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

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

REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA") hereby submits its reply comments on the Second Further Notice of Proposed Rulemaking in the above-captioned proceeding.

I. THE COMMISSION HAS NO AUTHORITY TO ABROGATE OR UNILATERALLY MODIFY THE TERMS OF EXISTING EXCLUSIVE CONTRACTS.

In our initial comments, we showed that, as a matter of law, the Commission has no authority to abrogate any exclusive rights in existing agreements that may have been negotiated by multichannel video programming distributors ("MVPDs") and owners of multiple dwelling unit ("MDU") buildings. Similarly, the Commission may not authorize MDU owners to take a "fresh look" at -- *i.e.*, renege on and abrogate -- their existing agreements with MVPDs.

A number of commenting parties have urged the Commission to nullify exclusivity provisions in existing contracts and/or to subject existing exclusive contracts to a "fresh look." Many of these parties assume that the same "ancillary jurisdiction" that the Commission relied upon to regulate the disposition of cable home run wiring also permits such retroactive abrogation of contractual rights.[1] As we pointed out in earlier rounds of this proceeding, the notion that the Commission's rate regulation mandate under Section 623 of the Communications Act somehow provides ancillary jurisdiction under Section 4(i) to regulate home run wiring outside individual subscribers' premises is fundamentally flawed -- and there is no basis for extending this rationale to the abrogation of existing contracts .

Section 4(i) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be *necessary* in the execution of its functions."[2] It is difficult to see how abrogating exclusive contracts (or, in the case of "fresh look," replacing one sole provider with another) is "necessary" to the Commission's rate regulation responsibilities -- especially since the rates of an incumbent cable operator subject to Section 623 will already be subject to rate regulation, while the rates of an alternative provider will not.

In any event, the Commission's authority to modify or abrogate existing contracts is even more tightly circumscribed than its general ancillary jurisdiction under Section 4(i). The courts have made clear that a statute will not be construed as authorizing an agency to abrogate existing contractual rights unless such authority either is explicit or is "imperatively required." Absent explicit authority to interfere with pre-existing contractual rights, those rights must be "so repugnant to the statue" that they would "deprive the . . . statue of its efficacy" and "render its provisions nugatory."[3]

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1 *See, e.g.*, Comments of Bell Atlantic at 6; Comments of RCN Telecom Services, Inc. at 14.

2 47 U.S.C. § 154(i).

3 *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907). *See also Bauers v. Heisel*, 361 F.2d 581, 587 (3d Cir. 1966) (en banc), *cert. denied*, 386 U.S. 1021 (1967).

As we showed in our initial comments, the Commission has no explicit authority to interfere with existing MDU contracts. Nor is it conceivable that the rate regulation provisions of Section 623 might somehow be rendered ineffective or meaningless by the continued existence of exclusive contracts. The MDU rates of incumbent cable systems that do not face effective competition remain subject to the same maximum rate regulation standards as the non-MDU rates of such systems -- standards that, pursuant to Section 623, are designed to ensure that rates are reasonable.[4] This is true regardless of whether or not the incumbent has an exclusive contract to serve the building. On the other hand, a non-cable alternative provider would be *immune* from rate regulation under Section 623, whether or not it was the sole provider of service to an MDU.

RCN Telecom Services, Inc. contends that, wholly apart from Section 4(i), "the Commission could determine that long-term exclusivity contract provisions should be preempted by the Commission pursuant to Section 253(d) of the 1996 Act."[5] But Section 253(d) preempts state and local barriers to the provision of *telecommunications* services. It has no applicability to exclusive contracts for the provision of video programming services.

Various parties point to instances where the Commission has banned exclusive contracts. But the regulations they cite (1) *prospectively* prohibit regulated entities from *entering into*

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[4] In 1996, Congress amended the uniform rate provisions of Section 623 to *permit* cable operators to provide non-predatory bulk discounts to MDUs and thereby charge MDU subscribers less than they charge other individual subscribers. *See* 47 U.S.C. § 623(d). But Congress did not *require* such discounts or indicate in any way that the purposes of Section 623 would be undermined if MDU rates were maintained at the Commission's benchmark levels. Having specifically addressed the question of MDU rates, and having declined to mandate any reductions in such rates, much less any modifications to existing exclusive contracts, it is impossible to argue that abrogating existing contracts is somehow "necessary" to make Section 623(d) work as Congress intended.

[5] Comments of RCN Telecom Services, Inc. at 14.

exclusive contracts and/or (2) implement explicit statutory mandates to abrogate existing contractual provisions.

Bell Atlantic, for example, cites the Commission's rule prohibiting cable operators and broadcasters from entering into exclusive retransmission consent arrangements.[6] But that prohibition was adopted as part of the rules implementing the retransmission consent provisions of the Act. It did not affect existing retransmission consent contracts, because before these rules were adopted, there were no retransmission consent contracts.

