its competitors.[15]

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[12]*Second FNPRM* at ¶ 260.

[13]The Commission does not expressly state its proposal to restrict the ability of cable operators to enter into exclusive agreements with MDUs. Instead, the Commission asks whether it should limit exclusive contracts "where the MVPD involved possesses market power." *Second FNPRM* at ¶ 261. As noted in the Comments of Cable Telecommunications Association at 4, however, "MVPDs with market power" appear to be code words for cable operators.

[14]*Fourth Annual Report* at ¶ 16.

[15]In its comments at 9, ICTA asserts, without any evidentiary support, that rates charged in MDUs by private cable operators are 10 to 15% below those charged by the next highest competitor. However, ICTA does not describe the services that are being offered at these different rates. In most cases, franchised cable operators offer a much larger channel selection than their competitors, such that the per channel rate to subscribers is actually less for cable television service. Indeed, in its *Fourth Annual Report* at ¶ 39-40, the Commission found that while cable operators' average monthly rates were higher than rates charged by DBS and MMDS providers, the *per channel* rate for cable television service was actually lower.

Numerous cable operators now provide digital video, data and voice services over their cable systems.[16] Most of the major MSOs have launched or announced plans to launch a high speed internet service.[17] In contrast, DBS and most SMATV providers lack the technical ability to provide these services, and MDU residents that have no opportunity to receive service from franchised cable operators will be blocked from receiving these rapidly-growing services.

Only franchised cable operators provide public access and other locally originated programming. SMATV and DBS providers who lock up MDU buildings will not provide residents with locally originated programming from the schools, the government, public access users, and original community programming like that produced by cable operators. When, for example, the local school board and city council meetings are carried on the local franchised system, every person living in the community in MDUs served by SMATV systems is deprived of the ability to watch the proceedings.

In the same way, only cable is subject to the FCC's must carry rules. If the Commission and Congress are correct in their conclusion that must carry is necessary to promote the public interest, then it is hard to imagine any reason why MDU residents should be prevented from receiving service from the only operator that must comply. Certainly there should be no federal rule that limits the ability of MDU residents to receive qualified must carry stations. Yet the

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[16] *Fourth Annual Report* at ¶ 45 and ¶52 ("Cox announced plans in September to launch one of the largest multiservice offerings, including cable video, telephone, and Internet access to 25,000 renters in Irvine, California, apartment communities.")

[17] For example, TCI, MediaOne, Time Warner, Jones Intercable, Comcast, Cox, Cablevision Systems, Adelphia, Marcus, Century, InterMedia, and TCA all have some form of high-speed cable internet access service either commercially deployed or in development.

Commission in essence proposes to set up an auction system for MDU buildings that disqualifies franchised operators before the auction even begins.

Restricting cable operators' ability to compete would also remove one of the most significant incentives to other MVPDs to improve their channel offerings and services. None of cable's competitors offers any services that are so clearly superior to cable as to warrant a federal rule that designates them as the sole option for MDU residents. Cable operators have often secured the rights to serve MDU buildings only to find that they must rewire or upgrade poor SMATV plant. The only evidence found in the Commission's records to date is that the price for cable's competitors' services are higher on a per-channel basis than cable. While alternative providers have started to develop technological improvements that promise increased channel offerings at lower rates for subscribers, that development has occurred because of competition.[18] The Commission could not adopt rules that would replicate or improve upon existing marketplace incentives. Indeed, it is utterly naive to trust that technological development will continue if cable, the most potent competitor, is removed from play.

Moreover, any perceived benefits that might be reaped from excluding cable from MDU competition are highly speculative. ICTA suggests that even if competition does not exist at the MDU level, in restricting cable operators' ability to compete there, competition may increase in the franchise area at the "property line."[19] The notion that handicapping cable at the MDU level will somehow jump-start competition at the franchise level is not only speculative, it is unfair

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[18]While the Commission's *Fourth Annual Report* discusses the ongoing efforts of cable's competitors to develop technologies to enhance their channel offerings, these efforts have yet to be manifested at the consumer level. *See Fourth Annual Report* at ¶ 85.

[19]ICTA Comments at 5.

to MDU residents who would be forced to pay the price of this experiment. What ICTA effectively proposes is a long-term tax on MDU residents, at least 15 years, to facilitate easier entry of its members into the market for single family dwellings.

