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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	)	

SUR-REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA") hereby submits its sur-reply comments on the Second Further Notice of Proposed Rulemaking in the above-captioned proceeding. NCTA has already filed comments and reply comments addressing the several issues raised in the Second Further Notice. In these sur-reply comments, we briefly address two matters raised in other parties' reply comments.

I. THERE IS NO BASIS FOR SUBJECTING INCUMBENTS' EXCLUSIVE CONTRACTS TO A "FRESH LOOK" OR FOR TREATING SUCH CONTRACTS DIFFERENTLY FROM THOSE OF OTHER MULTICHANNEL PROVIDERS OF VIDEO PROGRAMMING.

The Independent Cable & Telecommunications Association ("ICTA") and Optel, Inc. have jointly submitted an economist's report on the "Competitive Effects of Exclusive

Contracting for Video Programming Services in Multiple Dwelling Units."[1] The report focuses primarily on the effects of exclusive contracts between private cable operators ("PCOs") and multiple dwelling unit ("MDU") owners, and concludes that the Commission "should be very cautious about imposing administrative limits on PCOs' use of exclusive contracts."[2] In preparing the report, the author "interviewed a number of PCOs and MDU owners,"[3] but apparently did not interview incumbent franchised cable operators. Nor does the author's "Summary of Opinions" include any opinion on or reference to the competitive effects of exclusive contracts between incumbent franchised cable operators and MDU owners.

Indeed, the author's only reference to incumbent cable operators consists of a two-paragraph aside, in which he speculates that while PCOs, in his opinion, have little ability or incentive to make anti-competitive use of exclusive MDU contracts, "using exclusive contracts for anti-competitive ends *may* be a more plausible strategy for a franchised cable operator."[4] He notes that this would only even conceivably be the case if "delivery by methods akin to those currently used by franchised cable operators turn out to be the most efficient alternative means of service to the franchised cable operator (i.e. if delivery by a LEC is much more efficient than delivery by a PCO)."[5] Exclusive contracts would, in his opinion, be unlikely to have anti-

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1 M.D. Whinston, "Report on the Competitive Effects of Exclusive Contracting for Video Programming Services in Multiple Dwelling Units," Attachment A to Reply Comments of Independent Cable & Telecommunications Association ("ICTA").

2 *Id.*, ¶ 8.

3 *Id.*, ¶ 6.

4 *Id.*, ¶ 23 (emphasis added).

5 *Id.*

competitive purposes or effects if, on the other hand, "PCOs turn out to be the most efficient alternative provider."[6] And the author acknowledges that "the most efficient source of competition in the future may not be entirely clear at this point."[7]

With respect to "very long-term, and even perpetual, exclusive contracts" that incumbents entered into "well before any alternative providers were on the scene," the author notes that MDU owners "may" not have foreseen any prospects for competition in the future.[8] If that were the case, "it *would have been* particularly easy for the franchised cable operator to induce an MDU owner to accept an anti-competitive contract."[9]

ICTA and Optel rely on these speculative asides to suggest that the report somehow bolsters their argument that PCOs and incumbent cable operators should be treated differently with respect to exclusive contracts -- that PCOs should be permitted to enter into exclusive contracts because such contracts are pro-competitive, but that incumbents' existing exclusive contracts are generally anti-competitive and should be subject to a "fresh look" by MDU owners. The report provides no support whatsoever for these contentions.

The report does not purport to show or conclude that incumbents' existing exclusive contracts are always, often, or *ever* anti-competitive. Its short digression on the subject of incumbents' contracts simply identifies circumstances in which exclusivity might have anti-competitive effects. But it does not examine or opine as to whether such circumstances, in fact,

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6 *Id.*

7 *Id.*

8 *Id.*, ¶ 24.

9 *Id.* (emphasis added).

exist. And, therefore, it obviously does not take the next step of examining whether, where such circumstances do exist, existing exclusive contracts actually *do* have anti-competitive effects.

There is, for example, no finding that, in fact, the most efficient competitors to incumbent cable operators are likely to be telephone companies rather than PCOs -- and, certainly, neither ICTA nor Optel suggests or provides any evidence that this is the case. Yet the report suggests that unless this were the case, incumbents' pre-existing exclusive contracts would be unlikely to be any more anti-competitive than future exclusive contracts entered into by PCOs. Moreover, there is no evidence that MDU owners who entered into long-term exclusive contracts before the incumbent faced any local competitors were unaware that there might ever be such competitors.[10]

In sum, the report submitted by ICTA and Optel provides no support for those parties' "fresh look" proposal (or for a Commission rule abrogating existing exclusive contracts). In our comments and reply comments, we showed that, as a matter of law, the Commission has no statutory authority to abrogate existing exclusive contracts or to allow MDU owners to abrogate and renege on such contracts. The report submitted by ICTA and Optel shows, if anything, that wholly apart from jurisdictional issues, there is no public policy basis for concluding that incumbents' exclusive contracts are any more or less desirable than those entered into by PCOs.

