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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 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	)	

To: The Commission

REPLY COMMENTS OF MEDIA ACCESS PROJECT AND CONSUMER FEDERATION OF AMERICA

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REPLY COMMENTS OF MEDIA ACCESS PROJECT AND CONSUMER FEDERATION OF AMERICA

Media Access Project and Consumer Federation of America ("MAP/CFA") respectfully submit this reply to various comments filed in response to the Commission's *Report and Order and Second Further Notice of Proposed Rulemaking*, FCC No. 97-376, at ¶¶258-71 (released October 17, 1997) ("*Second Further NOPR*") in the above referenced dockets.

INTRODUCTION AND SUMMARY

Several parties supporting long term contracts giving MVPDs exclusive access to MDUs make the dubious argument exclusivity ***promotes*** viewer choice. In reality, long-term exclusive contracts ***inhibit*** choice, and in turn, MVPD competition. Exclusive contracts of short duration may be necessary, as an economic matter, to assist entry of competing MVPDs. but there is no evidence that contracts need to exceed five years to permit competitors to recover costs. However, whatever terms the Commission may permit for new entrants, no rationale supports exclusive contracts of any duration for ***incumbent*** MVPDs.

The Commission should reject any suggestion that lacks authority to preempt exclusive contracts. The case law clearly counsels preemption of contracts which interfere with the effective functioning of the law. That is certainly the case here; exclusive contracts impede several mandated objectives of the Communications Act directing the FCC to promote competition and choice in the MDU market.

Arguments that terms of 15 years or more are needed to attract adequate investment capital for MVPDs are vastly overstated; any theory justifying even some exclusivity would support only contracts of no more than 5 years in length. The Commission has clear and express statutory authority to require as much. Moreover, it has even broader powers ancillary to other statutory powers.

I. EXCLUSIVE CONTRACTS OF UNLIMITED DURATION INHIBIT MDU OWNER AND VIEWER CHOICE AND, THEREBY, COMPETITION.

A number of commenters argue that long term exclusive contracts do not necessarily inhibit competition. They urge the Commission not to cap exclusive contracts. *E.g.,* Comments of the Independent Cable & Telecommunications Association ("ICTA") at 4-5; Comments of Wireless Cable Association ("WCA") at 3-11; Comments of Tele-Communications, Inc. ("TCI") at 21-28.

ICTA claims that long-term exclusivity facilitates market entry for MVPDs, and generates competition in which "several providers can operate in a given market, each with a handful of exclusive contracts at particular MDUs,..." *Id.* WCA argues that "exclusive contracts are the natural result of unavoidable market conditions...the fact remains that for aesthetic and safety reasons many MDU owners simply will not allow multiple sets of equipment and wiring to be installed on their properties." WCA Comments at 4 [footnote omitted.] TCI touts the benefits as redounding to viewers, *i.e.*, MDU owners extracting efficiencies, including more and better services and lower prices. TCI Comments at 21-27.

A. Long Term Exclusive Contracts Cannot Be Reconciled with the Commission's Goals to Promote Choice and Competition.

Exclusive contracts of unlimited duration cannot be reconciled with the Commission's expressed goal in this docket - "to foster the ability of subscribers who live in MDUs to choose among competing service providers." *Second Further NOPR* at ¶35; *see* MAP/CFA Comments at 1-2. Far from promoting viewer choice, exclusive contracts of unlimited duration prevent it. When an MDU is subject to a long-term exclusive MVPD contract, the building owner and the subscribers in that building are all hostage to the incumbent. To the extent that the Commission has made a policy decision to imbue in MDU owners the power to choose,[1] exclusive contracts of unlimited duration eliminate that choice, even if the MDU owner later decides that another MVPD would better serve her tenants.[2]

ICTA's proves MAP's point in its opposition to only one specie of exclusive contract, that is, where there is a mandatory access statute, ICTA Comments at 11. As ICTA demonstrates, it is unlikely that the brand of competition it describes will ever come to fruition.[3] Were

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[1]MAP/CFA have challenged the FCC's decision to vest control of cable "home run" wiring in MDU owners rather than individual subscribers. *See, generally*, December 15, 1997 MAP/CFA Petition for Reconsideration in CS Docket No. 95-184 and MM Docket No. 92-260).