The real question is *who* should pay the price of this experiment? Is it the MDU resident, as ICTA suggests, who will be sealed off from the broadband pipe and local programming of the cable operator? In policy terms, the cost is in fact better borne by the deep pockets of communications providers, including ICTA's members, who include such prominent players as DirecTV, owned by Hughes Electronic Corporation, which reported $15.9 billion total revenues in 1996,[20] and OpTel, Inc., the largest SMATV operator in the country, owned by Caisse de Depot et Placement du Quebec, with reported assets for 1997 of over $52 billion[21]; as well as RCN, Telecom Services, In. ("RCN"), with reported revenues in excess of $400 million and backed by Peter Kiewet and Sons, Inc., with total revenues of $3 billion in 1996,[22] and CAI Wireless, which recently bought out $100 million worth of RBOC stake in the company.[23] As succinctly noted by Winstar Communications in its comments, the Commission's role is not to insulate these so-called "start-ups" from business risk.[24]

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[20] General Motors Corp. Report, Disclosure Incorporated, LEXIS US Co. file (1998).

[21]IAC (sm) Newsletter Database, Crosbie & Co., Inc. (9/1/97).

[22]Daniel Roth, *RCN's High-Wire Act*, Forbes, Dec. 29, 1997.

[23]Television Digest, Feb. 23, 1998.

[24]Comments of Winstar Communications, Inc. at 8.

History has proven that rules intended to foster development of competing businesses by excluding incumbents from competition are not rooted in sound economic policy.[25] As the Commission itself recognized recently in its *Report and Order* lifting the ban on wireline common carrier's provision of non-wireline services, permitting incumbents to compete "will allow the realization of significant economies of scope and provide a new source of capital that will yield a broader array of services at lower costs to consumers."[26] Indeed, the Commission conceded as much in the context of its SMATV/Cable Cross Ownership rules when it reversed its decision to permit cable operators to acquire in-region SMATV facilities.[27]

There is growing recognition at the Commission of the basic principle that blocking strong competitors from specific markets is unwise. Commissioner Furchtgott-Roth recently opined that competition may be harmed by precluding participation by incumbent LECs and cable operators from participating in the LMDS auctions. Commissioner Powell echoed that sentiment in his statement that, "In the zeal to promote competition, we regulators sometimes champion as 'procompetitive' policies, which in reality, take solace in the shadows of highly speculative fears about market power and anticompetitive conduct. . . . Indeed, it may be that proven companies

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[25]*See, e.g., FCC Forum on Streamlining Wireless*, Communications Daily, Vol. 18, No. 14 (1/22/98) at 1 (Ex-Chief Economist Michael Katz criticizing Commission decision to help small businesses get PCS licenses).

[26]*Report & Order*, Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, 10 FCC Rcd 6280, 6288, ¶15 (1995).

[27]*Memorandum Opinion and Order on Reconsideration of the First Report and Order* in MM Docket No. 92-264, 10 FCC Rcd 4654 (1995) at ¶¶21-31.

are just the animals to create new innovative markets and usher in competition in those markets to the benefit of consumers."[28]

B. The Record Does Not Support A Need For Market Power Based Restrictions.

There is no empirical evidence in the Commission's rulemaking or the comments that would support limits on exclusive contracts of the MVPD that has a strong presence in the community. Nor is there evidence demonstrating that cable operators have more strength in the MDU market than the big SMATV and DBS owners. For example, such players as Optel, RCN, CAI Wireless and DirecTV are backed by owners with billions of dollars in working capital or financing.[29] In fact, competition is thriving in the MDU market and there is no valid reason to alter the competitive balance for MDU access.[30]

If anything, current marketplace conditions suggest that cable's competitive presence is needed to round out the choice of providers available to MDU residents. The DBS industry has partnered with SMATV providers nationwide in an effort to increase its share of the MDU

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[28]Separate Statements of Commissioners Michael Powell and Harold Furchtgott-Roth in *Third Order on Reconsideration*, Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Establish Rules and Policies for Local Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297 (Feb. 3, 1998).

[29]See infra. at 7-8.

[30]*Fourth Annual Report* at ¶ 84 ("The SMATV industry appears to have considerable growth potential and is becoming a more significant competitor to traditional cable service"); Monica Hogan, *DirecTV Builds MDU Distribution*, Multichannel News, Feb. 23, 1998 at 62 ("We're optimistic that we'll have a very good year," said John McKee, VP of Special Markets); Joe Estrella, *Private Cable Giant Buys Houston MDUs*, Multichannel News, Sept. 8, 1997, at 47; Monica Hogan, *MDU Market Attracts Notice as Competition Enters Field,* Multichannel News, Dec. 15, 1997 at 6.

market.[31] Moreover, in some instances, alternative MVPDs are leasing fiber capacity from local exchange providers to serve multiple MDUs in a single cable franchise area without obtaining a local franchise. Without the presence of cable operators in the competition for exclusive access, consumer choice would be severely limited.

