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

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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

REPLY COMMENTS OF DIRECTV, INC.

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REPLY COMMENTS OF DIRECTV, INC.

I. INTRODUCTION AND SUMMARY

Earlier in this proceeding, DIRECTV, Inc. ("DIRECTV") urged the Commission to eliminate two impediments that have had a substantial negative effect on the ability of alternative multichannel video programming distributors ("MVPDs") to compete against entrenched cable incumbents in multiple dwelling units ("MDUs"): (1) the existence of exclusivity provisions in contracts between MDU owners and cable incumbents, and (2) the inability of MDU owners to require incumbents to share incumbent-owned wiring with alternative MVPDs. With respect to cable exclusivity provisions, DIRECTV demonstrated that the cable industry has used its market power to obtain long-term and even perpetual exclusive

contracts that bar alternative MVPDs from serving the residents of many buildings.[1] DIRECTV also explained that, even in the absence of an express exclusivity provision, many cable incumbents enjoy a *de facto* exclusive in MDUs because of their control over the inside wiring.[2] To help eliminate this *de facto* exclusive, DIRECTV urged the Commission to adopt rules that would give the MDU owner the right to require the incumbent provider to allow an alternative MVPD to transmit its signal to residents across a building's existing wiring.[3] DIRECTV demonstrated that sharing of wiring is technically feasible and, in fact, is occurring today in buildings where the MDU owner controls the inside wiring of a building.[4]

Many of the comments submitted by other parties in this proceeding support DIRECTV's position that Commission action is needed to enhance the ability of alternative MVPDs to compete against cable incumbents in MDUs. Several commenters agree that MDU owners often enter into long-term or perpetual exclusive contracts because of cable's market power in the MVPD market.[5] While the comments vary on the appropriate treatment of exclusivity provisions, the record demonstrates that cable exclusives must be rendered unenforceable if full-fledged competition is to develop in the MDU market. In fact, the only parties that appear to oppose Commission action are the cable interests, who not surprisingly wish to maintain their market dominance. Their position, however, is at odds with the

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1 Comments of DIRECTV, Inc. ("DIRECTV Comments") at 2-7.

2 *Id.* at 9-10.

3 *Id.* at 12-13.

4 *Id.* at 10-12.

5 *See* MAP Comments at 3; ICTA Comments at 14-15; BOMA Comments at 3 n.2; WCAI Comments at 11; CAI Comments at 3.

procompetitive policies that the Commission has sought to foster in the inside wiring proceeding, and should be given little weight. Some parties support the Commission's policy of promoting competition, but are concerned that excessive Commission regulation of exclusive contracts may unintentionally diminish the procompetitive effects that exclusive contracts can have when used by MVPDs without market power. The Commission can address these concerns by prohibiting exclusivity provisions only in contracts between cable incumbents and MDU owners. In this way, the Commission can ensure that the competitive benefits of exclusive contracts can be preserved while preventing the anticompetitive effect that exclusive contracts can have when used by MVPDs possessing substantial market power.

Several parties also support DIRECTV's proposal to provide MDU owners with the right to require incumbents to share wiring with alternative MVPDs. Many parties agree that sharing would promote competition in the MVPD market because it would give residents a choice of video service providers. While some parties expressed concern about the rights of building owners to control access to their properties, DIRECTV's sharing proposal would preserve that right by leaving the decision of whether to require sharing in the hands of building owners. Perhaps realizing how important bottleneck control over a building's inside wiring is to maintaining market power, the cable interests have opposed DIRECTV's sharing proposals based on unsupported legal and technical grounds. DIRECTV urges the Commission to reject positions of the cable interests that would maintain barriers to competition and to adopt DIRECTV's proposal to allow MDU owners to require sharing of wiring.

II. THE RECORD SUPPORTS COMMISSION ACTION TO PROHIBIT CABLE INCUMBENTS FROM ENFORCING EXCLUSIVITY PROVISIONS IN THEIR MDU CONTRACTS

The record contains substantial evidence that the cable industry has been able to use its market power to obtain long-term and even perpetual exclusive contracts from MDU owners. These exclusive contracts, in turn, help the cable industry preserve its market power by preventing MDU owners from switching providers and by giving cable incumbents the ability to threaten legal action against MDU owners who would otherwise consider switching. Moreover, the record demonstrates why restrictions on exclusivity provisions should apply only to cable incumbents. As explained by several commenters, exclusivity provisions can have procompetitive effects when used by an alternative MVPD without market power that is trying to compete against an entrenched cable incumbent. Finally, the record supports the Commission's authority to adopt rules that regulate both existing and future cable exclusive contracts.

