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March 16, 1998

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**BY HAND**

Ms. Magalie Roman Salas  
Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, D.C. 20554

Dear Ms. Salas:

Enclosed please find an original and four (4) copies of the Surreply Comments of Independent Cable & Telecommunications Association. In addition, I have enclosed five (5) copies of the Surreply Comments for each of the Commissioners.

Sincerely,

Treg Tremont

Enclosures

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ORIGINAL

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

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

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To: The Commission

**SURREPLY COMMENTS OF INDEPENDENT CABLE &  
TELECOMMUNICATIONS ASSOCIATION**

INDEPENDENT CABLE &  
TELECOMMUNICATIONS ASSOCIATION

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Its Attorneys

Dated: March 16, 1998

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

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Cable Home Wiring	)	

To: The Commission

**SURREPLY COMMENTS OF INDEPENDENT CABLE &  
TELECOMMUNICATIONS ASSOCIATION**

The Independent Cable & Telecommunications Association ("ICTA") hereby submits these surreply comments in connection with the Second Further Notice of Proposed Rulemaking (the "Second Further Notice") in the above-captioned proceeding.<sup>1/</sup>

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<sup>1/</sup> DirectTV, while a member of ICTA, does not join in these comments, but rather submits its own response to the Second Further Notice.

## DISCUSSION

### I. Exclusive Contracts

The record in this proceeding unequivocally establishes that non-perpetual exclusive contracts are pro-competitive and benefit consumers. Most commenters in this proceeding agree that the Commission should not bar such contracts, and those who disagree cannot produce any facts to dispute the inescapable conclusion that exclusive contracts promote competition in the MDU market. Where alternative providers cannot enter into exclusive agreements (i.e. mandatory access states), there is little competition in the MDU market. Conversely, in non-mandatory access states competition in the MDU market is becoming more prevalent in part because exclusive contracts enable private cable operators ("PCOs") and other new entrants to attract the long-term investment and obtain the necessary financing to provide such competition. Given the concern of the Commission and the general public regarding the lack of cable competition and the endless increases in cable rates, barring exclusive agreements is particularly unwise as such a ruling would exacerbate those problems.

It also would be unwise to place a cap on the length of such agreements. The length of time needed for exclusivity will vary by property and will depend upon the necessary expenditures on each property and a variety of other factors, including the size of the property. Moreover, if the Commission subsequently determines that the lack of a cap on the exclusivity period was not the correct policy, it can revisit the issue later with no harm to any party. On the

other hand, if the Commission imposes a short cap period competition may be greatly harmed to the detriment of the public and alternative providers.<sup>2/</sup>

The commenters who oppose exclusivity primarily argue that such agreements harm tenants because they will not have a choice of cable providers in their building. As shown in ICTA's previous comments, without such agreements the tenants still will not have a choice within their building — and more importantly, they will not have a choice within their city because the franchised operator will be the only provider at MDUs in town. Moreover, as previously explained by ICTA, such agreements benefit tenants because they enable the provider to offer more expansive services and/or pass on cost savings to tenants. In addition, the opponents' claims that landlords will not consider the interests of their tenants when negotiating deals with video services providers ignores the realities of the MDU market, as the Commission has previously recognized in its inside wiring decision. See Reply Comments of TCI at 22.<sup>3/</sup>

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<sup>2/</sup> For the reasons set forth by ICTA in its initial comments to the Second Further Notice, if the Commission decides to place a cap on the length of exclusive agreements, the cap should be at least 15 years.

<sup>3/</sup> Charter Communications argues that the Commission should not permit exclusive agreements because cable operators are superior to other providers because they provide channels that other providers do not include and they are the only providers who can offer Internet and telephone services as well as video. See Charter Communications Reply Brief at 3-9. Charter's first assertion is misleading and its second assertion is plain wrong. PCOs ordinarily provide, at a lower price, all of the popular channels that are provided by cable operators. Cable operators often add certain unpopular channels in order to be able to raise their rates to circumvent rate regulation. These unpopular channels are of virtually no benefit whatsoever to consumers, and if Charter is correct when it alleges that the average per channel rate for cable service is less than the rate for competitors' services such unpopular channels are the reason. As for Internet and telephone service, numerous non-franchise providers are currently providing such services, including many PCOs. Charter's assertions to the contrary reveal that it does not have an understanding of the current offerings provided by many alternative providers.

## 2. Perpetual Agreements

ICTA has requested that the Commission establish a "fresh look" period during which property owners are empowered to renegotiate "perpetual contracts" with MVPDs.<sup>4/</sup> Such an approach is clearly warranted given that (i) these contracts were typically executed at a time where the franchised operator was the only video services provider and the property owner correctly believed it had no choice of providers; (ii) the MVPDs have ordinarily more than recouped their costs from such contracts, many of which were executed in the 1970s and early 1980s; and (iii) a fresh look period will help promote competition and reduce cable rates as more properties will be available for competing offers from providers. Implementation of the "fresh look" policy is particularly critical to competition in certain areas where franchised operators used perpetual agreements throughout the area. In the absence of a "fresh look" period, competition will forever be thwarted in those areas.