Interestingly, the MDU owners do not support any proposal that would restrict their choice of providers.[32] Only ICTA, RCN and Wireless Cable Television Association International, Inc. ("WCA") seek to restrict cable operators, but not other MVPDs, from entering into exclusive agreements with MDU owners.[33] And only DirecTV seeks to shut cable out entirely.[34] Thus, the auctioneer MDU owners would like the chance to enter into exclusive deals with cable, while cable's competitors transparently advocate a skewed market for those buildings under a Commission rule that would insulate them from a competitive fight.

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[31]Monica Hogan, *DirecTV Builds MDU Distribution*, Multichannel News, Feb. 23, 1998 at 61 (DirecTV signing up master system operators to facilitate service to MDUs nationwide); *Fourth Annual Report* at ¶ 88 (DBS and SMATV operators are beginning to use combined technology to create a DBS/SMATV delivery system); *DBS Firms Look to Align with Wireless Cable*, Video Technology News (Nov. 4, 1996).

[32]Joint Comments of Building Owners and Managers Assoc. Int'l. *et al.*; Comments of the Community Associations Institute.

[33]Comments of ICTA at 11 (seeking to restrict cable operators from entering into exclusive agreements in states with mandatory access laws); Comments of RCN at 8 (seeking to restrict cable operators from entering into exclusive agreements in states with mandatory access laws and from obtaining exclusive agreements for use of molding and conduit); Comments WCA at 9-10 (seeking to limit benefits of exclusivity to operators that "face competition").

[34]Comments of DirecTV, Inc. at 5-8 (requesting Commission to prevent cable operators from enforcing exclusivity provisions in their contracts with MDU owners).

C. Market-Power Based Restrictions Are Not Administratively Feasible.

A market-power based approach to MDU exclusivity would create an unreasonable drain on the Commission's limited resources. Such inquiries are better left to courts, whose years of experience in considering antitrust matters are certain to yield sufficient protection.

1. Determinations of market power are highly fact-dependent.

The first step in assessing a party's market power is defining the relevant product and geographic markets.[35] This inquiry requires a thorough analysis of economic factors affecting competition, including actual sales, interchangeability of products or services and availability of substitutes, cross-elasticity of demand and supply, intensity of competition, existence of barriers to entry, transportation costs, and government regulation.[36] Definition of the relevant markets is an issue of fact and typically requires the testimony of economists who have examined these market conditions, as well as consumer data. Given the variety of factors that must be evaluated, it would be virtually impossible to adopt any generally applicable presumptions. Thus, if the

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[35]The Commission requested comment on how to define the relevant geographic market, but did not seek comment on how to define the relevant product market. To the extent that this omission suggests an assumption by the Commission that the product market is somehow "obvious" or consistent across all MVPDs or all MDUs, this assumption is erroneous. In the case of MDUs, the product market may consist of cable services or all MVPD services or all entertainment services. *See, e.g., Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Va, Inc.*, 714 F.2d 351, 355 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984) (where SMATV challenged cable operator's exclusive access to MDUs, district court defined product market as "cinema, broadcast television, video disks and cassettes, and other types of leisure and entertainment-related businesses for customers who live in single-family dwellings and apartment houses"); *Viacom Int'l, Inc. v. Time, Inc.*, 785 F. Supp. 371, 376 (S.D.N.Y. 1992) (where pay television programmer challenged cable operator's refusal to carry its programs, product market was defined as pay television programming services).

[36]*See* 2 Julian O. Von Kalinowski, Antitrust Laws and Trade Regulation, §§ 24.02-24.03 (1997).

Commission were to adopt the "market power" approach it has proposed, it would be required to embark on a complicated, contested adjudicatory proceeding for each MDU in which an exclusive agreement is challenged.

2. Market power is an inquiry better left to courts.

Even if it were feasible to determine the relevant product and geographic markets for each MDU in which an exclusive agreement is challenged, it is unnecessary and unwise for the Commission to step into a role already adequately and expertly filled by courts and agencies charged with antitrust enforcement. It would be a waste of Commission resources to create and then enforce a new set of antitrust-like laws when such laws already exist and are readily enforceable, both by private parties and by governmental bodies.

