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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
	)	
Cable Home Wiring	)	

SURREPLY

The Wireless Cable Association International, Inc. ("WCA"), by its attorneys, hereby submits its surreply with respect to the *Report and Order and Second Further Notice of Proposed Rulemaking* (the "*R&O*" and "*Second Further Notice*") in this proceeding.

WCA continues to believe that the Commission can and should apply a competition-based "fresh look" policy to cable-exclusive MDU service agreements entered into before the emergence of "effective competition." WCA's arguments in support of its "fresh look" policy are already a matter of record in this proceeding and, in the interests of minimizing any additional burdens on the Commission's staff, will not be reiterated in detail here.[1/] It must be emphasized, however, that WCA's proposal is *not* an attempt to run roughshod over the legitimate contractual rights of

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[1/] *See* Comments of The Wireless Cable Association International, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 11-17 (filed Dec. 23, 1997) [the "WCA Comments"]; Reply Comments of The Wireless Cable Association International, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 6-16 (filed Mar. 2, 1998) [the "WCA Reply Comments"].

incumbent cable operators,[2] nor is it an effort to artificially tilt the marketplace in favor of alternative multichannel video programming distributors ("MVPDs").[3] Rather, WCA's proposal represents a balanced approach that favors a "fresh look" only at the MDU owner's option, and even then only with respect to those exclusive 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. Thus, under WCA's proposal the *subscriber* ultimately wins, since MDU owners will be provided 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.[4]

By and large, the reply comments filed in opposition to "fresh look" raise arguments already addressed by WCA, particularly as to the Commission's statutory authority to apply "fresh look

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[2] *Compare, e.g.*, Reply Comments of Time Warner Cable, CS Docket No. 95-184 and MM Docket No. 92-260, at 5-6 (filed Mar. 2, 1998) [the "Time Warner Reply Comments"]; Reply Comments of Tele-Communications, Inc., CS Docket No. 95-184 and MM Docket No. 92-260, at 20-22 (filed Mar. 2, 1998) [the "TCI Reply Comments"].

[3] 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).

[4] Charter Communications and various other cable operators therefore are simply wrong in suggesting that even a limited "fresh look" policy will relegate MDU properties to the "backwater of the growing tide of telecommunications services." Reply Comments of Charter Communications, Inc. *et al.*, CS Docket No. 95-184 and MM Docket No. 92-260, at 3-9 (filed Mar. 2, 1998) [the "Charter Reply Comments"]. WCA has never advocated that "fresh look" be applied in a manner that denies MDU residents access to whatever new services cable operators bring to market. Rather, WCA only asks that MDU owners be permitted to evaluate whether those services represent the best possible offering their residents when compared to other available alternatives. If a cable operator is willing to provide advanced services that are valued highly by MDU residents, the MDU owner will presumably refrain from exercising its "fresh look" right.

" as a means of promoting competition to cable and, more specifically, to ensure that cable rates are reasonable.[5] TCI, however, vehemently argues that the Commission has no authority under Section 4(I) of the Communications Act to regulate cable rates via regulation of cable-exclusive contracts. In support, TCI quotes the following language from Section 623(a)(1) of the 1992 Cable Act: "No Federal agency . . . may regulate the rates for the provision of cable service except to the extent provided under [section 623] and section 612."[6] As the Commission recognized in the *R&O*, however, Congress did not intend to limit the Commission's regulatory options for ensuring reasonable cable rates; to the contrary, Congress agreed that:

> [r]ather than requiring the Commission to adopt a formula to set a maximum rate for basic cable service, the conferees agree to allow the Commission to adopt formulas *or other mechanisms or procedures* to carry out this purpose. The purpose of these changes [in the legislation] is to give the Commission the authority to choose the best method of ensuring reasonable rates for the basic service tier and to encourage the Commission to simplify the regulatory process.[7]

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[5] *See* WCA Reply Comments at 6-9; NCTA Reply Comments at 2-3; Charter Reply Comments at 14-16; TCI Reply Comments at 4-18; Time Warner Reply Comments at 3-9.

[6] TCI Reply Comments at 6.

