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Before the
Federal Communications Commission
Washington, D.C. 20554

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

SURREPLY COMMENTS OF
GTE SERVICE CORPORATION

GTE Service Corporation and its affiliated domestic telephone and video service companies (collectively "GTE")[1] hereby files its surreply comments in response to the *Second Further Notice of Proposed Rulemaking* issued in the above-captioned dockets.[2] The Commission must take advantage of the unique opportunity presented in

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[1] GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc., GTE Communications Corporation, and GTE Media Ventures, Inc.

[2] *In the Matter of Telecommunications Services Inside Wiring*, CS Docket No. 95-184, MM Docket No. 92-260 (Report and Order and Second Further Notice of Proposed Rulemaking) (rel. Oct. 17, 1997).

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this proceeding to promote competition with incumbent cable operators by not adopting rules that will impede the ability of new entrants to provide service to multiple dwelling unit ("MDU") buildings. To this end, GTE reiterates its view that any cap or regulatory limit on exclusive contracts between MDU building owners and multichannel video programming distributors ("MVPDs") that are subject to "effective competition" is neither authorized by the Communications Act nor in the public interest. However, as stated in previous comments, GTE submits that adoption of a limited "fresh look" policy for certain existing, perpetual exclusive contracts is warranted and authorized by Section 623 of the Act.

I. THE COMMISSION LACKS STATUTORY AUTHORITY TO LIMIT EXCLUSIVE CONTRACTS BETWEEN MDU BUILDING OWNERS AND MVPDS SUBJECT TO EFFECTIVE COMPETITION

Throughout this proceeding, GTE has consistently maintained that the Communications Act does not authorize the Commission to regulate exclusive contracts between MDU building owners and cable operators subject to "effective competition" or other non-cable MVPDs.[3] As the FCC itself has recognized in various contexts and the Building Owners and Managers Association pointed out in its comments, the Act does not confer any independent authority on the FCC to regulate the conduct of MDU

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[3] *See, e.g.,* Ex Parte Letter from Whitney Hatch, Vice President Regulatory Affairs, GTE Service Corporation to Ms. Meredith Jones, Chief, Cable Services Bureau, Federal Communications Commission, CS Docket No. 95-184, at 1-2 (Feb. 7, 1997); Comments of GTE Service Corporation, CS Docket No. 95-184, MM Docket No. 92-260 (filed Dec. 23, 1997) ("GTE Comments").

building owners.[4] On the other hand, although the Act gives the FCC limited jurisdiction over non-cable MVPDs and cable operators subject to effective competition, none of these provisions even arguably gives the Commission authority to regulate the terms of the contracts entered into by these providers.[5] In particular, the Commission's authority under Section 623 is limited to cable systems not subject to effective competition, and the general authority of Sections 4(i) or 303(r) may not be invoked because such regulation would be neither consistent with, nor necessary to effectuate, the FCC's regulatory authority under Section 623. As such, the Commission must refrain from regulating private agreements signed by competitive providers and MDU building owners.

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[4] *See In re Complaint of Illinois Citizens Comm. For Broadcasting*, 35 F.C.C.2d 237, *aff'd sub nom., Illinois Citizens Comm. For Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972); *In the Matter of Investigation of Television Interference to be Caused by the Construction of the World Trade Center*, 10 Rad. Reg. 2d (P&F) 1769 (Aug. 7, 1967) (comments of Commissioner Lee); *see also* Further Joint Comments of the Building Owners and Managers Association International, CS Docket No. 95-184, MM Docket No. 92-260, at 5-6 (filed Dec. 23, 1997).

[5] The National Cable Television Association's ("NCTA") characterization of GTE's position regarding the scope of the FCC's jurisdiction misses the point. In its reply comments, NCTA states that "GTE . . . argues that the Commission should apply its rules [regarding exclusive contracts] only to cable operators and not to non-cable MVPDs, because it lacks authority under the Act to regulate non-cable MVPDs." *See* Reply Comments of the National Cable Television Association, CS Docket No. 95-184, MM Docket No. 92-260, at 7 (filed Mar. 2, 1998) ("NCTA Reply Comments"). While GTE agrees that the FCC may not regulate the contracts of non-cable MVPDs, it also asserts that neither Section 623 nor any other provision of the Act permits the FCC to regulate exclusive contracts entered into by a cable operator when *effective competition is present* at the time the contract is signed. *See* GTE Comments at 2-6.

II. REGULATING CONTRACTS BETWEEN NEW ENTRANTS AND MDU BUILDING OWNERS IS NOT IN THE PUBLIC INTEREST

Moreover, the record provides compelling evidence that limiting exclusive arrangements between competitive providers and building owners would be inconsistent with the FCC's goal of promoting competition and consumer choice for MDU residents.[6] For example, the economic report by Dr. Michael D. Whinston provided in the Independent Cable & Telecommunications Association's ("ICTA") reply comments details the competitive effects of exclusive contracts and concludes that "there is little risk of competitive harm arising from the use of exclusive contracts by [private cable operators]."[7] Significantly, Dr. Whinston opines that exclusive contracts in a competitive marketplace "may be essential for assuring the competitive participation of [private cable operators] in this market"[8] and that the absence of such ability may make the operator "unwilling to invest in the MDU in the first place."[9] Echoing this view, OpTel notes that the ability to enter into exclusive contracts permits new entrants "to

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[6] *See, e.g.,* Reply Comments of the Independent Cable & Telecommunications Association, CS Docket No. 95-184, MM Docket No. 92-260, at 3-4 and attached report of Dr. Michael D. Whinston (filed Mar. 2, 1998) ("ICTA Reply Comments"); Reply Comments of OpTel, Inc., CS Docket No. 95-184, at 2-4 (filed Mar. 2, 1998) ("OpTel Reply Comments").