A. THE COMMENTS DEMONSTRATE THAT EXCLUSIVITY PROVISIONS IN CONTRACTS BETWEEN CABLE INCUMBENTS AND MDU OWNERS HARM COMPETITION AND CONSUMER CHOICE

Several parties confirm DIRECTV's position that MDU owners often enter into exclusive contracts with cable incumbents because they were coerced by the cable industry's market power. While these parties may offer various proposals for dealing with exclusive contracts, they agree that cable's market power contributes to an MDU owner's decision to obtain service from the local cable incumbent. For example, the Community Associations Institute ("CAI"), an organization representing 160,000 community associations, explains that "incumbent monopolistic cable companies have leveraged their position" on certain occasions to

obtain unfavorable or exclusive contracts.[6] Building Owners and Managers Association International *et al.* ("BOMA") agrees that "market power was a factor in many cases in which building owners have agreed to exclusive contracts with cable operators."[7]

The comments demonstrate that cable exclusive contracts present a significant impediment to alternative MVPDs' ability to compete. Now that competitors to cable television service have begun to emerge, many MDU owners wish to receive service from one or more of these competitors, but are prohibited from doing so by the exclusivity provisions in their cable service contracts.[8] As the Wireless Cable Association International ("WCAI") explained, "Alternative MVPDs are frequently finding that MDU building owners/operators are refusing access, not because they do not desire to provide wireless cable services to their residents, but because they entered into exclusive contracts with the local cable operator before the emergence of a competitive marketplace."[9] Nor are cable incumbents shy about using their exclusive contracts to thwart competition. DIRECTV agrees with Ameritech that "many incumbent MVPDs invoke contractual exclusivity rights (which often were negotiated long before the MDU owners had any viable alternative) to prevent MDU owners from negotiating access agreements with new entrants."[10]

To make matters worse, because of the cable industry's market power, cable incumbents have been able to obtain exclusive contracts that are long-term or even perpetual in

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6 CAI Comments at 3.

7 BOMA Comments at 3 n.2.

8 *See* MAP Comments at 4.

9 WCAI Comments at 11.

10 Ameritech Comments at 4.

duration, *i.e.*, continuing as long as the cable incumbent maintains its franchise.[11] CAI attached examples of several such contracts to its initial comments.[12] The very first contract provided by CAI gives the cable incumbent a ten-year exclusive access right to the MDU, with automatic ten-year renewals thereafter. Exclusive contracts such as these harm competition by locking in MDUs for a substantial period of time, thus discouraging many MDU owners from considering the services of alternative MVPDs.

B. RESTRICTIONS ON EXCLUSIVITY PROVISIONS SHOULD BE LIMITED TO CABLE INCUMBENTS.

Although several parties recognize the anticompetitive effects that exclusive contracts can have, some of these parties are concerned that excessive regulation of exclusive contracts by the Commission could eliminate the procompetitive effects that exclusive contracts between MDU owners and new entrants can have.[13] As DIRECTV explained in its initial comments, exclusive contracts are a procompetitive, and often necessary, tool for new entrants competing against entrenched incumbents, but such contracts are anticompetitive when used by MVPDs with market power.[14] For this reason, DIRECTV supported Commission action to strike down exclusivity provisions in cable-MDU contracts, while preserving the ability of new entrants to use such provisions.

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11 Contrary to the position of Time Warner, *see* Time Warner Comments at 5, these contracts are effectively perpetual because they continue indefinitely, regardless of a desire by the MDU owner to switch providers, as long as the cable incumbent maintains its franchise. The fact that these contracts do not have an explicit eternal term does not make them any less perpetual for practical purposes.

12 *See* Exhibits to CAI Comments.

13 *See, e.g.*, BOMA Comments at 4; ICTA Comments at 4-9; WCAI Comments at 5-6.

14 *See* DIRECTV Comments at 7 n.9; *see also* GTE Comments at 2-4; Bell Atlantic Comments at 5-7.

