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

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

REPLY COMMENTS

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March 2, 1998

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EXECUTIVE SUMMARY

WCA and various incumbent cable operators are now in agreement that the marketplace is the most effective regulator of exclusive MDU service contracts, provided that all multichannel video programming distributors are able to compete on equal footing for the opportunity to offer service on an exclusive basis. As set forth, however, in the Commission's recently-issued *Fourth Annual Report* on the status of competition among multichannel video providers, a fully competitive marketplace for multichannel video service does not yet exist.

WCA recognizes that basic considerations of fairness require the Commission to strike a balance between promoting competition in the MDU environment and preserving the legitimate contractual rights of incumbent cable operators. For this reason, WCA has recommended that the Commission adopt a carefully tailored "fresh look" policy that would allow an MDU owner to reexamine certain cable-exclusive service contracts for a limited period running from the effective date of the Commission's new rules up to 180 days after the Commission has determined that the incumbent cable operator is subject to effective competition. Sections 4(i) and 303(r) of the Communications Act, read in tandem with Sections 601 and 623 of the 1992 Cable Act, provide the Commission with more than ample statutory authority to adopt WCA's proposal, and neither the "right to remain" exception nor anything in the 1992 Cable Act or 1996 Telecom Act otherwise restricts the Commission's regulatory authority in this area.

Furthermore, WCA's proposal provides maximum certainty that the "fresh look" period will not end until competitive alternatives are available in the market. In addition, WCA's proposal is far simpler and less arbitrary than the "cost-recovery" proposals under consideration in this proceeding, and therefore will minimize any additional administrative burdens on the Commission's staff. And, contrary to what has been suggested by certain incumbent cable operators, adoption of WCA's proposal would not result in immediate abrogation of *all* exclusive MDU service contracts. Rather, WCA's proposal targets only those exclusive contracts that have the most severe adverse effect on competition, and allows review of such contracts up to a date certain after which an MDU owner has become aware that a competitive alternative is available in the market.

Finally, WCA opposes any Commission rule that would prohibit exclusive MDU service contracts for high-speed Internet access and other non-video services. High-speed Internet access will be an essential service offering for many wireless cable operators, and, given the absence of any evidence that exclusive Internet access contracts have any effect whatsoever on the cable industry's ability to compete, the Commission should not adopt impose any contractual restrictions that preclude wireless cable operators from recovering the substantial costs of developing and marketing wireless Internet access service.

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To: The Commission

REPLY COMMENTS

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

I. INTRODUCTION.

Ironically, the initial round of comments on the *Second Further Notice* reveals that WCA and certain incumbent cable operators share common ground on the question of how the Commission should regulate the use of exclusive contracts by multichannel video programming distributors ("MVPDs") in multiple dwelling units ("MDUs"). For example, WCA agrees with Time Warner that "exclusive contracts are legitimate business practices that can benefit both parties to such agreements," and that "there is no basis for treating one MVPD differently from another MVPD *when all MVPDs have the same ability to negotiate with MDU owners for the exclusive right to*

provide service to that MDU."[1] WCA also agrees with TCI that the Commission's proposed seven-year cap on exclusive contracts is impractical given the unique needs and characteristics of each MDU building, and that the appropriate length of an exclusive contract is best left to private arms-length negotiations between the landlord and the multichannel service provider.[2] In other words, there is now substantial support in this proceeding for Commission rules that generally allow market forces to determine whether exclusive contracts provide MDU residents with the best possible package of multichannel video, voice and/or data services at an optimum price.

WCA and the cable industry part company, however, on the question of whether special interim rules are necessary to redress the fact that emerging alternative MVPDs have not had a full and fair opportunity to bid for exclusivity in the MDU environment, and will not have such opportunity absent the limited Commission safeguards proposed in the *Second Further Notice.* The Commission recently found that *87%* of MVPD subscribers still receive service from their local franchised cable operator.[3] Equally significant is the Commission's finding that the cable industry's

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[1] Comments of Time Warner Cable, CS Docket No. 95-184 and MM Docket No. 92-260, at 6, 13 (filed Dec. 23, 1997) [emphasis added] [the "Time Warner Comments"]; *see also* Comments of U S WEST, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 2 (filed Dec. 23, 1997) ["The Commission should avoid imposing regulatory burdens [on exclusive contracts] where a competitive market has already been established and is reasonably well-functioning."] [the "U S WEST Comments"].