[7] ICTA Reply Comments, Dr. Michael D. Whinston Report at ¶¶ 7, 15-19.

[8] *Id.* at ¶ 7.

[9] *Id.* at ¶ 28.

attract investment and compete in this market."[10] GTE maintains that these competitive concerns also hold true for new entrants that offer franchised services and other non-cable MVPDs. Thus, private negotiations should govern the duration of exclusive contracts between MDU building owners and these competitive providers in order to ensure that new entrants can effectively enter markets that presently face little or no competition.

III. THE COMMISSION SHOULD ADOPT GTE'S LIMITED "FRESH LOOK" POLICY TO ADDRESS EXCLUSIVE, PERPETUAL CONTRACTS SIGNED IN THE ABSENCE OF COMPETITION

With respect to existing, perpetual exclusive contracts, the record supports adoption of a limited "fresh look" policy designed to give MDU building owners an opportunity to reevaluate agreements signed in the absence of effective competition.[11] In its reply comments, GTE proposed that a limited fresh look policy should be adopted along the following lines: (1) the policy should apply only to perpetual,[12] exclusive contracts signed where competition did not exist; (2) the decision to reevaluate existing contracts must be at the discretion of the MDU building owner in order to protect

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[10] OpTel Reply Comments at 4.

[11] *See, e.g.*, ICTA Reply Comments at 5-8; Reply Comments of the Wireless Cable Association International, Inc., CS Docket No. 95-184, MM Docket No. 92-260, at 8, 14-15 (filed Mar. 2, 1998).

[12] As GTE and ICTA have stated, the FCC should define "perpetual" contracts to include those contracts that either are tied to the term of the franchise agreement or are ambiguous as to the terms of renewal. *See* Reply Comments of GTE Service Corporation, CS Docket No. 95-184, MM Docket No. 92-260, at 9 n.23 (filed Mar. 2, 1998) ("GTE Reply Comments"); ICTA Reply Comments at 6-7.

owners' long-standing constitutional and statutory rights; and (3) the fresh look "window" should commence immediately upon adoption of rules in this proceeding and should remain open for all operators in a franchise area until five years from the date at which a decision finding "effective competition" is made under the Commission's rules for that franchise area.[13] Such a policy is workable because it relies upon objective criteria and because it will remain open for a time period sufficient to facilitate entry by both franchised and private operators.

Further, GTE disagrees with Time Warner's and other incumbent operators' claims that the Commission may not adopt a "fresh look" policy for existing exclusive contracts and that such a policy would be contrary to the public interest.[14] As GTE explained in its reply comments, a limited fresh look policy may be adopted consistent with Section 623 of the Act, which requires the FCC to ensure that the rates for basic tier services are reasonable and to protect subscribers in the absence of effective competition.[15] Contrary to the assertions of NCTA and Charter Communications Inc.,

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[13] GTE Reply Comments at 9-10.

[14] Reply Comments of Time Warner Cable, CS Docket No. 95-184, MM Docket No. 92-260, at 3-9 (filed Mar. 2, 1998) ("Time Warner Reply Comments"); *see also* NCTA Reply Comments at 1-6; Joint Reply Comments of Charter Communications, Inc. *et al.*, CS Docket No. 95-184, MM Docket No. 92-260, at 14-17 (filed Mar. 2, 1998) ("Charter Communications Reply Comments").

[15] 47 U.S.C. § 543(b). Apparently, Time Warner Cable misunderstands GTE's position when it cites GTE in support of its statement that "[a]s Time Warner and other commenters have argued repeatedly, the Commission does not have jurisdiction to abrogate existing MVPD service contracts." *See* Time Warner Reply Comments at 3. As noted above, GTE does believe that Section 623 gives the FCC jurisdiction to allow MDU building owners to reevaluate existing, perpetual exclusive contracts signed in the absence of effective competition.

Section 623 provides the Commission with the necessary statutory basis to adopt a fresh look policy consistent with Commission and judicial precedent.[16] In addition, GTE maintains that a limited fresh look mechanism is warranted for perpetual exclusive contracts signed by incumbent operators because, as in other contexts where contracts have been subject to a fresh look period, these contracts were signed with a monopoly provider and prevent customers from receiving the benefits of emerging competition. Accordingly, the Commission should adopt the limited fresh look policy proposed by GTE.

For the foregoing reasons, the record supports allowing private negotiations to govern exclusive contracts signed by cable operators subject to effective competition and other non-cable operator MVPDs as defined in the Act. Where competition exists, these contracts will promote economically efficient entry and increased choice for MDU residents. However, to address those situations where perpetual contracts were signed

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[16] *See* NCTA Reply Comments at 2-4; Charter Communications Reply Comments at 15.

in the absence of competitive alternatives, the Commission should adopt GTE's proposed limited fresh look policy.

Respectfully submitted,

GTE SERVICE CORPORATION, and its affiliated domestic telecommunications and video service companies

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Certificate of Service

I, Judy R. Quinlan, hereby certify that copies of the foregoing "Surreply Comments of GTE Service Corporation" have been mailed by first class United States mail, postage prepaid, on March 16, 1998 to all parties of record.

Judy R. Quinlan

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