This distinction in regulatory treatment is justified by the vastly different market positions held by the cable industry and alternative MVPDs. In the Commission's recent *1997 Video Competition Report*, it noted that "the cable industry continues to occupy the dominant position in the MVPD marketplace," with 87.1% of all MVPD subscribers receiving video programming services from the local cable operator.[15] In contrast, the total market share for direct-to-home satellite services is 9.8%; SMATV, 1.6%; and wireless cable, 1.5%.[16] As Chairman Kennard recognized, "it is clear that broad-based, widespread competition to the cable industry has not developed and is not imminent."[17]

It is because the MVPD market is so dominated by the cable industry that DIRECTV supports a ban on cable exclusive contracts. As usual, the cable interests have argued that, if the Commission adopts rules regulating exclusive contracts, "parity" requires that such rules apply to all MVPDs.[18] The cable interests would have the Commission ignore the realities of the MVPD marketplace, as documented in the *1997 Video Competition Report*; and, indeed, they have suggested that, despite cable's 87% market share and its vast control over most of the MDUs in the United States, the MDU market is "highly competitive"[19] and that cable, in fact, operates at a "market disadvantage."[20] Contrary to the cable interests' position, however, the fact

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15 Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Fourth Annual Report*, CS Docket No. 97-141, FCC 97-423, at ¶ 128 (rel. Jan. 13, 1998) ("*1997 Video Competition Report*").

16 *Id.*

17 *Id.*, Statement of Chairman William E. Kennard at 1.

18 Time Warner Comments at 13; *see also* NCTA Comments at 5-7; CATA Comments at 4; Cablevision Comments at 4; Cox Comments at 9.

19 Time Warner Comments at 2.

20 CATA Comments at 4; *see also* TCI Comments at 33.

is that cable possesses market power in the MVPD market, including in the MDU market, and this market power justifies differences in the application of the Commission's regulation of exclusive contracts.

Accordingly, DIRECTV disagrees with the positions of those parties who would preserve exclusivity provisions in cable-MDU contracts because of concern over inadvertently eliminating the procompetitive benefits that exclusive contracts can provide. For example, ICTA and WCAI oppose restrictions on exclusivity provisions because of their concern that, without the ability to enter into such contracts, alternative MVPDs would be financially unable to compete against the cable incumbents.[21] BOMA believes that exclusive contracts are necessary in many cases to attract new entrants, and that without such contracts, "many building owners would be forced to deal with the incumbent cable operator and nobody else."[22] By striking down only cable exclusive contracts, the Commission can address these concerns. Because restrictions on exclusivity provisions would apply only to cable incumbents, alternative MVPDs could still use exclusivity provisions to obtain financing and recoup their upfront investment. In addition, building owners would be able to use exclusivity provisions to attract new entrants and to help themselves escape from the grip of the cable industry's market power. In this way, by prohibiting only cable incumbents from enforcing exclusivity provisions, the Commission can help prevent the anticompetitive effects of such provisions while preserving the ability of alternative MVPDs to use them for procompetitive purposes.

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21 ICTA Comments at 4-11; WCAI Comments at 4-11.

22 BOMA Comments at 4; *see also* CAI Comments at 3.

DIRECTV also disagrees with those parties that urge the Commission to strike down all exclusivity provisions, including those entered into by alternative MVPDs.[23] As explained above, exclusive contracts promote competition by enhancing the ability of alternative MVPDs to compete against the dominant cable industry. These exclusive contracts are not contrary to the Commission's policy of enhancing consumer choice.[24] Consumer choice will be enhanced when there exists an MVPD market in which no particular video programming delivery service possesses market power. To achieve that end, it is necessary to adopt policies that foster the ability of alternative MVPDs to compete against the cable industry. Preventing alternative MVPDs from using exclusive contracts would take away an important tool in promoting that type of competition. Thus, the effect of the proposal to bar all exclusive contracts would be to weaken alternative MVPDs and to strengthen the dominance of the cable industry, which would result in lesser, not greater, choice for consumers.[25]

C. THE COMMISSION HAS AMPLE AUTHORITY TO STRIKE DOWN EXCLUSIVITY PROVISIONS IN CABLE-MDU CONTRACTS

In DIRECTV's initial comments, it demonstrated that the Commission has statutory authority under Section 207 of the Telecommunications Act of 1996 ("1996 Act") to

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23 MAP Comments at 3-4; Ameritech Comments at 3-9; Winstar Comments at 5-10.