[2]This should not be taken as an endorsing the notion that landlords will - or could - always act to choose an MVPD that is in the tenants' best interests. MAP has opposed Commission policies which would not empower MDU owners as representatives for the rights of subscribers. *See* 1997 MAP/CFA Comments at 8-13; December 15, 1997 MAP/CFA Petition for Reconsideration, *supra.* at 7-12. Indeed, in a remarkably revealing footnote, the Building Owners demonstrate that they have little interest in meeting the video programming needs at least of low income residents, . Building Owners Comments at 4, n. 3.

[3]Several commenters claim that the MVPD market in MDUs is already "highly competitive," and, thus, that regulation of exclusive contracts is unnecessary. *E.g.*, Time Warner Comments at 2-3; US West Comments at 3. The Commission has decisively rejected this argument. Incumbent cable operators as yet face little effective competition, holding approximately 87 percent of the market for subscription-based TV services. *See generally*, *Fourth Annual Report on the State of Competition in Video Markets*, No. 97-423 (released January 13, 1998) at ¶7; *see also*, Paul Farhi, "Cable TV Firms Still Face Little Competition, FCC Says," Washington Post, January 14, 1998 at D11. And the 1 million SMATV subscribers counted by time Warner cannot

ICTA correct that exclusive deals are necessary to attract capital for the installation *of wiring in an MDU, then the vast majority of MDUs (perhaps with the exception of new buildings) would already have exclusive arrangements with incumbent MVPDs. As a result of the exclusive contract, MDU owners would be unable to switch, and competitors unable to compete.

B. Even if MDU Owner Control and Physical Constraints Limit Viewer Choice, This Does Not Justify Exclusive Contracts.

WCA unsuccessfully propounds one "one basic fact" about the MDU market:

> the MDU owner's fundamental right to control access to his or her property, combined with the physical burdens each multichannel service provider imposes in the MDU environment, preclude absolute freedom of subscriber choice.

WCA Comments at 5. To the extent that these factors do, in fact, inhibit freedom of choice, exclusive contracts simply exacerbate the problem. That is because viewers (or MDU owners as their proxies) cannot even choose among providers, even if that provider were to be the only one in a building. WCA provides no reason why MDU owner control and physical constraints make exclusive contracts necessary or in the public interest.

C. The Best Way to Bring Lower Costs and Better Service to Viewers is Through Increased Competition, Not Exclusive Contracts.

TCI describes a litany of benefits allegedly viewers allegedly receive. It concludes that these benefits "outweigh the costs of not allowing each resident to choose his or her own service provider." TCI Comments at 23.

MAP/CFA must respectfully disagree. The benefits TCI describes, *i.e.*, additional services, higher quality services and lower prices redound from competition and choice, and not from exclusivity. While MVPDs may offer good service and prices initially as a means of receiving and exclusive contract, there is no incentive to do so once that MVPD is entrenched.

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seriously be considered effective competition to cable's nearly 65 million subscribers. *Fourth Annual Report* at ¶11.

Cox said it best in their Comments:

> [T]he claim by some MVPDs that exclusive contracts in MDUs are the best means of ensuring high quality services at competitive prices turns the concept of competition on its head. 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. Indeed, this continuing dynamic is the very essence of "competition." While a group of service providers may jockey among themselves to win an exclusive contract, and offer some enticements to the MDU owner as part of their sales pitch, the fact remains that the incentive to constantly improve service over time ***diminishes*** as soon as the exclusive agreement is finalized.

Cox Comments at 7.