[7] *R&O* at ¶ 89, *quoting* H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. 62 (1992) (emphasis added). Equally unpersuasive is TCI's argument that Commission regulation of exclusive contracts is not "necessary" to ensure reasonable cable rates, and thus is not authorized under Section 4(I). TCI Reply Comments at 6-7. As noted by the Commission, federal courts have made it very clear that the Commission "does not have to show that it selected the only conceivably appropriate remedy in order to invoke its 4(I) powers." *R&O* at ¶ 87, *quoting New England Tel. & Tel Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039. Rather, the relevant standard is whether the Commission's chosen method of regulation is appropriate and reasonable. *Id.* For the reasons set forth in WCA's comments and reply comments on the *Second Further Notice*, WCA's competition-based "fresh look" proposal more than satisfies these criteria.

Certain parties also have argued that the abrogation of a cable-exclusive MDU service contract pursuant to "fresh look" would constitute an unconstitutional taking of private property under the Fifth Amendment.[8] This argument too is incorrect. Since "fresh look" requires no physical occupation of an incumbent cable operator's property, the issue here is whether an incumbent cable operator's loss of exclusivity via "fresh look" effectively destroys the economic benefit of its contract to provide multichannel video service to an MDU property.

It is well settled, however, that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[9] Thus, a cable operator's loss of exclusivity by virtue of the 1992 Cable Act's prohibition against exclusive franchises has been determined not to constitute an unconstitutional taking:

> [The cable operator's] exclusivity provision was part of its contract, but it did not constitute the entirety of the contract. Evidence that [the cable operator] still provides services in accordance with the contract's remainder, coupled with the fact that one can logically discuss exclusivity as a characteristic separate from the contract, indicates that the destruction of exclusivity is not equivalent to destruction of the contract.[10]

The above quotation applies with equal force to cable-exclusive MDU service contracts: where the incumbent cable operator retains a contractual right to remain on the property and provide service on a non-exclusive basis, the hypothetical loss of exclusivity via "fresh look" cannot be said

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[8] Charter Reply Comments at 17-18; TCI Reply Comments at 12 n.24.

[9] *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

[10] *Cox Communications, Inc. v. U.S.*, 866 F.Supp 553, 558 (E.D. Ga. 1994).

to constitute destruction of the *entire* contract. Indeed, Time Warner has already acknowledged that exclusivity is severable from an incumbent's broader contractual right to provide service, and has specifically asked the Commission to allow an incumbent's non-exclusive rights to remain in force where the incumbent's exclusivity has been eliminated via "fresh look."[11/] When viewed in this context, it is apparent that a cable operator's loss of an exclusive right to serve an MDU property is not a "taking" of constitutional dimension.[12/]

Finally, Adelphia Communications Corp., the Pennsylvania Cable TV Association and Suburban Cable TV Company, Inc. urge the Commission not to preempt state mandatory access statutes.[13/] WCA has already briefed this issue extensively in its Petition for Reconsideration and related pleadings filed with respect to the *R&O*, and thus asks that those filings be incorporated by

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[11/] Comments of Time Warner Cable, CS Docket No. 95-184 and MM Docket No. 92-260, at 10 (filed Dec. 23, 1997); *see also* WCA Reply Comments at 14 n.31.

[12/] Similarly, removal of a cable operator's right to exclusivity pursuant to "fresh look" would not withstand the Supreme Court's alternative *ad hoc* test for determining whether an unconstitutional taking has occurred. Three factors have "particular significance" to this inquiry: "'(1) the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 225 (1986) (quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)). In *Cox*, *supra*, the court observed that a cable operator's loss of an exclusive franchise satisfies none of these factors, since (1) forcing a cable operator to compete does not exact unreasonable economic impact; (2) cable operators have long been aware that their activities may be regulated under the 1992 Cable Act; and (3) the "fresh look" did not equate to an appropriation of the cable system's assets for the government's own use. *Cox*, 866 F.Supp at 559. Again, each of these observations is applicable to any abrogation of a cable operator's exclusive contractual rights pursuant to "fresh look," and thus militates against a finding that "fresh look" effects a Fifth Amendment taking.