24 *See* MAP Comments at 3-4; Ameritech Comments at 4-5; Winstar Comments at 4-5.

25 Clearly, the Commission should reject self-serving proposals by the cable interests to preserve existing exclusivity provisions while prohibiting future exclusive contracts. *See* Cablevision Comments at 4-5; Cox Comments at 4-5. Similarly, the Commission should reject Cablevision's proposal to preempt local laws that prohibit exclusive contracts by franchised cable operators. Cablevision Comments at 10. These proposals also would reduce, rather than increase, the choices available to consumers.

impose restrictions on exclusivity provisions in cable-MDU contracts.[26] As DIRECTV explained, the Commission already has used its Section 207 authority to strike down homeowners association rules that prevented viewers from receiving video programming services from an alternative MVPD.[27] Cable exclusive contracts are even more pernicious than homeowners association rules. While a homeowners association can amend its rules to permit alternative MVPDs to serve its members, an MDU owner that is bound by an exclusive contract with a cable incumbent is legally forbidden from providing its residents with an alternative MVPD's service. Because cable exclusive contracts are similar to homeowners association rules that prohibit a viewer from receiving video programming service from an alternative MVPD, Section 207 provides the Commission with ample authority to strike down such contracts.[28]

Other commenters have argued that the Commission possesses the statutory authority to regulate exclusive contracts under Sections 4(i) and 303(r) of the Communications Act.[29] These sections generally grant the Commission the authority to adopt rules necessary to carry out the Commission's functions and the provisions of the Communications Act. As

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26 Section 207 gives the Commission the authority to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of . . . direct broadcast satellite service." Telecommunications Act of 1996, Pub. L. No. 104-104, § 207, 110 Stat. 114, *codified at* 47 U.S.C. § 303 note.

27 *See, e.g.*, In re Jason Peterson, *Memorandum Opinion and Order*, CSR 5115-0, DA 98-188 (Feb. 4, 1998); Wireless Broadcasting Systems of Sacramento, Inc., *Memorandum Opinion and Order*, CSR 5001-0, DA 97-2506 (Nov. 28, 1997).

28 As explained in DIRECTV's initial comments, the Commission's mandate "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, nationwide and world-wide wire and radio communication service" also provides the authority to preempt cable exclusive contracts. *See* DIRECTV Comments at 8-9.

29 *See* 47 U.S.C. §§ 154(i); 303(r).

Ameritech explained, regulation of exclusive contracts is "necessary in order to achieve Congress's clearly expressed objectives of promoting reasonable cable rates through the introduction of competition, and promoting competition generally in cable communications."[30] DIRECTV agrees with this statement and supports the Commission's authority under Sections 4(i) and 303(r) to restrict the enforceability of cable exclusive contracts.

The Commission should reject the cable interests' attempts to limit the Commission's authority to adopt rules that promote competition and consumer choice in the MVPD market.[31] The cable interests do not refute the Commission's authority to regulate cable exclusivity provisions under Section 207.[32] Nor is there any justification for the positions of some parties that the Commission's authority is limited to future exclusive contracts and does not extend to existing exclusive contracts.[33] Section 207 clearly permits the Commission to preempt existing private restrictions on the ability of viewers to receive programming from alternative MVPDs, and, as previously discussed, the Commission has used its authority to do exactly that with regard to homeowners association rules. The Commission should use the same authority to strike down exclusivity provisions in cable-MDU contracts.

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30 Ameritech Comments at 9; *see also* RCN Comments at 14.

31 *See* US West Comments at 4; NCTA Comments at 2-5; Time Warner Comments at 5-9; TCI Comments at 5-18.

32 Indeed, TCI acknowledges that Section 207 authorizes "the Commission to preempt local governmental restrictions and private agreements that impair a viewer's ability to receive video programming services through over-the-air reception devices." TCI Comments at 17.

33 *See* Time Warner Comments at 5-6; NCTA Comments at 2-5; BOMA Comments at 5-7.