Some parties also cite the Commission's rule prohibiting exclusive contracts between cable operators and vertically integrated satellite programmers. That rule did apply to some existing contracts[7] -- but it was explicitly required by Section 628 of the Communications Act.

Similarly, the "fresh look" process that has been imposed by the Commission in the past, which several parties cite, provides no precedent for authorizing MDU owners to abrogate existing contracts with incumbent MVPDs. As TCI's comments show, "[t]he Commission has generally only imposed "fresh look" in order to correct common carrier rates in private contracts that had previously been found to be unreasonable *in violation of express congressional directives in sections 201 through 205 of the Communications Act.*"[8]

The Building Owners and Managers Association, *et al.*, which represent the owners and managers of MDUs, acknowledge that they "might benefit from the right to escape unfavorable agreements."[9] Nevertheless, they oppose proposals to interfere with existing "freely-negotiated

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6 Comments of Bell Atlantic at 6.

7 The rule grandfathers exclusive contracts that were entered into before June 1, 1990. 47 C.F.R. § 76.1002(e).

8 Comments of Tele-Communications, Inc. at 19 (emphasis added) (footnote omitted).

9 Comments of Building Owners and Managers Association, *et al.* at 5.

arms'-length contracts" -- including "fresh look" proposals -- for a variety of reasons, including the "difficult legal questions" that such interference would raise.[10] In contrast, two of the strongest and earliest proponents of a "fresh look" rule -- OpTel, Inc. and the Independent Cable Telecommunications Association ("ICTA") -- simply *ignore* the question of the Commission's authority to adopt such a rule. They either take for granted -- or, more likely, recognize that there is no persuasive legal support for -- such authority.[11]

But the Commission's authority to abrogate existing contractual and property rights cannot simply be taken for granted. Nor can it be justified by general invocations of the "public interest." Indeed, the test is even more stringent than the "ancillary jurisdiction" standard of Section 4(i). If, as in this case, there is no explicit statutory authority to interfere with pre-existing contractual rights, and if, as in this case, such interference with contractual rights is not "imperatively required" to effectuate a statute, then the Commission may not act.

Finally, we agree with Time Warner that even if the Commission were to permit MDU owners to take a "fresh look" at the *exclusivity* terms of a contract, "such action should have no impact on other provisions of that contract."[12] It is one thing to attempt to promote competition by terminating exclusive rights and quite something else to allow MDU owners to terminate and renege completely on a freely negotiated service agreement.

In this regard, Media Access Project misses the point when it suggests that incumbents whose contracts are terminated can be fairly compensated for their losses and damages by

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10 *Id.* at 5-8.

11 *See* Comments of OpTel, Inc. at 1-5; Comments of ICTA at 11-16. RCN Telecom Services, Inc. similarly provides no statutory basis for the "fresh look" proposal that it supports. *See* Comments of RCN Telecom Services, Inc. at 15-16.

12 Comments of Time Warner Cable at 10.

requiring MDU owners to reimburse them for "unrecovered investment costs."[13] As Time Warner points out, "an MVPD bargains fairly and carefully for the right to serve an MDU for an agreed upon term, or for permission to maintain absolute dominion over its facilities installed on the premises, even after its right to provide service may have terminated."[14] To obtain such rights, or to obtain exclusive rights, the incumbent may have made significant concessions to the owner -- such as payments to the owner, or reduced rates -- in addition to its investment costs. Fair compensation for the unilateral abrogation of the incumbent's contractual rights, if such abrogation were permitted, would have to include reimbursement for such concessions and for anticipated profits in addition to the simple return of the incumbent's investment. The bottom line, however, is that such abrogation of the incumbent's contract should not and may not be permitted by the Commission.

II. ANY RULES THAT THE COMMISSION ADOPTS REGARDING EXCLUSIVITY SHOULD APPLY TO ALL MVPDs.

In our initial comments, we argued that whatever position the Commission might ultimately adopt regarding prospective exclusive contracts to serve MDUs, its rules should apply equally to all MVPDs. If the point of any such rules is to promote fair competition among competing MVPDs, it would hardly make sense to burden such competition with unequal and divergent regulatory requirements.

Several parties agree that fair competition depends on such parity and oppose the notion that the rules should apply differently to MVPDs that have "market power" and those that do not. As Media Access Project argues, "[t]his unwieldy plan undermines First Amendment values and

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[13] Comments of Media Access Project at 6.