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10 Indeed, far from claiming that they now require government assistance to extricate themselves from exclusive contracts that they unwittingly were forced to sign, MDU owners and managers strongly *oppose* proposals to abrogate such contracts or to allow them to take a "fresh look" at such contracts. *See generally* Further Joint Comments of Building Owners and Managers Association International, *et al.*

II. MANDATORY SHARING OF MDU WIRING IS NOT A FEASIBLE OPTION.

In its reply comments, DIRECTV notes that "[p]redictably, the cable interests oppose DIRECTV's proposal to require sharing,"[11] and it attempts to show that "the cable interests' claims that sharing is technically infeasible are unsupported by the evidence."[12] In portraying the technical explanations and arguments of NCTA, Time Warner, CableVision Communications, *et al.*, and U S West as nothing more than anti-competitive efforts of incumbent cable operators, DIRECTV conveniently ignores the comments of Ameritech, which, while not objecting to sharing "in principle," argued that "the Commission must address a broad range of operational and technical issues before mandating simultaneous use of home run wiring."[13]

In its reply comments, Ameritech confirms that DIRECTV "significantly understates the technical and operational difficulties associated with mandatory simultaneous use of home run wiring,"[14] and it provides several illustrative examples of the problems that DIRECTV fails to address. In particular, Ameritech highlights inevitable problems of distortion caused by the necessary amplification (and, in many cases, *multiple* amplification) of shared signals.[15] And it explains that "the bandwidth capacity of existing cable plant does not appear to be sufficient to support shared use of home run wiring."[16] Moreover, it points out that shared use would "require

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11 Reply Comments of DIRECTV, Inc. at 14.

12 *Id.* at 13.

13 Comments of Ameritech at 12.

14 Reply Comments of Ameritech at 22.

15 *Id.* at 23.

16 *Id.*

widespread network upgrades when equipment capable of carrying the necessary bandwidth becomes available."[17]

GTE Service Corporation also "agrees that the technical and operational issues associated with sharing home run wiring are insurmountable at the present time."[18] In addition to confirming the technical objections raised by NCTA and U S West, GTE shows that "mandated sharing of cable home run wiring also presents a number of practical problems."[19] For example, as GTE explains, "mandated sharing would require one operator to relocate to other spectrum, which may make service more expensive to deliver and unsatisfactory for customers because of channel positioning issues."[20]

Thus, opposition to DIRECTV's sharing proposal is hardly limited to incumbent cable operators. Indeed, the *only* other supporter of the proposal to require sharing at this time appears to be United States Satellite Broadcasting Company, Inc. ("USSB"), which jointly markets its DBS service with DIRECTV's. But USSB offers no independent evidence or analysis of the technical feasibility of sharing MDU home run wiring, simply citing and noting its agreement with DIRECTV's comments on the technical issues.[21] Wholly apart from the jurisdictional and constitutional barriers to mandating the sharing of home run wiring,[22] such mandatory sharing simply is not feasible at this time -- and the record does not support any other conclusion.

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17 *Id.*

18 Reply Comments of GTE Service Corporation at 13.

19 *Id.* at 14.

20 *Id.*

21 *See* Comments of United States Satellite Broadcasting Company, Inc. at 6.

22 *See* Comments of Time Warner at 22-23; Reply Comments of NCTA at 8.

CONCLUSION

As we have shown in our previously filed comments, the Commission has no authority to abrogate, or to authorize MDU owners to take a "fresh look" at, existing exclusive contracts. And, contrary to the arguments of ICTA and Optel, the report that those parties submitted with their reply comments provides no public policy basis for abrogating -- or authorizing MDU owners to abrogate -- existing exclusive contracts with incumbent cable operators. Any rules or policies that the Commission adopts with respect to exclusive MDU contracts should apply equally to *all* multichannel video programming distributors. Finally, wholly aprt from its constitutional and jurisdictional infirmities, mandatory sharing of home run wiring is not feasible or practical at this time and should not be adopted.

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