III. PROVIDING MDU OWNERS WITH THE ABILITY TO REQUIRE SHARING OF WIRING IS PROCOMPETITIVE AND TECHNICALLY FEASIBLE

A. SHARING OF WIRING ENCOURAGES COMPETITION AND ENHANCES CONSUMER CHOICE

As DIRECTV's initial comments explained, striking down exclusivity provisions in cable-MDU contracts is an important step toward promoting competition and consumer choice, but it is only the first step. Even without an exclusive contract, a cable incumbent generally possesses exclusive access to the existing wiring within a building. As the Commission has recognized, "MDU property owners often object to the installation of multiple home run wiring in the hallways of their properties, for reasons including aesthetics, space limitations, the avoidance of disruption and inconvenience, and the potential for property damage."[34] As a result, even if an alternative MVPD is not precluded by a cable exclusive contract from serving an MDU, it may be unable to provide service unless it has the ability to share wiring with the cable incumbent.

Several commenters support giving an MDU owner the right to require an incumbent to share wiring with an alternative MVPD. MAP supports DIRECTV's sharing proposal because it will enable "MDU dwellers . . . to choose between two or more MVPDs simultaneously, or perhaps even receive service from both."[35] CAI also supports sharing "to facilitate and expedite the delivery of services while minimizing the amount of wiring on

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34 *Second Notice* at ¶ 35. US West's assertions that MDU owners are not reluctant to implement a two-wire solution in their building, *see* US West Comments at 8, is at odds with the Commission's findings that MDU owners generally oppose installation of a second set of wiring in their building.

35 MAP Comments at 10.

common property."[36] Even US West concedes that sharing "might solve some of the problems alleged by alternative video programming providers."[37] Indeed, except for the cable interests who wish to maintain their bottleneck control over the inside wiring of MDUs, no party has disputed DIRECTV's position that sharing would facilitate entry into MDUs by alternative MVPDs, thereby increasing the video programming options available to consumers.

B. THE CABLE INTERESTS' CLAIMS THAT SHARING IS TECHNICALLY INFEASIBLE ARE UNSUPPORTED BY ANY EVIDENCE

In DIRECTV's initial comments, it submitted a detailed explanation of the process by which sharing of wiring is accomplished. DIRECTV explained that sharing can occur because the frequencies over which direct broadcast service ("DBS") signals are transmitted do not overlap with the frequencies used by cable television providers.[38] DIRECTV explained that the same wiring is often used to transmit signals using different frequencies, such as UHF/VHF signals and cable modem signals, and that, in fact, simultaneous transmission of DBS and cable signals occasionally occurs today where an MDU owner owns the inside wiring of its building.[39] The technical feasibility of sharing was supported by a statement from Kesse Ho, a DIRECTV engineer, who is an expert in the area of signal processing and distribution.[40]

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36 CAI Comments at 8.

37 US West Comments at 8.

38 DIRECTV Comments at 10. As DIRECTV previously explained, although sharing of wiring should be feasible whenever any two signals operate at non-overlapping frequencies, because DIRECTV's experience with sharing is limited to high-power DBS signals, these reply comments will refer only to sharing of wiring between DBS and cable. *See id.* at 4 n.3.

39 *Id.* at 10-12.

40 *See id.*, App. D.

Predictably, the cable interests oppose DIRECTV's proposal to require sharing of wiring.[41] However, none of the cable interests has provided any evidence, in the form of engineer's statements, exhibits, or documentation, to refute DIRECTV's showing that sharing of wiring is feasible. The most common allegation made by the cable interests against DIRECTV's sharing proposal is that no equipment is available on the market that could be used to accomplish sharing.[42] This assertion is simply false. As explained in the attached statement of Kesee Ho ("Ho Statement"), the basic sharing configuration would involve the use of two types of devices: multi-switches and diplexers.[43] Multi-switches combine the DBS and cable signals onto a single wire for transmission to a subscriber's home.[44] Diplexers are then used to separate the signals in the subscriber's unit.[45] Both of these devices are readily available from equipment manufacturers.[46]

The cable interests also assert that sharing of wiring would cause interference with the transmission of the cable signal.[47] In DIRECTV's initial comments, it demonstrated that a

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41 *See* Time Warner Comments at 20-24; NCTA Comments at 8-10; US West Comments at 8-9.

42 *See* Time Warner Comments at 20-21; NCTA Comments at 9-10; US West Comments at 8.