[2] Comments of Tele-Communications, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 27-28 (filed Dec. 23, 1997) [the "TCI Comments"]; *see also* Time Warner Comments at 13; Comments of the Independent Cable & Telecommunications Association, CS Docket No. 95-184 and MM Docket No. 92-260, at 4-9 (filed Dec. 23, 1997) [the "ICTA Comments"]; Comments of OpTel, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 4-5 (filed Dec. 23, 1997) [the "OpTel Comments"].

[3] *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of*

(continued...)

large share of the MVPD audience "*reflects an inability of consumers to switch to some comparable source of video programming.*"[4] Simply put, a fully competitive marketplace for multichannel video service does not yet exist, and, accordingly, "more is needed to foster the ability of subscribers who live in MDUs to choose among competing service providers."[5]

Nonetheless, WCA recognizes that basic considerations of fairness require that the Commission strike a balance between preserving legitimate contractual rights and allowing for a reexamination of specific types of exclusive contracts that have a demonstrable adverse effect on competition and consumer choice. For this reason, WCA has *not* proposed that the Commission immediately abrogate *all* existing exclusive conracts between incumbent cable operators and MDU owners, nor has it proposed that only alternative MVPDs be permitted to enter into exclusive contracts. Instead, WCA has proposed that the Commission apply a limited "fresh look" period only to those cable-exclusive contracts of a specified length (*i.e.*, those that extend either for the life of the cable operator's franchise and any renewals thereof, or for three years or longer) that were entered into before the emergence of "effective competition" in the local market for multichannel video services.[6] WCA's proposal is not, as suggested by the National Cable Television Association,

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[3] (...continued)
Video Programming, CS Docket No. 97-141, FCC 97-423, at ¶ 7 (rel. January 13, 1998) [the "*Fourth Annual Report*"].

[4] *Id.* at ¶ 8; *see also* Separate Statement of Chairman William E. Kennard re: *Fourth Annual Report*, at 1 ("[L]ess than 15 months away from the sunset of most cable rate regulation, it is clear that broad-based, widespread competition to the cable industry has not developed and is not imminent.") [the "Kennard Statement"].

[5] *R&O* at ¶ 35.

[6] Comments of The Wireless Cable Association International, Inc., CS Docket No. 95-184 and MM (continued...)

designed to "[tilt] the playing field in order to give a competitive boost to less efficient or less skilled providers."[7] Rather, it is only designed to give MDU owners their first opportunity to select among competing providers and thereby determine whether their residents are in fact receiving the highest quality of service at the lowest possible price.

WCA further submits that Sections 4(i) and 303(r) of the Communications Act of 1934, read in tandem with Sections 601 and 623 of the Cable Competition and Consumer Protection Act of 1992 (the "1992 Cable Act"), provide the Commission with the necessary statutory authority to adopt the "fresh look" policy proposed by WCA. As recognized by the Commission in the *R&O*, Section 4(i) allows the Commission to take remedial action not expressly authorized elsewhere in the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission's functions.[8] This is precisely the case with respect to application of "fresh look" to pre-competition exclusive contracts, particularly in view of the Commission's broad statutory mandate in Sections 601 and 623 to promote competition to cable and, more specifically, to ensure that rates for basic cable service are reasonable. Moreover, the legal and public interest rationales for adoption of WCA's proposal are not, as suggested by certain cable operators, defeated by the "right to remain" exception in the Commission's new "home

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[6] (...continued)
Docket No. 92-260, at 11-17 (filed Dec. 23, 1997) [the "WCA Comments"].

[7] Comments of the National Cable Television Association, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 6 (filed Dec. 23, 1997) [the "NCTA Comments"].

[8] *R&O* at ¶ 83.

run" wiring rules or by Congress's inclusion in the Telecommunications Act of 1996 (the "1996 Telecom Act") of a "bulk discount" exception in the uniform pricing provisions of Section 623(d).