Moreover, the approach the Commission has proposed would directly conflict with the standards established by federal antitrust law. For example, under the antitrust laws, a nonprice vertical arrangement (such as an exclusive agreement) is evaluated under the rule of reason.[37] Thus, a court examining an exclusive dealing agreement would be required to weigh the agreement's procompetitive advantages against its anticompetitive harm before deciding whether the agreement, as a whole, stifles competition. Federal courts and agencies charged with antitrust enforcement have long recognized that the existence of market power, by itself, is not anticompetitive and may simply be the legitimate result of aggressive, efficient competition.[38] Under the Commission's proposal, by contrast, the Commission would ***presume*** anticompetitive

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[37] *See Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 (1988); Telecommunications Act of 1996, § 301(b)(2), amending 47 U.S.C. § 543(d).

[38] *See, e.g., United States v. Syufy Enters.*, 903 F.2d 659, 663 (9th Cir. 1990).

harm merely from the presence of market power, while ignoring any potentially procompetitive effects accruing from such an arrangement.

Not surprisingly, while some commenters expressed support for the Commission's market power approach, no commenters offered specific suggestions for promulgating rules that would exclude entities with "market power," however defined.

III. THE FRESH-LOOK PROPOSAL EXCEEDS THE COMMISSION'S AUTHORITY UNDER THE ACT AND WOULD EFFECT AN UNCOMPENSATED TAKING IN VIOLATION OF THE CONSTITUTION.

In advocating a "fresh look" approach for existing agreements between cable operators and MDU owners, ICTA, OpTel, and other commenters ask the Commission to ignore the statutory and constitutional limitations on its authority as well as the protected property rights of cable operators in the name of jump-starting competition. However, the Commission must remember that competition is not the *goal* but rather the *means* of ensuring that subscribers receive the best available services at lower rates. A fresh-look approach will not deliver improved services at lower rates to subscribers, and would instead work a taking of cable operator's property without just compensation, in violation of the Fifth Amendment to the U.S. Constitution.

A. The Commission Lacks The Necessary Authority To Adopt Rules That Would Effectively Abrogate Existing Contracts.

Commenters in this proceeding have debated extensively the Commission's authority to regulate inside wiring agreements between MVPDs and MDU owners. The enabling text of the home wiring rule is limited to "cable installed by the cable operator within the premises of such

subscriber."[39] The Commission's extension of this provision to regulate existing contracts between cable operators and MDUs cannot be justified under this authority. Indeed, in the 1996 Act, Congress expressed its intent to *reduce* regulations governing cable operators' service to MDUs, when it eliminated the uniform rate structure requirement for bulk discounts to MDUs except where operators are engaged in predatory pricing.[40]

The Commission's lack of statutory authority is particularly alarming where, as here, it is considering rules that would abrogate existing agreements. The Commission may not abrogate existing contractual agreements without express authority from Congress.[41] Nor may the Commission avoid the need for express statutory authority by labelling its policy "fresh look." The Commission's use of fresh look in other contexts does not justify its use in the context of inside wiring.

In applying "fresh look" in other contexts, the Commission relied heavily upon its broad powers over incumbent LECs under Sections 201 *et seq.* of the Communications Act, which empower the Commission to prescribe charges for tariffed LEC offerings, including termination charge provisions.[42] The only instance in which the Commission has applied a similar policy

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[39]47 U.S.C. § 544(i); H.R. Rep. No. 862, 102d Cong., 2d Sess. (1992) ("Conference Report") at 86; H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) ("House Report") at 118.

[40]Telecommunications Act of 1996, § 301(b)(2), amending 47 U.S.C. § 543(d).

[41]*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, 180 (3d Cir. 1974).

[42]*Expanded Interconnection with Local Telephone Company Facilities,* Second Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd. 7341, 7348 ¶ 16 n. 23 (1993); *Competition in the Interexchange Marketplace,* Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677, 2682 ¶ 25 (1992); *First Report and Order*, CC Docket 96-98, FCC 96-325 *at* ¶ 1095 (rel. Aug. 8, 1996).

outside of common carrier regulation is in the context of an experimental license issued to GTE for air-ground service. There the Commission relied upon its broad authority under Section 303(r) of the Communications Act to revoke the experimental license outright.[43]

The Commission's authority to regulate cable operators' contractual relations with MDUs is much more narrow. For example, Section 623(a)(1) prohibits the Commission from regulating cable service rates except to the extent provided in Sections 623 and 612 of the Communications Act. 47 U.S.C. § 543(a)(1). In the context of MDUs, rates are presumed reasonable unless proven to be predatory. 47 U.S.C. § 543(d). The Commission is prohibited from regulating cable operators' rates *at all* in areas subject to effective competition. 47 U.S.C. § 623(a)(2). Accordingly, the Commission may not rely upon its authority to regulate rates to support application of a "fresh look" or similar policy to cable operators' agreements with MDUs.