II. FIVE YEAR EXCLUSIVE CONTRACTS ARE ADEQUATE TO ATTRACT INVESTORS AND TO ENSURE RECOVER OF INSTALLATION COSTS.

ICTA urges that if the Commission were to adopt caps based on the length of exclusive contracts, they should be no less than 15 years duration. ICTA Comments at 9. The primary rationale for this chosen time period is the fact that cable operators enjoyed either exclusive franchises or *de facto* exclusivity for a similar period of time in the years between cable's inception and the advent of new competing services and providers. *Id.* at 9.

If the adage "two wrongs don't make a right" ever applied, it would be here. The cable industry enjoyed actual or *de facto* exclusivity for more than 15 years, largely because there was no other competition, not because there was any economic necessity. While MAP/ CFA agree that the Commission should permit exclusive contracts if it finds that they are necessary to allow alternative MVPDs to compete with incumbents, there is nothing in the record here that warrants a 15 year time period, as ICTA requests.

In support of long-term exclusive contracts, ICTA and WCA argue that long term exclusivity is necessary to attract capital to finance the installation of MDU wiring. ICTA Comments at 5, 8, WCA Comments at 6-7. Permitting two or more MVPDs to share an MDU, the argument goes, would be economically infeasible, because neither MVPD would generate sufficient revenues to cover system installation costs. ICTA Comments at 6; Building Owners Comments at 2. This seems to confuse construction cost with ongoing costs of providing service. As discussed above, MAP/CFA have proposed a five year exclusive contract term to recover the fixed installation costs. MAP/CFA Comments at 4-6. Several incumbent and competitive MVPDs concur. *E.g.*, Bell Atlantic Comments at 3; CableVision Communications, *et al.* Comments at 4; Cox Comments at 10. After this recovery, MVPDs should be able to profit from each subscriber, without regard to how many MVPDs serve the building. Indeed, ***by ICTA's own estimates***, five years is what incoming MVPDs need to recover upfront, fixed costs. *Second Further NOPR* at ¶259 n. 737, *citing* ICTA *ex parte* presentation, dated February 27, 1997. *See also* Letter of Henry Goldberg, Counsel for OpTel Inc. to FCC Chairman Reed Hundt, February 7, 1997 (average length of time is 3.4 years).[4] Even if it were true that some MVPDs will not recover all installation costs during this five year period, the Commission should not permit exclusive contracts of longer duration. *E.g.*, WCA Comments at 9-10. The Commission's duty is to promote viewer choice, not to guarantee winners and losers in the marketplace. As Winstar aptly states:

> What these parties are asking for is an FCC-guaranteed rate of return of investment in an MDU****Rather than addressing the bottleneck directly, these parties are advocating that the Commission use its authority to reduce customer choice so that alternative MVPDs have an opportunity to recover costs. Such an arrangement, while beneficial to the MVPD and the building owner, directly aggrieves the end use customer.

Winstar Comments at 8.

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[4]MAP/CFA expect that a study promised to be presented in ICTA's reply comments will conclude that 5 years is not enough for competitive MVPDs to recoup fixed costs. In view of the tactics used to insure that the study will not be subject to scrutiny in further reply comments, the Commission should examine any such self-serving study with a jaundiced eye, and rely upon its own independent assessment of the relevant economics.

III. THE COMMISSION HAS AUTHORITY TO ADOPT CAPS ON THE DURATION OF EXCLUSIVE CONTRACTS.

A number of the cable industry commenters contest the Commission's authority to preempt private contracts. *E.g.*, Time Warner Comments at 6; NCTA Comments at 3-4; TCI Comments at 5-18. In support, several cite *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) for the proposition that

> a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.

Id. at 437. [emphasis added.]