WCA further requests that the Commission reject Cox Communications, Inc.'s recommendation that all exclusive contracts for non-video services, and particularly high-speed Internet access, be prohibited.[9] Internet access has become a critical component of the wireless cable industry's service offerings, and thus the Commission must be extremely careful not to take any action which renders Internet access uneconomical for wireless cable systems. Moreover, to date the Commission has chosen not to assert jurisdiction over Internet services in the context of this proceeding and, given the absence of any evidence that exclusive Internet access agreements have prevented incumbent cable operators from competing in that market, there is no reason for the Commission to assert such jurisdiction now.

Finally, WCA continues to support an exemption for smaller wireless cable operators (15,000 subscribers or less) from the Commission's annual signal leakage reporting requirements.[10] WCA wishes to reemphasize that it does *not* oppose the imposition of signal leakage rules on smaller systems. As recognized by the Commission, however, the annual signal leakage reporting requirement may impose undue burdens on smaller operators. For the reasons set forth in WCA's initial comments, WCA believes that a reporting exemption would reduce the burdens on smaller operators and Commission staff alike without compromising the Commission's regulation of signal leakage in any material respect.

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[9] Comments of Cox Communications, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 11 (filed Dec. 23, 1997) [the "Cox Comments"].

[10] WCA Comments at 19-20.

II. DISCUSSION.

A. The Commission Should Apply a Competition-Based "Fresh Look" Policy To Cable-Exclusive MDU Contracts.

1. The Commission Has The Necessary Statutory Authority To Apply a "Fresh Look" Policy to Exclusive Contracts.

Various cable operators, relying heavily on the Third Circuit's decision in *Bell Telephone Co. of Pa. v. FCC*, 503 F.2d 1250, 1280 (3d Cir. 1974), have contended that the Commission does not have the requisite statutory authority to apply a "fresh look" policy to exclusive contracts, on the theory that the Communications Act does not explicitly give the Commission any authority to regulate privately negotiated contracts.[11] As demonstrated below, that argument is incorrect.

At the outset, it must be noted that on prior occasions the Commission has applied a "fresh look" policy to private contracts in the telephone context, pursuant to its authority under Section 205 of the Communications Act to prescribe "just and reasonable charges" for telephone service. For instance, in 1992 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.[12] Similarly, the Commission adopted a "fresh look" policy to promote competition in the market for toll-free "800" service, giving existing customers the option to terminate contracts for toll-free service, without liability, for a period of time after

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[11] *See, e.g.*, TCI Comments at 8; Time Warner Comments at 6; NCTA Comments at 3.

[12] *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7463-64 (1992), *aff'd* 8 FCC Rcd 7341, 7345 (1993).

"800" numbers became portable among service providers.[13] In both cases, the Commission relied on its Section 205 authority *even though the statute does not explicitly authorize the agency to apply a "fresh look" policy to private contracts.*[14]

Sections 4(i) and 303(r) of the Communications Act of 1934, read in tandem with Sections 601 and 623 of the 1992 Cable Act, provide a similar basis for application of a "fresh look" policy to cable-exclusive MDU contracts.[15] Section 4(i) authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions"; Section 303(r) states that the Commission may "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.[16] The Commission has noted that it "may properly

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[13] *Competition in the Interstate Interexchange Marketplace*, 7 FCC Rcd 2677, 2682 (1992). Even outside the Title II context, the Commission has applied a "fresh look" policy to private contracts pursuant to its broad statutory mandate to promote competition. *See Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands*, 6 FCC Rcd 4582, 4583-84 (1991) [applying "fresh look" policy to air-to-ground service contracts between GTE and various airlines, which had been entered into when GTE had a *de facto* monopoly on air-to-ground service].

[14] The Third Circuit's decision in *Bell Telephone* does not suggest otherwise. That case only stands for the very narrow proposition that Sections 203 and 204 of the Communications Act cannot be read to authorize a private carrier to abrogate intercarrier contracts by means of subsequently filed tariffs. Moreover, that decision (issued eighteen years prior to passage of the 1992 Cable Act) has nothing whatsoever to do with the Commission's Title VI mandate to promote competition to cable and thus has no bearing on the Commission's authority to adopt WCA's "fresh look" proposal.