43 Ho Statement ¶¶ 5, 6.

44 *Id.* at ¶ 5. In MDUs with two or fewer integrated receiver/decoders, or set-top boxes, a diplexer may be used to combine signals instead of a multiswitch. *Id.*

45 *Id.* at ¶ 6.

46 *Id.* at ¶ 4. NCTA asserts that filters and frequency upconverters also may be necessary in constructing a shared wiring system. NCTA Comments at 9-10. Filters are already built-in to diplexers to prevent interference from out-of-band emissions. *Id.* at ¶ 6. Frequency upconverters are not needed to combine DBS and cable signals because they already operate at different, non-overlapping frequencies. *Id.* at ¶ 5.

47 Time Warner Comments at 20; NCTA Comments at 9; Cablevision Comments at 11.

minimum of 144 MHz separation exists between cable signals and DBS signals and that this separation adequately protects against any out-of-band emissions that could cause interference.[48] Aside from making conclusory assertions regarding the limitations of home run wiring and the potential for interference, the cable interests provide no evidence to support their claim that interference would pose a problem in shared wiring systems. Accordingly, the Commission should discount the technical claims made by the cable interests in deciding whether to adopt rules to allow MDU owners to require sharing of wiring.

Finally, the cable interests raise a number of "regulatory issues" that they claim justify delay or denial of DIRECTV's sharing proposal.[49] Contrary to these claims, however, implementing DIRECTV's sharing proposal would be relatively straightforward. Because the building owner would maintain control over access to the building, conflicts between the alternative MVPD and the incumbent would be kept to a minimum. The fact is that a building owner will not be willing to invite an alternative MVPD onto the property to provide service if doing so would result in diminished quality of service to MDU residents. Indeed, under DIRECTV's proposal, the Commission merely would be providing MDU owners who do not own the inside wiring of their buildings with the same rights that MDU owners who do own the wiring currently have. The "regulatory issues" raised by the cable interests are merely "red herrings" designed to impede the development of competition, and they should be rejected.

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48 DIRECTV Comments at 10.

49 US West Comments at 9; *see also* NCTA Comments at 10 (arguing that sharing would impose cap on incumbents' bandwidth); Cablevision Comments at 12 (expressing compensation concerns).

C. THE COMMISSION HAS THE AUTHORITY TO ALLOW MDU OWNERS TO REQUIRE SHARING OF WIRING

Under DIRECTV's proposal, the Commission would adopt rules that would prevent an incumbent from asserting a property or contractual interest in a building's wiring as a basis for denying a request by the building owner to allow an alternative MVPD to transmit its signal over the wiring. This proposal imposes no obligation on building owners and does not create a federal mandatory access right.[50] Moreover, DIRECTV's proposed sharing rule would not impose any obligation on incumbents unless an MDU requested that the incumbent share. It is only when the MDU owner wishes to provide its residents with access to additional video service providers that the Commission's rules would create a right in the MDU owner to require sharing.

This proposed framework is well within the Commission's authority. Sections 4(i) and 303(r) of the Communications Act grant the Commission the authority to adopt rules necessary to carry out the purposes of the Communications Act. One of the stated purposes of the Communications Act is "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multi-channel video programming market."[51] As explained above, allowing MDU owners to require sharing of wiring will help achieve both competition and diversity in the MVPD market by facilitating alternative MVPDs' access to MDUs served by entrenched cable incumbents. Accordingly, the Commission has the authority to adopt DIRECTV's sharing proposal.

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50 *See* ICTA Comments at 17; BOMA Comments at 8.

51 47 U.S.C. § 548(a); *see also id.* §§ 621(6), 548(b).

Time Warner challenges the Commission's authority to mandate sharing on statutory and constitutional grounds. Time Warner argues that the Commission lacks the authority to impose what Time Warner considers to be common carrier obligations on cable service providers.[52] However, DIRECTV's sharing proposal would do no such thing. Unlike common carriers, incumbent cable operators would be under no obligation to provide access to wiring simply because an alternative MVPD requests it. The shared wiring proposal simply prevents incumbents having bottleneck control over an MDU's inside wiring from using that control to deny a request by the MDU owner to allow a competing provider to use the wiring. Time Warner's statutory argument is without merit.