Introducing into this debate filed rate doctrine principles from a ninety year-old decision is very much beside the point. More generally, however, the case cited actually counsels very strongly in favor of FCC preemption authority, since it is one of the earliest and strongest ennunications of the Commerce Clause power to confer exclusive or primary jurisdition on federal agencies. The decision emphasizes the importance of harmonizing differing bodies of state law, *id.* at 440-441, and underscores the power of the Interstate Commerce Commission to supercede local ordinances and state courts. *Id.*

Contrary to how cable operators would have it, exclusive contracts are plainly "repugnant" to those portions of the Communications Act that mandate competition and lower prices in the MVPD marketplace. As discussed in detail below, exclusive contracts rob several provisions of the Act of their efficacy, including, *inter alia*,: 1) Section 623, which requires the FCC to establish reasonable rates for cable programming and equipment; 2) Section 151 of the Communications Act, which requires the FCC 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." 47 USC §151 [emphasis added]; *See* DIRECTV Comments at 8-9 and 3) Section 207 of the 1996 Act, which requires the Commission to "prohibit restrictions that impair a viewer's ability to receive video programming services by means of antennas and DBS dishes. " 1996 Act §207.

Where private contracts run contrary to statutory mandates and goals, the Commission's power to preempt them under the authority granted to them by Congress is clear. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986); *Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988) (Treasury Department regulations prohibiting U.S. nationals from performing contracts with Libya permissible under the authority of the International Emergency Economic Powers Act.) In *Connolly*, the Supreme Court held that

> Contracts may create rights of property, but when contracts deal with a subject matter that lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.
>
> If a regulatory statute is otherwise within the powers of Congress...its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking.

Id. at 224.

Certainly, viewer access to alternative MVPDs is a matter upon which Congress has legislated. Thus the Commission may, pursuant to the authority delegated to it by Congress, preempt private contracts that restrict that access.[5]

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[5]The legislative history of the 1984 Cable Act cited by TCI in its comments at 8-9 does not support its claim that "Congress expressly determined that the Commission ***should not*** be given...authority" to prohibit exclusive contracts. That Congress chose not to include a provision in the 1984 Act that would have essentially created a federal mandatory access right, if anything, would ***support*** an inference that Congress did not seek to prohibit regulation of exclusive contracts. Mandatory access statutes often give cable operators effectively exclusive rights to many MDUs, since MDU owners are often reluctant to permit additional MDU's on their premises. In any event, Rep. Fields' statement that the goal of this provision "can be achieved

The FCC has itself invalidated certain contract terms where they have conflicted with its duty to regulate in the public interest, even where those contracts predated a specific Congressional mandate. In *Teleprompter Corp and Teleprompter Southeast, Inc. v. Florida Power Corporation*, File No. PA 81-0008 et al., 1984 FCC LEXIS 1874 (October 3, 1984), *rev'd on other grounds*, *Florida Power Corp. v. FCC*, 772 F.2d 1537 (11th Cir. 1985), *rev'd on other grounds*, *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), the Commission affirmed a Common Carrier Bureau determination that under the Pole Attachment Act, 47 USC §224, certain rates in Florida Power's pole attachment contracts were unreasonable. In rejecting the utility's argument that the Bureau's decision unconstitutionally abrogated contracts that predated the enactment of the Pole Attachment Act, the Commission noted:

> It is well established that contracts made in areas of governmental regulation are subject to modification by subsequent legislation...The ability of Congress to react to changing conditions and to legislate in the public interest cannot be restricted by private agreements. Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution.

Id. [citations omitted].[6]

TCI offers a convoluted but ultimately pointless analysis of cases resolving landlord-MVPD contracts, most of which predate the 1992 Cable Act. Comments of TCI at 8-10. What is most salient about the cases it invokes is that even those issued after enactment of the 1992 Act arose under Section 621(a), a provision in the 1984 Cable Act relating to the power of ***local***

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in a better, more orderly manner through a negotiated agreement between the cable operator and the property owner,..." TCI Comments at 9, does not demonstrate that he (or, by extension, the entire Congress)intended to prohibit the Commission from regulating long-term exclusive agreements, especially since MDU competition was at that point years away.