[15] Indeed, the Commission has already concluded that "Sections 4(i) and 303(r) of the Communications Act, in conjunction with the pervasive regulatory authority committed to the Commission under Title VI, and particularly Section 623" have provided it with sufficient authority to adopt procedures for disposition of an incumbent's home run wiring upon termination of service to an MDU property. *R&O* at ¶ 83.

[16] 47 U.S.C. §§ 154(i) and 303(r).

take action under § 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission's functions."[17]

Furthermore, as the Commission observed in the *R&O*, Section 601 of the 1992 Cable Act states that one of the purposes of Title VI is to promote competition in cable communications.[18] To that end, Section 623(b)(1) of the Act directs the Commission to prescribe rules to ensure that rates for basic cable service are "reasonable."[19] In substance, this is no different than the Commission's Section 205 mandate to ensure that rates for Title II common carrier services are "just and reasonable." Moreover, since reexamination of pre-competition cable-exclusive MDU contracts is designed to give property owners and their tenants a choice among competing providers of multichannel service, the "fresh look" policy advocated by WCA will promote the very same facilities-based competition that the Chairman acknowledges is the most effective check on rising

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[17] *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996*, 11 FCC Rcd 18233, 18238 (1996). *See also North American Telecom. Ass'n v. FCC*, 772 F.2d 1282, 1929-93 (7th Cir. 1985) [Section 4(i) "empowers the Commission to deal with the unforeseen — even if that means straying a little way beyond the apparent boundaries of the Act — to the extent necessary to regulate effectively those matters already within the boundaries."].

[18] *R&O* at ¶ 90.

[19] 47 U.S.C. § 543(b)(1).

cable rates.[20] Accordingly, the Commission has the necessary statutory authority to adopt WCA's "fresh look" proposal in this proceeding.[21]

2. *Neither the "Right to Remain" Exception, Congress's Amendment of Section 623 in the 1996 Telecom Act, Nor the Existence of State Mandatory Access Statutes Militate Against Adoption of a "Fresh Look" Policy With Respect to Pre-Competition Cable-Exclusive MDU Contracts.*

Time Warner alleges that the Commission's "fresh look" proposals in the *Second Further Notice* are incongruous with the Commission's decision not to apply its new "home run" wiring procedures to any MDU in which an incumbent cable operator has a contractual right to remain on the property.[22] In fact, no such incongruity exists, since the two rules are designed to serve different objectives.

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[20] Kennard Statement at 1-2 ["Our Report indicates that the presence of true, head-to-head competition to cable has a substantial downward effect on cable rates. Prices, not surprisingly, appear lower where there is competition than where there is none."]; *see also* Comments of Cox Communications, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 6 (filed Dec. 23, 1997) ["The constant threat that MDU residents individually, or the MDU owner itself, might select another competitor provides the greatest motivation to constantly improve service offerings and price."].

[21] The fact that the Commission recently has refused to apply a "fresh look" policy in the universal service context does not dictate a contrary result. *See In the Matter of Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9063-64 (1997). In that case, the Commission declined to adopt a "fresh look" requirement that would have obligated carriers with existing service contracts with schools and libraries to participate in a competitive bidding process. At no point in its decision did the Commission indicate that it cannot apply a "fresh look" policy to existing contracts absent explicit statutory authority to do so. Moreover, the Commission specifically found that it had "no reason to believe that the terms of these contracts are unreasonable," and that abrogating such contracts "would not necessarily lead to lower pre-discount prices, due to the incentives the states, schools and libraries had when negotiating the contracts to minimize costs." *Id.* at 9064. Of course, no such observation can be made with respect to cable-exclusive MDU contracts entered into before competition to cable became a reality.

[22] Time Warner Comments at 4.

As explained in the *R&O*, the "right to remain" exception merely recognizes that an incumbent cable operator cannot be forcibly removed from MDU property where it has a clear contractual right to remain. Standing alone, an incumbent cable operator's contractual right to remain only means that a competing provider must postwire the premises in order to provide service to the building; it does not *per se* give the incumbent cable operator a right to exclude competitors (though, as WCA has repeatedly argued throughout these proceedings, postwiring has a substantial chilling effect on an MDU owner's willingness to take service from competing providers). By contrast, the Commission's "fresh look" proposals address an entirely different issue, *i.e.*, whether an incumbent cable operator's contractual right to exclude competitors under any and all circumstances disserves the public interest and should be subject to a "fresh look" policy similar to that already applied in the common carrier context. In other words, it is the incumbent's contractual right to keep competitors out, and not its contractual right to remain on MDU property, which is the subject of the *Second Further Notice*. The Commission may regulate the former without compromising the latter.