[14] Comments of Time Warner Cable at 10.

the very policies upon which it is purportedly based."[15] Time Warner also agrees that "[a]ny attempt to differentiate among MVPDs is contrary to Congress' goal of fostering competition among all types of MVPDs."[16]

GTE, however, argues that the Commission should apply its rules only to cable operators and not to non-cable MVPDs, because it lacks authority under the Act to regulate non-cable MVPDs.[17] We agree with GTE that the Commission's Section 4(i) jurisdiction is narrowly constrained and not as expansive with respect to issues of home wiring and exclusive contracts as the Commission maintains. But if Section 4(i) somehow provides authority to regulate in this area because such regulation is deemed necessary to promote competition and ensure reasonable rates for subscribers, it is hard to see how such objectives can be achieved without subjecting all MVPDs to equivalent regulation.

If the Commission were to conclude that it had no authority to regulate non-cable MVPDs, this would wholly undermine its basis for exercising Section 4(i) jurisdiction at all. If it is impossible for the Commission to apply its rules fairly and equally to all competing MVPDs, then the answer is not to apply the rules in a manner that imposes a unique competitive handicap on cable operators. The answer in such circumstances must be to refrain from applying such rules at all.

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15 Comments of Media Access Project at 6.

16 Comments of Time Warner Cable at 13. *See also* Comments of Cox Communications, Inc. at 9-10; Comments of U S WEST, Inc. at 7-8; Comments of Cable Telecommunications Association at 4-5.

17 *See generally* Comments of GTE Service Corporation.

III. THERE IS NO BASIS FOR REQUIRING SHARING OF HOME RUN WIRING.

The comments on DirecTV's proposal to require simultaneous sharing of home run wiring in MDUs make clear that such a proposal is at best premature, is not presently feasible and should not be adopted. We showed in our initial comments that current technology does not make sharing of wiring a feasible or practical alternative, much less a *mandatory* alternative. Several cable operators confirm that this is the case.[18] In addition, Time Warner correctly points out that the Commission lacks statutory authority to require such shared use -- and that requiring incumbents to allow sharing of their facilities raises Fifth Amendment problems that are likely to be insurmountable.[19]

Other non-cable parties also recognize that sharing of home run wiring cannot realistically be required at this time. Thus, Ameritech notes that "[i]n principle, [it] does not object to DirecTV's proposal, but believes that the Commission must address a broad range of operational and technical issues before mandating simultaneous use of home run wiring"[20] -- issues on which Ameritech "lacks sufficient information . . . at this time."[21]

WCA notes that "sharing is possible under some circumstances,"[22] but the circumstance that it cites involves joint marketing agreements between wireless cable operators and DirecTV, in which the wireless cable operator "jointly markets both a wireless cable and DBS service to

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18 *See, e.g.*, Comments of Time Warner Cable at 20-21; Comments of CableVision Communications, *et al.* at 11-13; Comments of U S WEST, Inc. at 8-9.

19 Comments of Time Warner Cable at 22-23.

20 Comments of Ameritech at 12.

21 *Id.* at 13.

22 Comments of WCA at 17.

residents."[23] WCA is concerned about being fairly compensated by DirecTV in such circumstances. It does not suggest that simultaneous sharing by competing cable and wireless providers or cable and DBS providers where there is no such joint marketing would be either feasible or desirable.

In sum, the evidence suggests that sharing is not a feasible alternative at this time from a technological standpoint, and there is no groundswell of support for such sharing from competing MVPDs.

IV. THE COMMISSION SHOULD NOT EXEMPT SMALL OPERATORS FROM SIGNAL LEAKAGE REPORTING REQUIREMENTS.

In our initial comments, NCTA opposed the Commission's proposal to exempt small operators from signal leakage reporting requirements. According to NCTA's small system operators, the burden of complying with these reporting requirements is small -- especially in comparison to the risks of noncompliance with the signal leakage rules.

WCA, on the other hand, supports the Commission's proposal. WCA does not oppose the substantive signal leakage requirements. It argues that the *reporting* requirement "may impose undue burdens on smaller operators" -- but it does not argue that (or explain how) they *do* impose such burdens.

The reason to retain the reporting requirement is precisely that it is *not* unduly burdensome (and it provides a discernible benefit). Once an MVPD conducts the necessary tests to measure signal leakage, the incremental burden of reporting those tests is minuscule. Indeed, the only reason why an MVPD would want not to have to comply with the reporting requirement would be that it had not, in fact, conducted tests.

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[23] *Id.* at 18.

The Commission has no means other than the reporting requirement to ensure that signal leakage tests are, in fact, performed. And since reporting the results of such tests is such a small burden relative to the risks of signal leakage, there simply is no reason to exempt small operators from the reporting requirement.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our initial comments, the Commission should not (and lacks authority to) abrogate existing exclusive contractual rights or authorize MDU owners to take a "fresh look" at (and renege on) existing contracts. Whatever policy the Commission adopts with respect to prospective exclusive contracts should be applied equally to all MVPDs. The Commission should not adopt rules requiring the sharing of home run wiring. And it should not relieve small operators from signal leakage reporting requirements.

Respectfully submitted,

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