[13/] Reply Comments of Adelphia Communications Corp. *et al.*, CS Docket No. 95-184 and MM Docket No. 92-260 (filed March 2, 1998) [the "Adelphia Comments"].

reference into the record for the *Second Further Notice.*[14] WCA wishes to note, however, that neither Adelphia *et al.* nor any other cable operator in this proceeding has effectively refuted WCA's demonstration that, as a practical matter, state mandatory access laws that discriminate in favor of the local cable operator deter competition. As WCA has already pointed out, many landlords who must give the local hardwire cable company access to their premises are unwilling to undergo the inconveniences associated with having a second provider. That view has been confirmed by the real estate community.[15] Indeed, Time Warner has conceded that "the real impediment to competition and choice is . . . landlords . . . restricting MVPD access to their buildings."[16]

At no time has WCA called for a federal preemption of any and all mandatory access statutes. Although such an approach might have the inadvertent effect of denying benefits to residents of those buildings where exclusivity is required in order to support the provision of advanced services, a statute which provides all MVPDs with equal access to MDU properties would certainly be an improvement over the current discriminatory statutes. What Adelphia *et al.* conveniently ignore is that every mandatory access statute adopted to date discriminates against wireless cable operators and other alternative MVPDs in favor of the local, franchise fee-paying hardwire provider.

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[14] *See* WCA Petition for Reconsideration, CS Docket No. 95-184 and MM Docket No. 92-260, at 10-14 (filed January 15, 1998); WCA Reply to Oppositions to Petition for Reconsideration, CS Docket No. 95-184 and MM Docket No. 92-260, at 3-5 (filed Jan. 28, 1998)

[15] *See* Opposition of Building Owners and Managers Ass'n Int'l, *et al.*, CS Docket No. 95-184 and MM Docket No. 92-260, at 3-4 (filed Jan. 15, 1998).

[16] Time Warner Opposition to Petitions for Reconsideration, CS Docket No. 95-184 and MM Docket No. 92-260, at 4 (filed Jan. 28, 1998).

Accordingly, there is simply no basis for the misleading claims by Adelphia and others that state mandatory access statutes are pro-competitive because they promote two-wire competition.[17] Mandatory access only promotes competition by permitting the hardwire cable operator to "overbuild" the facilities of an alternative MVPD, and does nothing to address the more common situation where an alternative MVPD is denied access to an MDU served by the hardwire cable operator. Indeed, the Commission has already found that of the 353 MDUs in New York State 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.*[18] In other words, the record establishes that 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 a MDU already served by cable.

In short, notwithstanding Adelphia's belated attempt to have the last word on the mandatory access issue, the record before the Commission remains devoid of any evidence that discriminatory state mandatory access statutes serve any public interest. To the contrary, the record is clear that in many cases these statutes are a deterrent to true competition by alternative MVPDs. Preempting discriminatory mandatory access statutes, while not an absolute assurance that two-wire competition

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[17] *See* Adelphia Reply Comments at 3-4. Also untrue is Adelphia's pejorative statement that "invidious economic discrimination in service" is a "common practice" among wireless cable operators. *Id.* at 7. In fact, there is no evidence whatsoever that wireless cable operators have ever engaged in the sort of discriminatory practices which gave rise to the anti-redlining provisions of the 1984 Cable Act. To the contrary, because wireless cable does not have to lay coaxial cable to provide service, wireless cable operators have no economic disincentive to serve areas where penetration is likely to be low.

[18] *See Further Notice of Proposed Rulemaking*, CS Docket No. 95-184 and MM Docket No. 92-260, at ¶ 30 (rel. Aug. 28, 1997).

will develop in all MDUs, will clearly increase the potential for alternative MVPDs to serve residents of MDUs.

WHEREFORE, for the reasons set forth herein and in WCA's comments and reply comments on the *Second Further Notice*, WCA requests that the Commission adopt WCA's "fresh look" proposals and other rule modifications suggested in its filings.

Respectfully submitted,

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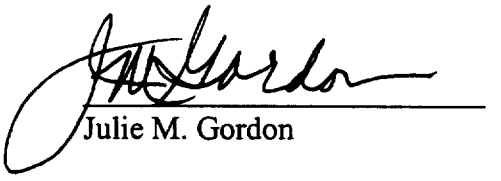

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