There is an obvious and politically expedient motivation for the Commission to forge beyond the bounds of permissible regulation in the name of "promoting competition." However, if the Commission can unilaterally abrogate existing contracts in direct contravention of Congressional intent, the Commission could promulgate a host of other rules in the name of "competition" or to support any other objective it deemed desirable. The Commission was sensitive to statutory limits on its authority in the context of promulgating digital broadcast television requirements and auctioning broadcast spectrum.[44] Moreover, if cable were to ask, it

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[43] *Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands*, 6 FCC Rcd 4582, 4583-84 n. 13 (1991).

[44] *See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809 (1997) at ¶ 13 ("The 1996 Act did not change the fact that the Commission lacks statutory authority to auction broadcast spectrum.") and ¶ 17 ("[G]iven Congress' explicit direction, there is now no statutory basis to question the

is highly unlikely that the Commission would amend its rules to limit franchise fees to three percent of gross revenues when Congress set the maximum at five percent. And yet here, where the statutory limitations on the Commission's power are equally clear, the Commission is considering regulating an area beyond its authority and interfering with existing contractual rights without express authority from Congress.

Significantly, MDU owners and landlords are far from unanimous in their support for a fresh-look approach, despite the fact that these entities stand to benefit the most from an ability to abrogate "perpetual" exclusive agreements.[45] They, too, question the Commission's authority to regulate in this area.[46]

B. The Fresh-Look Approach Effects An Impermissible Taking Under the Fifth Amendment of the Constitution.

Rules that permit MDU owners to unilaterally cancel their contracts with cable operators would effectuate an unconstitutional taking of property in violation of the Fifth Amendment, unless cable operators were justly compensated for the fair market value of their contracts.[47] Fair market value is not merely the operator's investment in plant, but must include "the property's capacity to produce future income . . ,"[48] which in the cable industry has traditionally

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Commission's authority to limit initial eligibility to existing broadcasters").

[45]*See* Joint Comments of Building Owners and Managers Assoc. International, *et al.* at 5-6.

[46]*Id.*

[47]*BFP v. Resolution Trust Co.*, 114 S.Ct. 1757, 1761 (1994); *United States v. 50 Acres of Land*, 469 U.S. 24, 26 & n. 1 (1984) (citing *United States v. Miller*, 317 U.S. 369, 374 (1943) ("what a willing buyer would pay in cash to a willing seller").

[48]*Yancy v. United States*, 915 F.2d 1534, 1542 (Fed. Cir. 1990).

been measured generally between $1,200 and $3,000 per subscriber. In addition, fair market value must take into account the often substantial consideration paid by MVPDs in connection with their contracts for MDU access.[49] Where cable operators have been required to install the wiring up front and have been forced to pay up front passing fees just to reach residents, the Commission cannot suppose that an operator is fully compensated at any particular annual benchmark.

Given the lack of support for a fresh-look approach, the negative impact on subscribers, and the lack of statutory authority to adopt such a policy, the Commission should refrain from adopting fresh-look at this time.

IV. THE COMMISSION'S CABLE HOME WIRING RULES SHOULD BE EXTENDED TO ALL MVPDs.

The Commission's cable home wiring rules are designed to protect subscribers. As noted by RCN, there is no reason why these rules should not be extended to all MVPDs.[50] Moreover, for the same reasons that the Commission should exercise regulatory parity in imposing restrictions on exclusive agreements, the Commission should not single out cable operators in this context simply to impede their ability to compete.

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[49]*See, e.g.*, Motion to Dismiss Petition for Special Relief filed by Jones Intercable on December 16, 1996 in *OpTel, Inc. v. Jones Intercable,* CSR 4620 (concerning competitive bidding that transpired between OpTel and Jones Intercable, Inc. for access to an MDU, Windrose Apartments, located in Palmdale, California, which yielded bids nearing $100,000).

[50]Comments of RCN at 18.

CONCLUSION

For the foregoing reasons, Joint Commenter respectfully request that the Commission adopt the recommendations set forth herein.

Respectfully submitted,

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