Simply put, a "fresh look" period will benefit consumers, property owners and competition in general. Conversely, to say the least, franchised operators are hard-pressed to explain why they need to have the exclusive right to serve a property in perpetuity.

Moreover, given the benefits of exclusive agreements as discussed in the first section herein, the Commission should also provide a "fresh look" period for perpetual agreements that are non-exclusive. Non-exclusive perpetual agreements just as effectively prevent property

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<sup>4/</sup> Perpetual contracts are those with a duration term linked to the renewal and/or extension of the franchise, those contracts that have no termination clause and those contracts in which the duration is linked to an uncertain event such as "when the parties deem the agreement impractical" or when "the franchisee ceases operations." In addition, if the Commission does not rule that an agreement that provides that it lasts for the term of the franchise expires upon the expiration of that franchise, the Commission should deem such contracts to be perpetual as well.

owners from switching to PCOs or other new entrants that require exclusivity as do exclusive perpetual agreements. Property owners should not be penalized simply because their perpetual agreement is non-exclusive. Accordingly, a “fresh look” period should be established for such agreements as well.

Finally, in passing, Charter Communications argues that adopting a “fresh look” period would effectuate an unconstitutional taking of its property. Charter Communications Reply Comments at 17. The cases Charter cites for this proposition, however, do not support its position at all. For example, BFP v. Resolution Trust Co., 114 S. Ct 1757, 1761 (1994), is a bankruptcy case that does not even involve the issue of an unconstitutional taking of property.

The reason the cases cited by Charter do not support its proposition is that its proposition has no basis in law. Congress has often enacted laws that affect contracts and such laws do not effectuate a taking of property in violation of the Fifth Amendment.

### 3. Mandatory Access

Adelphia argues that mandatory access laws promote head-to-head competition between video services providers at individual MDUs and thereby enhance competition in the video services market as a whole. Adelphia is incorrect. Its argument ignores the fact that mandatory access laws almost universally discriminate in favor of franchised operators such as Adelphia and against their non-franchised competitors, thereby chilling competition from these operators. Moreover, Adelphia’s argument fails to recognize that competition “at the property” line has a greater pro-competitive impact on the market and avoids many of the inefficiencies associated with a dual provider scenario.

With few exceptions, mandatory access laws discriminate in favor of franchised cable operators and against all other video service providers, rather than seeking to ensure in a neutral fashion that tenants have the ability to obtain video services from some source. By their express terms or practical operation, these laws force property owners to grant only franchised cable operators access to their private property for the provision of service to residents, even when the owners have arranged for equivalent services to be provided through an alternative provider. Under such laws, while non-franchised operators are completely precluded from entering into exclusive contracts, franchised operators may enter into such contracts and enjoy their benefits whenever they so choose. In addition, property owners have proven reluctant or unwilling to contract with alternative providers where forced access via condemnation is available to the local franchisee. They simply will not suffer an overbuild of their properties even under circumstances where the franchisee's service and rates are less than optimal.

As a result of the preferential treatment of franchised operators, entry by alternative providers in mandatory access jurisdictions has been and will surely continue to be forestalled. Indeed, most ICTA members do not willingly operate in mandatory access states and the overwhelming number of their subscribers reside elsewhere. Thus, not only are alternative providers absent from a specific property such that the head-to-head competition envisioned by Adelphia simply does not occur, they avoid entire markets that are governed by a forced access regime. Thus, such laws are hardly pro-consumer as Adelphia alleges. There is nothing pro-consumer about laws that discourage competition in a franchise area and lead the tenant to have only one choice for its programming no matter where in the city the tenant resides. Accordingly, if the Commission decides to reconsider the issue of whether to preempt discriminatory

mandatory access laws, it should find that preemption would serve the public interest, greatly promote competition and is clearly warranted.

Moreover, until such laws are preempted, the Commission should ban exclusive contracts in mandatory access states since only the franchised operators may execute such contracts. Providing the monopolist or near monopolist with such a competitive advantage serves no purpose whatsoever.

### CONCLUSION

For the reasons discussed above, ICTA believes that the Commission should adopt rules and regulations consistent with ICTA's comments herein.

Respectfully submitted,

INDEPENDENT CABLE &  
TELECOMMUNICATIONS ASSOCIATION

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Its Attorneys

Dated: March 16, 1998

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of March, 1998, a true copy of the foregoing Sur-Reply Comments of Independent Cable & Telecommunications Association was served via first-class mail, postage prepaid on the following:

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