Various cable operators also cite Congress's inclusion of a "bulk discount" exception in Section 623(d) as evidence that "Congress has specifically recognized that because of intense competition in the MDU marketplace, MDU cable rates are *already* reasonable."[23] Again, however, the cable operators are mixing apples and oranges. The "bulk discount" exception, added via the Telecommunications Act of 1996, states in relevant part that a cable operator's bulk discounts generally are exempt from the uniform pricing requirements of the 1992 Cable Act, but that a cable

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[23] TCI Comments at 12 (emphasis in original); *see also* NCTA Comments at 6.

operator not subject to effective competition may not charge bulk discounts that are predatory.[24] Nowhere in this provision or its legislative history did Congress suggest that the market for multichannel video service is fully competitive; indeed, the fact that Congress specifically prohibited predatory pricing by systems not subject to effective competition suggests otherwise. Moreover, the bulk discount exception does not address the problem at issue in the *Second Further Notice*, *i.e.*, the inability of alternative MVPDs to gain access to MDUs by virtue of cable-exclusive service contracts entered into before the emergence of competition. The fact that cable operators may now offer non-uniform bulk discounts throughout their franchise areas does not defeat the substantial record evidence in this proceeding indicating that pre-competition exclusive contracts remain a substantial barrier to *bona fide* consumer choice in the MDU market.

Finally, Time Warner suggests that the Commission should not apply any of its proposed "fresh look" policies in "mandatory access" states.[25] This argument, however, is based on the mistaken assumption that mandatory access gives an incumbent cable operator a right to exclude competitors from MDU property. Mandatory access at most only gives a cable operator right to enter MDU property and provide service. *This* proceeding, however, is about whether a cable operator should be permitted to maintain an exclusive contract that prevents *others* from providing multichannel service on MDU property. A cable operator's mandatory access rights have no bearing whatsoever on that issue.

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[24] 47 U.S.C. § 543(d).

[25] *See, e.g.*, Time Warner Comments at 11.

WCA does agree, however, that there may be situations where exclusive contracts held by alternative MVPDs might be unenforceable in mandatory access states.[26] This, however, only further highlights the basic inequity of mandatory access statutes: such laws only promote competition by permitting the hardwire cable operator to "overbuild" the facilities of an alternative MVPD, and do nothing to address the more common situation where an alternative MVPD is denied access to an MDU served by the hardwire cable operator. In other words, 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 an MDU already served by cable.[27] WCA thus once again urges the Commission to reconsider and reverse its earlier decision not to preempt discriminatory mandatory access statutes.[28]

3. *WCA's Competition-Based "Fresh Look" Proposal Will Minimize Administrative Burdens On the Commission's Staff And Provide All Parties With Greater Certainty As To When the "Fresh Look" Period Has Opened For Any Particular Building.*

WCA's "fresh look" proposal is very straightforward. Beginning on the effective date of any rules adopted pursuant to the *Second Further Notice* until 180 days after the Commission declares that a particular cable operator is subject to "effective competition" as defined in Section 623 of the

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[26] *See, e.g.,* U S WEST Comments at 5.

[27] For example, the Commission has found that in 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. *See Further Notice of Proposed Rulemaking*, CS Docket No. 95-184 and MM Docket No. 92-260, at ¶ 30 (rel. Aug. 28, 1997).

[28] *See, e.g.,* WCA Reply to Oppositions to Petitions for Reconsideration, CS Docket No. 95-184 and MM Docket No. 92-260, at 2-4 (filed Jan. 28, 1998).