[6]TCI argues that the Commission should not regulate exclusive contracts because "[i]t is well settled that the rights of property owners are a matter of state or local law." TCI Comments at 4. But it is equally as well settled that a viewer's "paramount" First Amendment right to receive access to a multiplicity of voices over mass media is one which the Commission is tasked to protect.

cable franchising authorities, in which the Commission has no direct enforcement or interpretive role. By contrast, the issue arises here under Section 624 of the 1992 Act, which is a limitation on the power of franchising authorities, and Section 624(i) ***directs*** the FCC to open a proceeding, *i.e.*, this docket, to "prescribe rules" governing inside wiring practices. Indeed, the case upon which TCI places its greatest reliance, *Cable Investments, Inc. v. Woolley*, 867 F.2d 151, 154 (3rd Cir. 1989) takes note of the 1984 Act's abdication of franchising powers to local authorities. Even so, the Court expresses its willingness to give deference to the FCC's interpretation of the statute. *Id.*, at 155, n.2; *Century Southwest Cable Television, Inc. v. CIIF Associates*, 33 F.3d 1068, 1070 (9th Cir. 1994)("It is in this way that the Federal Communications Commission, charged with administration of the statute, has apparently construed the term.")

IV. THE COMMISSION OTHERWISE HAS AUTHORITY TO ADOPT CAPS ON THE DURATION OF EXCLUSIVE CONTRACTS.

In what has now become a familiar refrain for @he cable industry, several commenters argue that the Commission has no authority to adopt caps on the length of exclusive contracts. *E.g.*, Comments of US West at 4; Comments of TCI at 11-14. As it has in the past, the Commission should reject this argument.

The Courts have determined, time and again, that the Commission has broad ancillary jurisdiction to adopt rules and regulations regarding video programming services that are "not inconsistent with the law, as may be necessary to carry out the provisions of this Act." 47 USC §303(r). *See* 47 USC §154(i); *e.g.*, *U.S. v. Southwestern Cable Co.*, 351 US 192, 203-204 (1956); *FCC v. Midwest Video , cite; Mobile Communications Corp. of America v. FCC,* 77 F.3d 1399, 1404-05 (DC Cir. 1996); *New England Telephone and Telegraph v. FCC*, 826 F.2d 1101 (DC Cir. 1987).

Rules limiting exclusive contracts are necessary to carry out a number of the Commission's mandates enacted to ensure competition in the MVPD market. Unless the FCC controls availability and duration of exclusive contracts, it will be nearly impossible for competitors to have access to MDUs. This results in higher prices. Thus, such regulation is necessary for the Commission to fulfill its mandate under Section 623 to establish reasonable rates for cable programming and equipment. Moreover, as DIRECTV points out, the Commission also has authority under its 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." 47 USC §151 [emphasis added]; *See* DIRECTV Comments at 8-9. Finally, because exclusive contracts prevent competitive MDUs from taking advantage of the Commission's new home run wiring rules, such regulations are also necessary to the successful implementation of those rules.

Importantly, rules limiting exclusive contracts are absolutely essential to the Commission's implementation of Section 207 of the 1996 Telecommunications Act. *See* DIRECTV Comments at 7-9. Section 207 requires the Commission to "prohibit restrictions that impair a viewer's ability to receive video programming services by means of antennas and DBS dishes. " 1996 Act §207. When exclusive contracts have the effect of locking in an incumbent cable operator, the serve as a "restriction" that impairs viewer' ability to use the antennas and dishes of competing MVPDs like DBS and MMDS.[7]

[7]Contrary to GTE's assertion, this authority also permits the Commission to adopt caps on exclusive contracts entered into by alternative MVPDs. *See, generally*, GTE Comments.

CONCLUSION

More than six years have passed since the Commission was directed to insure that inside wiring issues would not impede MVPD competition. The record, having been supplemented, is complete. The Commission should adopt rules preempting long-term exclusive contracts.

Respectfully Submitted

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