Time Warner also asserts that allowing MDU owners to require sharing of wiring would constitute a taking of its property.[53] This is incorrect. Contrary to Time Warner's assertion, nothing in DIRECTV's sharing proposal would deny an incumbent access to its property. An incumbent would still be able to use the wiring to transmit its programming to subscribers as it did before the sharing occurred. As a result, the incumbent is not denied "all economically beneficial uses" of the wiring.[54] Nor does sharing constitute a "permanent physical occupation" of an incumbent's property.[55] The transmission of video programming signals across an incumbent's wiring does not constitute a permanent physical occupation of the wiring any more than the transmission of radio signals over a person's land constitutes a

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52 Time Warner Comments at 22.

53 *Id.* at 22-23.

54 *See Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1019 (1992).

55 *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

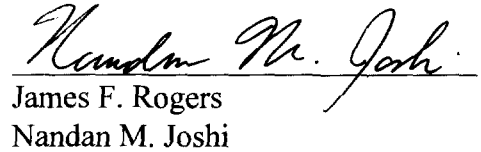
permanent physical occupation of the land. Accordingly, allowing MDU owners to require sharing of wiring would not constitute a taking of property in violation of the Fifth Amendment.

IV. CONCLUSION

As demonstrated above, the record supports Commission action to prevent cable incumbents from enforcing exclusivity provisions in their contracts with MDU owners. In addition, the record provides support for DIRECTV's proposal to give MDU owners the right to require incumbents to share wiring with alternative MVPDs. These rules should be adopted because they will help further the Commission's goal of promoting competition and consumer choice among MVPDs in the MDU market.

Respectfully submitted,

DIRECTV, Inc.



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March 2, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have this 22nd day of January, 1998, caused copies of the foregoing "Reply Comments of DIRECTV, Inc." to be served by first-class mail, postage prepaid, on the following:

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Nandan M. Joshi

Nandan M. Joshi

DIRECTV

STATEMENT OF KESSE HO

1. My name is Kesse Ho. I received a Bachelor of Science in Electrical Engineering from the City University of New York in 1970 and a Master of Business Administration from Northwestern University in 1977.

2. I have been employed by Hughes-related entities for more than 18 years. I am currently a Senior Staff Engineer for DIRECTV, Inc., where I serve as a consultant to the MDU group working on MDU signal distribution issues. I am also DIRECTV's Airborne DSS Technical Manager in charge of the In-Flight Entertainment DSS video system design. My prior positions with Hughes include 10 years as head of the Advanced Circuits Group at Hughes-Fullerton and director of the Core Video Group at Hughes-Avicom.

3. I have more than twenty-five years of experience in the field of discrete analog circuit design and analog IC design. I also have expertise in the area of wired and wireless signal modulation/demodulation and distribution. In addition, I have worked with equipment vendors, such as Spaun USA, on multiswitch/diplexer design operations and improvements.

4. In my experience, simultaneous transmission of direct broadcast satellite (DBS) and cable programming signals along a single wire can be accomplished using equipment that is commercially available from various equipment manufacturers, such as Channel Master and Spaun USA.

APPENDIX

STATEMENT OF KESSE HO

5. To install a shared wiring network within an MDU, equipment is needed to combine DBS and cable signals onto a single wire. A multiswitch or a diplexer may be used for this purpose. In buildings that have two or fewer integrated receiver/decoders (IRDs or set-top boxes), only diplexers need to be used. A diplexer is a low cost, two-way device consisting of a low-pass and a high-pass filter. It is used to combine the cable signal (54-806 MHz) and DBS signal (LHCP or RHCP, 950-1450 MHz) onto a single coaxial cable. In buildings having more than two IRDs, a multiswitch with built-in diplexers can be used to combine the cable and DBS signals. Because DBS signals and cable signals operate at different, non-overlapping frequencies, simultaneous transmission of these two signals along a single wire can be accomplished without the use of a frequency upconverter.

6. Regardless of whether DBS and cable signals are combined using a multiswitch or a diplexer, a diplexer can be used, in reverse, to separate the cable and DBS signals at the subscriber's residence. (A multiswitch cannot be used for separating signals.) Because diplexers have built-in low-pass and high-pass filters, each signal is protected against out-of-band emissions from the other.

Kesse Ho

Dated: February 27, 1998