1992 Cable Act, as amended, a "fresh look" period would apply to any of that operator's exclusive MDU service contracts that extend either for the life of the franchise and any renewals thereof or for three years or longer.[29] Where effective competition already exists, the "fresh look" period would run from the effective date of the new rules until 180 days thereafter. Under WCA's proposal, the Commission's staff would *not* be required to devote time and resources to defining exactly what constitutes "market power" on an individualized, case-by-case basis, since "effective competition" is a clearly defined statutorily standard which the staff already uses extensively in the cable rate regulation context. Moreover, the close of the "fresh look" period proposed by WCA would be tied to the Commission's announcement that the cable system in question is subject to effective competition, *not* when the landlord is first contacted by a competing service provider. As a result, the Commission's staff will avoid becoming embroiled in disputes between franchised cable operators, MDU owners and competitors as to when the "fresh look" period for any given building had occurred.[30] Furthermore, it is far simpler to tie "fresh look" to "effective competition" than to whether the incumbent has recovered its costs of providing service to the building: in the latter case, the staff would be required to undertake extensive economic analyses that will drain the

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[29] WCA Comments at 14. This comports with the Commission's decision in *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7463-64, *aff'd* 8 FCC Rcd 7341, 7345 (1993), in which 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] WCA Comments at 16.

Commission's resources and delay competitive entry into the MDU environment, results which are precisely the opposite of what the Commission is attempting to achieve in this proceeding.[31/]

Finally, WCA submits that its "fresh look" proposal sufficiently balances the Commission's pro-competitive objectives with the need to protect the legitimate contractual rights of MDU owners and incumbent cable operators. Since "fresh look" is always at the MDU owner's option, WCA's proposal will not "force [MDU] owners to renegotiate their service agreements when they have no interest in doing so."[32/] WCA's proposal also will not put MDU owners in the frustrating position of having a "fresh look" opportunity before any competitive alternatives have actually emerged in the market.[33/] Furthermore, WCA's proposal does not call for immediate abrogation of *all* cable-

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[31/] Time Warner urges the Commission to clarify that any abrogation of a cable-exclusive MDU contract pursuant to a "fresh look" will not apply to other provisions of the contract that effectively allow an incumbent cable operator to remain in the building on a non-exclusive basis. Time Warner Comments at 10. If, in fact, an incumbent cable operator's MDU service contract provides it with a clear right to remain on the property notwithstanding the application of any "fresh look" rules adopted in this proceeding, then WCA would agree that the incumbent should be allowed to continue providing service on a non-exclusive basis if it chooses to do so. As in the case of the Commission's home run wiring procedures, however, such contracts should not be presumed to confer such a right, and thus absent clear contractual language to the contrary an incumbent cable operator should be required to obtain a court determination of its legal right to remain where the MDU owner voids the operator's right to provide service on an exclusive basis.

[32/] U S WEST Comments at 6. *See also* Comments of Bell Atlantic, CS Docket No. 95-184 and MM Docket No. 92-260, at 7 (filed Dec. 23, 1997) ["[R]ules proscribing exclusive contracts would create no physical occupation because they would not compel property owners to provide access to competing cable providers. The building owner could decide, in each instance, whether or not to permit a new provider into the building, but that decision would not be encumbered by an exclusive contract with the incumbent."] [footnote omitted].

[33/] *See, e.g.,* Comments of Ameritech, CS Docket No. 95-184 and MM Docket No. 92-260, at 8 (filed Dec. 23, 1997) ["[L]imiting any fresh look to a one-time opportunity (such as by opening a 180-day fresh look window for MDU owners on the effective date of the Commission's rules) would prejudice MDU owners who do not yet have viable competitive alternatives, and limit[s] the scope

(continued...)

exclusive MDU contracts. Instead, WCA's proposal only targets those cable-exclusive MDU contracts that have the greatest anticompetitive effect, *i.e.*, those that antedate a competitive environment and are of sufficient length to preclude competitive entry for an unreasonable length of time. By tailoring its "fresh look" rules in this fashion, the Commission will accommodate the competing interests of alternative MVPDs and incumbent cable operators in a manner which puts the *subscriber* first.[34/]

[33/] (...continued)
of competition to existing service providers by locking out any new entrant that was not operational when the fresh look window closed."]; Comments of the Community Associations Institute, CS Docket No. 95-184 and MM Docket No. 92-260, at 5 (filed Dec. 23, 1997) ["A 'fresh look' should not be limited to [an initial] short period but should be available as a flexible option to community associations who can invoke it when they determine that a critical mass of competition among video services providers exists in their area."].

[34/] On this point, CATA's complaint that incumbent cable operators already suffer disproportionate public interest burdens is meritless. Comments of the Cable Telecommunications Association, CS Docket No. 95-184 and MM Docket No. 92-260, at 4 (filed Dec. 23, 1997). 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 (47 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 CATA 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.

B. The Commission Should Not Regulate Exclusive Contracts for Non-Video Services Such As High-Speed Internet Access.

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, including high-speed Internet access.[35] Wireless cable operators have already conducted successful testing of high-speed Internet access in a number of markets, and as a result that service has become a key component of their business plans.[36] Moreover, there is every indication that the Internet access business, even in its embryonic stages, is already highly competitive: for example, many multichannel subscribers are or will soon be able to purchase Internet access from stand-alone Internet service providers (*e.g.*, Erol's, America Online), cable television systems, wireless cable systems, LMDS systems, the Wireless Communications Service ("WCS"), and landline telephone companies. And, as readily acknowledged both by alternative MVPDs and incumbent cable operators in this proceeding, the cost efficiencies created by exclusivity are essential to any multichannel provider who seeks to offer a package of video and non-video services to MDU residents. This is especially true where the package includes high-speed Internet access, given the high start-up costs and vigorous competition inherent to that business. Finally, the Commission has not yet deemed it necessary to assert jurisdiction over Internet services in this proceeding, and, given

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[35] *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).

[36] 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 non-video service offerings as its competition. *See* WCA Comments at 8 n.15 and the cases cited therein.

the absence of any evidence that exclusive Internet access agreements cause any harm whatsoever to incumbent cable operators offering Internet access themselves, there is no reason for the Commission to assert such jurisdiction now. Accordingly, to give the wireless cable industry the fullest opportunity to develop wireless Internet access as a viable service offering, WCA urges the Commission to reject Cox's recommendation that exclusive contracts for non-video services, and particularly high-speed Internet access, be prohibited.[37]

C. The Commission Should Exempt Smaller Multichannel Systems From Its Annual Signal Leakage Reporting Requirements.

Both WCA and ICTA have recommended that the Commission exempt smaller MVPDs from its annual signal leakage reporting requirements.[38] Even NCTA has indicated that it would not oppose an across-the-board "small system" exemption for all types of MVPDs.[39] As the Commission has already recognized, such an exemption is particularly appropriate as a means of reducing regulatory burdens on smaller operators. Indeed, the Commission has acknowledged that its signal leakage rules were originally adopted exclusively for the cable industry, and, in recognition of the burdens that those rules 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.[40] Furthermore, contrary to what has been suggested by Time Warner,[41] there

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[37] Cox Comments at 11.

[38] WCA Comments at 19-20; ICTA Comments at 16-17.

[39] NCTA Comments at 7.

[40] *R&O* at ¶ 239. It therefore would make absolutely no sense for the Commission to *increase* those same regulatory burdens by adopting Time Warner's suggestion that alternative MVPDs be required

(continued...)

is no evidence that a "small system" exemption from the annual signal leakage reporting requirements will yield widespread abuses of the signal leakage rules or otherwise prompt smaller systems to be less attentive to their signal leakage obligations. In fact, given that smaller systems can ill afford to suffer the economic burden of a substantial FCC forfeiture, it is more likely that small systems will continue to take the FCC's signal leakage requirements very seriously. Elimination of the annual signal leakage reporting requirement for these types of multichannel systems thus will have no practical effect on aeronautical safety.

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[40] (...continued)
to notify a competing cable system of leaks in the *competing cable system's* plant. Simply stated, incumbent cable operators are more than able to satisfy the Commission's system monitoring obligations; there is no legal or public interest basis to require their competitors to discharge those obligations for them.

[41] Time Warner Comments at 17-18.

III. CONCLUSION.

WHEREFORE, WCA continues to support the Commission's efforts to regulate exclusive contracts as suggested in the *Second Further Notice*, and, consistent with the Commission's pro-competitive objectives in this proceeding, urges that the Commission further amend its inside wiring rules as recommended in WCA's initial comments filed on December 23, 1997.

Respectfully submitted,

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March 2, 1998

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